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1924

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FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE MADRAS HIGH COURT REPORTED IN

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(3) 34 & 35 MADRAS LAW TIMES (4) 19 & 20 MADRAS LAW WEEKLY
(5) 1924 MADRAS WEEKLY NOTES (6) 75 to 83 INDIAN CASES.

WITH

MANY MORE EXTRA JUDGMENTS

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1924.

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Thimma Reddi, Kona v. Secretary of State for India in Council	...		325	1924	M	523
Tirumala Reddi, S, *In re*	...		396	"	"	540
Usean Kasim Sait v. The Secretary of State for India in Council	...		116	1923	M	624
Vaidyanatha Ayyar v. Swaminatha Ayyar	...	PC	884	1924	P C	221
Vairavan Servai v. Emperor	...		438	"	M	668
Vellayappa Chettiar, Savanna V. A. R. v. M. L. M. Ramanathan Chettiar	...		446	"	"	529
Venkatanarayana Chetty v. U. R. M. M. S. Sevugan Chetty	...		916	"	"	769
Venkata Reddy v. Kunjappa Goundan	...		551	"	"	650
Venkatasubba Chettiar v. Sesha Aiyar	...		700	"	"	797
Venkateswarlu Nimmagaddi v. Bodapti Lingayya	...		633	"	"	689
Yadavendra Bhattu v. Srinivasa Babhu	...		698	1925	M.	62

THE

ALL INDIA REPORTER

1924 MADRAS

COMPARATIVE TABLES

Hints for the use of the following Tables :---

TABLE No. I—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

TABLE No. II—This Table shows serially the pages of the other REPORTS and JOURNALS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III—This Table is the converse of the **First and Second Tables**. It shows serially the pages of the ALL INDIA REPORTER, 1924 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. 1

Showing seriatim the pages of INDIAN LAW RERORTS, MADRAS SERIES for 1924 with corresponding references of the ALL INDIA REFORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 47 MADRAS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 47 Madras = All India Reporter.

ILR	A. I. R.			ILR	A. I. R.			I.L.R	A. I. R.			ILR	A. I. R.		
1	1923	*M*	684	232	1924	*M*	379	462	1924	*M*	550	716	1925	*M*	64
7	"	"	533	245	"	"	227	476	"	"	608	722	"	"	39
30	"	"	301	250	"	"	119	483	"	"	494	729	1924	*PC*	226
39	"	"	444	262	"	"	420	525	"	"	137	746	1925	*M*	1
47	"	"	144	288	"	"	431	543	"	"	324	761	"	"	7
56	"	"	473	308	"	"	687	551	"	,	650	774	"	"	17
61	1924	"	375	312	"	"	448	567	"	"	625	783	"	"	30
63	"	"	130	316	"	"	597	572	"	*PC*	150	800	"	"	145
79	"	"	297	325	"	"	523	585	1923	*M*	475	813	"	"	12
87	"	"	411	337	"	*PC*	65	605	1924	"	761	819	"	"	21
116	1923	"	624	357	"	*M*	442	610	"	"	773	824	"	"	14
120	1924	"	163	369	"	"	561	618	"	"	695	833	1924	"	810
136	"	"	90	381	"	"	669	621	"	"	682	837	"	"	802
139	"	"	369	384	"	"	657	633	"	"	689	846	"	"	808
150	"	"	360	396	"	"	540	641	"	"	673	850	"	"	716
160	"	"	111	398	"	"	547	651	"	"	715	861	"	"	913
164	"	"	336	403	"	"	464	653	"	"	205	877	1925	"	155
171	"	"	114	411	"	"	530	660	"	"	474	884	1924	*PC*	221
176	"	"	210	426	"	"	729	667	"	"	693	896	1925	*M*	22
181	"	*P C*	56	428	"	"	640	673	"	"	345	914	"	"	136
190	"	"	36	438	"	"	668	688	"	"	366	916	1924	"	769
197	"	*M*	208	442	"	"	555	692	"	"	680	920	1925	"	78
203	"	"	292	446	"	"	529	698	1925	"	62	927	1924	"	895
215	"	"	214	449	"	"	472	700	1924	"	797	934	"	"	846
222	"	"	236	453	"	"	469	706	"	"	677	942	"	"	782
229	"	"	387	459	"	"	484	713	"	"	795	948	"	"	901

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1924 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 *denotes pages of other* JOURNALS.
Column No. 2 *denotes corresponding references of the* ALL INDIA REPORTER.

46 Madras Law Journal = All India Reporter.

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1924	*M*	286	150	1924	*M*	489	302	1924	*M*	567	456	1924	*M*	604
12	"	"	281	158	"	*P C*	2	309	"	"	729	463	"	"	602
23	"	*P C*	50	160	1923	"	184	311	"	"	584	464	"	"	544
32	"	*M*	509	164	1924	"	36	314	"	"	550	468	"	"	619
36	"	"	521	169	"	"	3	324	"	"	549	471	"	"	571
40	"	"	540	172	"	"	56	325	"	"	587	482	"	"	783
42	"	"	455	179	"	*M*	484	329	"	"	592	491	"	"	766
45	"	"	539	181	"	"	786	334	1923	*P C*	154	494	"	"	764
46	"	"	473	182	"	"	493	340	1924	*M*	607	497	"	"	559
49	"	"	472	184	"	"	461	341	"	"	615	501	"	"	720
51	"	"	485	189	"	"	687	343	"	"	557	503	"	"	708
52	"	"	308	192	"	"	527	345	"	"	646	505	"	"	754
56	"	"	513	166	"	"	614	348	"	"	489	515	"	"	626
60	"	"	523	198	"	"	469	350	"	"	582	532	1924	*P C*	34
68	"	"	474	201	"	"	561	353	"	"	565	536	"	"	1
71	"	"	234	209	"	"	442	357	"	"	701	537	"	"	125
74	"	"	453	217	"	"	420	361	"	"	610	541	"	"	136
78	"	"	448	239	"	"	616	363	"	"	763	546	"	"	65
80	"	"	529	240	"	"	611	366	"	"	692	560	"	*M*	676
82	"	"	464	242	"	"	830	368	"	"	648	563	"	"	721
86	"	"	411	245	"	"	491	371	"	"	789	565	"	"	795
104	"	"	431	250	"	"	457	374	"	"	707	567	"	*P C*	133
117	"	"	399	254	"	"	118	377	"	"	621	575	"	*M*	680
119	"	"	483	255	"	"	612	380	"	"	619	580	"	"	662
120	"	"	375	258	"	"	449	383	"	"	578	590	"	"	682
122	"	"	771	261	"	"	530	391	"	"	650	598	"	*P C*	137
125	"	"	450	274	"	"	657	401	"	"	668	610	"	"	60
129	"	"	622	282	"	"	446	404	"	"	625	618	"	"	88
131	"	"	541	285	"	"	696	407	"	"	731	625	"	"	208
133	"	"	482	288	"	"	605	415	"	"	494	628	"	"	95
134	"	"	476	291	"	"	608	447	"	"	555	637	"	"	75
138	"	"	597	295	"	"	547	450	"	"	623	655	"	"	143
145	"	"	458	298	"	"	604	453	"	"	638	661	"	"	113

47 Madras Law Journal = All India Reporter.

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1924	*M*	600	79	1923	*PC*	171	180	1924	*PC*	123	256	1924	*M*	827
4	"	"	673	85	1924	*M*	716	192	"	*M*	697	258	1922	*PC*	382
8	"	"	670	93	"	*PC*	162	199	"	"	815	260	1923	"	160
13	"	"	715	128	"	"	186	201	"	"	797	269	1925	*M*	126
14	"	"	770	136	"	"	200	205	1925	"	17	271	1924	"	810
16	"	"	761	145	1922	"	339	211	"	"	7	273	1925	"	30
20	"	"	711	150	1924	*M*	773	221	"	"	1	286	1924	*PC*	202
23	"	*PC*	144	154	"	"	695	232	1924	"	808	294	"	"	206
35	"	"	150	155	"	"	677	235	"	"	713	300	"	"	221
48	"	"	175	160	"	"	693	240	"	"	769	302	"	*M*	812
64	"	"	183	164	1923	*PC*	184	242	"	"	802	305	"	"	829
69	"	"	187	168	1924	"	192	248	1923	*PC*	205	307	1925	"	57

47 Madras Law Journal = All India Reporter (*Concld.*)

MLJ	A.I.R.			MLJ	A.I.R.			MLJ	A.I.R.			MLJ	A.I.R.		
310	1925	*M*	61	475	1925	*M*	132	640	1925	*M*	230	765	1925	*M*	371
312	"	"	46	477	1924	"	834	641	1924	"	890	770	"	"	240
316	"	"	80	481	"	"	899	646	"	"	877	774	"	"	173
322	1922	*PC*	361	483	"	"	840	652	"	"	849	776	"	"	272
329	1924	"	184	487	1925	"	52	655	"	"	902	780	"	"	355
337	1925	*M*	88	495	1924	"	839	656	"	"	882	783	"	"	170
350	"	"	12	497	1925	"	230	658	1925	"	123	788	"	"	415
355	"	"	136	503	1924	"	913	661	1924	"	895	791	"	"	192
356	"	"	155	514	"	"	842	662	"	"	851	795	"	"	160
361	1924	*PC*	221	517	"	"	861	664	"	"	898	798	"	"	127
370	"	*M*	813	520	"	"	838	667	1925	"	253	801	"	"	194
373	1925	"	39	522	"	"	901	671	"	"	421	809	1924	*PC*	226
379	1924	"	825	523	1925	"	114	678	1924	"	900	824	"	"	247
383	"	"	818	528	1924	"	780	679	"	"	787	829	1925	*M*	279
385	1925	"	37	530	"	"	893	683	"	"	863	833	"	"	177
389	"	"	78	532	"	"	893	686	1925	"	260	840	"	"	261
393	1924	"	782	535	1924	"	859	689	"	"	189	844	"	"	161
397	1925	"	58	537	"	"	906	695	"	"	430	850	"	*PC*	27
398	"	"	21	540	"	"	883	700	"		258	853	"	"	29
401	1924	*PC*	209	545	1925	"	86	704	"		275	857	"	"	18
409	1925	*M*	14	549	1924	"	778	710	"	"	199	871	"	*M*	237
415	"	"	22	552	1925	"	229	714	"	"	411	876	"	"	281
428	1924	"	836	554	1924	"	909	720	1924	"	889	887	"	"	304
431	"	"	865	558	"	"	907	723	1925	"	254	906	"	"	345
434	"	"	901	62	"	*PC*	156	728	"	"	358	908	"	"	333
435	1925	"	62	574	"	"	216	730	"	"	297	910	"	"	332
437	1924	"	862	585	"	"	191	735	"	"	401	913	"	"	338
439	"	"	896	591	"	"	213	737	"	"	215	917	"	"	186
441	"	*PC*	198	598	"	*M*	833	743	"	"	261	919	"	"	323
447	"	*M*	895	602	1925	"	76	745	"	"	244	922	"	"	222
448	1925	"	117	605	"	"	84	746	"	"	320	926	"	"	174
460	1924	"	846	608	"	"	152	749	"	"	249	928	"	"	204
465	1925	"	60	612	1924	"	858	755	"	"	288	932	"	"	167
469	1924	"	832	614	"	"	873	759	"	"	248	935	1924	*PC*	121
470	1925	"	64	622	1925	"	95	762	"	"	376	938	"	"	126

34 Madras Law Times (P.C.) – All India Reporter.

MLT	A.I.R.			MLT	A.I.R.			MLT	A.I.R.			MLT	A.I.R.		
1	1924	*PC*	36	55	1924	*PC*	40	78	1924	*PC*	102	99	1924	*PC*	133
4	"	"	28	57	"	"	60	81	"	"	125	102	"	"	123
10	"	"	65	62	"	"	95	83	"	"	109	106	"	"	117
20	"	"	56	69	"	"	93	87	"	"	121	111	"	"	137
27	"	"	5	70	"	"	126	93	"	"	113	120	"	"	156
30	"	"	48												

35 Madras Law Times (P.C.) (Part 1 to 11) = All India Reporter.

MLT	A.I.R.			MLT	A.I.R.			MLT	A.I.R.			MLT	A.I.R.		
128	1924	*PC*	50	141	1924	*PC*	183	169	1924	*PC*	144	189	1924	*PC*	221
135	"	"	191	143	"	"	198	177	"	"	184	210	"	"	162
136	"	"	200	146	"	"	175	179	"	"	206	241	"	"	209
139	"	"	186	156	"	"	187	182	"	"	202	247	"	"	213
140	"	"	143	161	"	"	192								

[*No parts after Part* 11 *of* 35 *M.L.T. were published till* 1*st March*, 1925.]

34 Madras Law Times (H. C.) = All India Reporter

MLT	AIR			MLT	AIR			MLT	AIR			MLT	AIR		
1	1924	M	616	99	1924	M	662	209	1924	M	571	292	1924	M	605
2	"	"	461	107	"	"	619	216	"	"	623	295	"	"	608
6	"	"	614	110	"	"	610	218	"	"	640	298	"	"	547
7	"	"	464	112	"	"	701	224	"	"	602	301	"	"	604
10	"	"	592	114	"	"	648	225	"	"	650	303	"	"	567
15	"	"	484	116	"	"	789	233	"	"	53	307	"	"	584
17	"	"	530	118	"	"	494	234	"	"	783	309	"	"	715
18	"	"	442	141	"	"	578	238	"	"	787	310	"	"	612
22	"	"	611	147	"	"	711	241	"	"	761	312	"	"	577
23	"	"	582	149	"	"	544	244	"	"	559	314	"	"	541
25	"	"	565	152	"	"	550	247	"	"	720	315	"	"	493
29	"	"	696	160	"	"	576	248	"	"	795	317	"	"	411
31	"	"	615	163	"	"	446	249	"	"	682	331	"	"	540
32	"	"	597	165	"	"	587	255	"	"	625	332	"	"	474
37	"	"	431	167	"	"	549	257	"	"	731	335	"	"	791
47	"	"	687	168	"	"	600	264	"	"	749	337	"	"	830
50	"	"	561	170	"	"	635	271	"	"	62	39	"	"	776
56	"	"	657	175	"	"	626	273	"	"	708	341	"	"	458
62	"	"	469	193	1925	"	49	275	"	"	697	345	"	"	449
65	"	"	420	195	1924	"	729	281	"	"	617	347	"	"	491
89	"	"	607	196	"	"	713	283	"	"	76	350	"	"	680
90	"	"	557	200	"	"	619	285	"	"	638	353	"	"	585
92	"	"	646	201	"	"	770	287	"	"	676	355	"	"	537
94	"	"	489	202	"	"	763	289	"	"	72	357	"	"	489
95	"	"	555	204	"	"	764	290	"	"	70	358	"	"	476
97	"	"	668	207	"	"	766								

35 Madras Law Times (H. C) (Parts 1 to 11) = All India Reporter.

MLT	AIR			MLT	AIR			MLT	AIR			MLT	AIR		
1	1925	M	7	57	1925	M	243	90	1925	M	5	1160	1925	M	201
8	"	"	17	60	1923	"	684	92	"	"	78	1166	1924	"	903
12	"	"	30	62	1924	"	877	96	1924	"	859	118	1925	"	127
21	"	"	1	67	"	"	818	97	"	"	906	120	"	"	132
29	"	"	22	68	1924	"	795	99	"	"	888	122	1924	"	911
39	"	"	136	70	"	"	782	100	"	"	779	124	"	"	882
40	"	"	12	72	"	"	866	101	1925	"	230	26	"	"	760
43	"	"	14	74	"	"	825	102	1924	"	906	127	1925	"	260
48	"	"	21	77	1925	"	39	103	"	"	861	129	"	"	257
50	1924	"	695	81	1924	"	901	106	1925	"	23	131	1924	"	890
51	1925	"	135	82	"	"	813	107	"	"	152	135	1925	"	229
53	1924	"	693	84	"	"	840	110	1924	"	86	136	"	"	167
56	1925	"	274	87	1925	"	37	112	1925	"	12				

[*No Parts after part II of* 35 *M. L, T. were published till 31st March* 1925]

19 Madras Law Weekly = All India Reporter.

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1924	P C	3	28	1924	M	307	54	1924	M	214	96	924	M	411
4	"	"	2	30	"	"	730	59	"	"	523	107	"	P C	56
6	"	M	22	31	"	"	478	67	"	"	472	113	"	M	622
16	"	"	457	34	"	"	455	69	"	"	473	115	"	"	771
20	"	"	210	37	"	"	292	72	"	P C	50	119	"	"	466
23	"	"	509	46	"	"	595	81	"	M	278	125	"	"	474
27	"	"	611	49	"	"	480	83	"	"	308	129	"	"	485

19 Madras Law Weekly = All India Reporter (*Concld*)

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
132	1924	*M*	511	292	1924	*M*	540	445	1924	*M*	442	582	1924	*M*	638
135	"	"	450	294	"	"	453	450	"	"	461	585	"	"	767
142	"	"	420	298	"	"	483	455	"	"	610	587	"	"	731
164	"	"	512	299	"	*P C*	75	458	"	"	701	597	"	"	458
165	"	"	687	316	"	*M*	662	461	"	"	587	605	"	"	710
168	"	"	464	331	"	"	286	463	"	"	585	608	"	"	713
173	"	"	786	342	"	"	612	465	"	"	696	613	"	"	178
174	"	"	491	345	"	*P C*	48	468	"	"	448	617	"	"	159
179	"	"	431	349	"	"	34	470	"	*P C*	60	619	"	"	93
193	"	"	830	352	"	*M*	577	477	"	"	88	621	"	"	676
197	"	"	476	355	"	"	582	484	"	*M*	571	623	"	"	721
201	"	"	487	358	"	"	657	494	"	"	542	626	"	"	832
205	"	"	537	367	"	"	615	499	"	"	789	627	"	"	770
207	"	"	489	36	"	"	576	502	"	"	645	629	"	"	623
210	"	"	485	372	"	"	616	504	"	"	555	632	"	"	764
211	"	"	584	374	"	"	446	507	"	"	668	636	"	"	766
215	"	*P C*	36	377	"	"	469	510	"	"	600	639	"	"	670
219	"	*M*	729	381	"	"	449	513	"	"	626	644	"	"	544
221	"	"	400	384	"	"	547	530	"	"	624	649	"	"	602
233	"	"	489	388	"	"	557	532	"	"	586	650	"	"	673
235	"	"	527	391	"	"	735	533	"	"	625	660	"	"	709
238	"	"	592	392	"	"	615	536	"	"	92	663	"	"	783
245	"	"	493	394	"	"	602	537	"	"	619	668	"	"	621
247	"	"	614	395	"	"	607	541	"	"	559	671	"	"	589
249	"	"	611	397	"	"	565	545	"	"	776	678	"	"	763
252	"	"	529	402	"	"	561	547	"	"	790	681	1925	"	51
253	"	*P C*	44	410	"	"	608	549	"	*P C*	95	683	1924	"	619
259	"	"	65	415	"	"	791	560	"	*M*	617	685	"	"	715
272	"	*M*	587	418	"	"	635	562	1925	"	56	686	"	"	279
275	"	"	549	425	"	*P C*	93	564	1924	"	617	691	"	"	682
277	"	*P C*	40	427	"	*M*	597	567	"	"	749	699	"	*P C*	106
283	1923	"	118	434	"	"	605	576	"	"	793	703	"	"	102
290	1924	*M*	603	437	"	*P C*	28								

20 Madras Law Weekly = All India Reporter

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1924	*P C*	136	87	1924	*M*	693	192	1925	*M*	126	293	1925	*M*	136
3	"	"	109	91	"	"	773	195	"	"	46	294	"	"	57
8	"	"	125	98	"	"	768	200	1924	"	829	298	1924	*PC*	162
10	"	"	121	99	"	"	695	202	"	"	805	321	"	*M*	844
14	"	*M*	722	101	"	*PC*	183	207	"	"	716	323	"	"	849
17	1925	"	62	103	"	"	680	216	"	*PC*	113	327	"	"	837
18	1924	"	640	107	"	*PC*	186	222	"	*M*	819	328	"	"	801
27	1923	"	684	109	"	"	137	234	1925	"	39	330	"	"	799
31	1924	"	723	122	"	*M*	741	239	1924	"	816	332	1925	"	14
41	"	"	787	137	"	"	650	242	"	"	817	338	"	"	37
45	"	"	761	148	"	"	797	243	"	"	811	342	"	"	78
49	1924	*P C*	150	153	"	"	736	245	"	"	812	347	1924	"	754
58	"	*M*	795	163	"	"	769	248	1925	"	30	357	"	"	550
60	"	"	692	165	1925	"	7	261	"	"	1	368	"	*PC*	192
63	"	"	689	175	"	"	42	272	"	"	17	378	"	*M*	885
69	"	"	677	181	"	"	125	278	"	"	80	384	"	"	873
74	"	"	703	185	"	"	139	285	1924	*PC*	184	385	"	"	848
82	"	*PC*	123	190	"	"	131	288	"	*M*	825				

20 Madras Law Weekly = All India Reporter (*Concld.*)

MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.		
387	1924	*M*	782	548	1925	*M*	62	701	1924	*PC*	226	851	1925	*M*	160
390	"	"	909	549	"	"	274	710	"	"	232	854	"	"	204
395	"	"	880	551	"	"	86	711	1925	*M*	229	859	"	"	157
399	"	"	838	556	1924	"	857	713	1924	"	905	86	"	"	271
402	1925	"	23	557	1925	"	233	716	"	"	832	864	1924	"	889
406	1924	*PC*	126	559	1924	"	863	717	"	"	760	868	1925	"	173
417	"	"	209	562	"	"	856	719	1925	"	257	870	1924	"	893
424	"	"	143	566	"	*PC*	213	721	1924	"	861	872	1925	"	248
425	"	"	191	571	"	"	200	725	1925	"	292	876	"	"	250
427	1925	*M*	21	573	1925	*M*	64	734	"	"	264	879	"	"	170
430	"	"	233	579	1924	"	855	736	"	"	202	880	"	"	242
433	1924	"	904	582	"	"	897	740	"	"	358	881	"	"	183
437	"	*PC*	206	585	1925	"	152	742	"	"	358	882	"	"	244
440	1925	*M*	60	589	1924	"	868	745	"	"	424	884	1924	*PC*	233
444	"	"	12	594	"	*PC*	117	746	"	"	425	893	1925	*M*	421
449	"	"	61	603	"	*M*	859	748	"	"	418	900	"	"	278
451	1924	"	867	608	"	"	911	753	"	"	187	902	1924	"	873
453	"	"	818	611	"	"	802	754	"	"	427	910	1925	"	192
456	"	*PC*	202	618	"	"	851	758	"	"	185	914	"	"	239
465	"	*M*	901	620	1925	"	150	761	"	"	266	916	"	"	317
467	"	"	697	622	1924	"	901	770	1924	*PC*	144	919	"	"	367
475	"	"	83	623	"	"	895	779	1925	*M*	246	921	"	"	320
478	"	"	828	624	1925	"	123	783	"	"	52	924	"	"	327
481	"	"	808	627	"	"	403	791	"	"	253	925	"	"	340
484	"	"	854	642	1924	"	877	795	1924	"	842	931	"	"	348
486	"	"	866	649	1925	"	127	798	1925	"	300	937	"	"	315
488	"	"	911	651	"	"	129	801	"	"	302	941	"	"	346
491	"	*PC*	198	655	"	"	201	803	1924	*PC*	221	943	"	"	351
495	"	"	187	656	1924	"	903	811	"	"	221	946	"	"	249
503	1925	*M*	67	659	1925	"	194	812	1925	*M*	303	952	"	"	344
521	1924	"	899	667	"	"	245	815	1924	"	913	954	1924	"	890
523	1925	"	227	669	1924	"	895	826	1925	"	290	959	1925	"	272
526	1924	"	893	670	1925	"	287	829	"	"	207	966	"	"	401
529	"	"	860	673	"	"	254	832	"	"	211	968	"	"	332
531	1925	"	228	677	"	"	155	834	"	"	186	971	"	"	330
533	1924	"	846	681	1924	"	839	836	"	"	222	973	"	"	355
538	"	"	779	683	"	"	86	840	"	"	181	977	1924	"	810
540	1925	"	112	687	1925	"	411	845	"	"	167	979	1925	"	319
544	1924	"	888	693	"	"	215	847	"	"	174	981	"	"	161
546	"	"	920	699	1924	*PC*	231	849	"	"	206	987	"	"	334

1924 Madras Weekly Notes = All India Reporter

MWN	A. I. R.			MWN	A. I. R.			MWN	A. I. R.			MWN	A. I. R.		
1	1924	*M*	308	38	1924	*M*	457	58	1924	*M*	622	94	1924	*M*	411
3	"	"	231	41	"	"	351	60	"	"	373	108	"	"	489
5	"	"	479	42	"	"	472	62	"	"	470	115	"	"	473
6	"	"	438	43	"	"	187	65	1923	*PC*	175	117	"	"	450
14*a*	"	"	307	46	"	"	485	68	1924	"	50	122	"	"	476
14*b*	"	"	271	47	"	"	338	76	"	"	2	125	"	"	281
18	"	"	160	50	"	"	539	77	"	"	3	133	"	"	378
19	"	"	286	51*a*	"	"	192	79	"	"	95	134	"	"	509
27	"	"	137	51*b*	"	"	644	86	"	"	56	137	"	"	489
35	"	"	485	53	"	"	201	90	"	*M*	125	138	"	"	521
37	"	"	278					92	"	"	649	141	"	"	540

1924 Madras Weekly Notes=All India Reporter (*Contd.*)

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
142	1924	*M*	455	322	1924	*M*	617	489	1925	*M*	136	666	1925	*M*	226
144	"	"	611	324	"	"	544	490	1924	"	815	668	"	"	57
145	"	"	730	326	"	"	474	491	"	"	689	670	1924	"	918
146	"	"	523	329	"	"	610	495	1925	"	114	672	1925	"	126
151	"	"	771	331	"	"	635	499	"	"	46	674	"	"	131
153	"	"	478	336	"	"	789	502	1924	"	677	675	1924	"	896
155	"	*P C*	34	338	"	"	646	506	"	"	865	676	"	"	829
158	"	"	40	340	"	"	582	508	1925	"	76	678	"	"	812
162	"	*M*	448	342	"	"	707	510	"	"	80	680	1925	"	60
163	"	"	529	344	"	"	449	515	"	"	135	682	"	"	14
164	"	"	595	346	"	"	530	516	"	"	61	687	"	"	12
167	"	"	597	355*a*	"	"	602	517	1924	"	840	689	"	"	21
172	"	*P C*	1	355*b*	"	"	619	520	"	"	761	691	1924	"	844
173	"	"	28	356	1925	"	56	522	"	"	883	692	1925	"	58
178	"	*M*	464	357	1924	*P C*	125	526	1925	"	225	693	1924	"	801
182	"	"	431	358	"	*M*	615	527	1924	"	673	694	"	*PC*	226
191	"	"	541	359*a*	"	"	602	529	"	"	850	701	"	*M*	780
192	"	"	458	359*b*	"	"	577	531	"	"	802	703	"	*PC*	213
196	"	*P C*	48	361	"	"	615	535	"	"	559	707	"	"	198
198	"	*M*	461	362	"	"	763	538	"	"	797	710	"	"	156
202	"	"	482	364	"	"	648	541	"	"	670	719	"	"	209
203	"	"	493	366	"	"	650	545	"	"	898	723	"	"	144
204	"	"	604	373	"	"	692	546	"	"	862	730	1925	*M*	86
207	"	"	466	375	"	"	668	547	"	"	911	733	"	"	22
210	"	"	611	376	"	"	625	548	"	"	768	742	"	"	112
212	"	"	830	378	"	"	576	551	"	"	889	745	1924	"	836
214	"	"	511	380	"	"	701	553	"	"	907	747	"	"	901
216	"	"	786	382	"	"	565	556	1925	"	39	748	"	"	866
217	"	"	491	386	"	"	731	559	1924	*PC*	192	749*a*	"	"	901
220	"	"	527	392	"	"	494	565	"	*M*	783	749*b*	"	*PC*	221
222	"	"	484	414	"	*PC*	137	569	"	"	711	755	"	*M*	854
224	"	"	442	422	"	"	133	571	"	"	800	757	1925	"	233
230	"	"	592	425	"	"	117	572	"	*PC*	150	758	1924	"	860
235	"	"	557	429	"	"	232	580	"	*M*	693	759	"	"	859
237	"	"	729	430	"	"	143	582	"	"	703	761	1925	"	274
238	"	"	584	431	"	"	123	588	"	*PC*	175	762	1924	"	888
240	"	"	612	434	"	"	113	598	"	*M*	811	763	"	"	813
241	"	"	469	438	"	*M*	760	599	"	*PC*	183	765	"	"	825
244	"	"	589	439	"	"	695	600	"	*M*	849	768	"	"	898
249	"	"	420	440	"	"	828	602	"	*PC*	187	769	"	"	818
265	"	"	512	442	"	*PC*	121	607	"	"	162	771	1925	"	127
266	"	"	687	445	"	"	106	623	"	*M*	716	773	"	"	78
268	"	"	487	447	"	"	109	628	"	"	676	776	1924	"	852
270	"	"	537	451	"	*M*	542	630	"	"	832	779	"	"	782
272	"	"	561	454	"	"	645	631	"	"	766	781	"	"	900
278	"	*P C*	44	456	"	"	600	633	"	"	713	782	"	"	909
281	"	*M*	400	458	"	"	662	636	"	"	178	785	"	"	880
289	"	"	489	465	"	"	624	638	"	*PC*	60	788	"	"	838
290	"	*P C*	36	466	"	"	626	643	1925	*M*	37	789	1925	"	235
293	"	"	65	477	"	"	776	645	1924	*PC*	186	792	"	"	260
303	"	*M*	587	478	"	"	790	646	"	"	200	794	"	"	403
305	"	"	549	479	"	"	715	648	"	*M*	773	806	1924	"	899
306	"	"	603	480	"	"	787	650	"	*PC*	126	807	1925	"	52
308	"	*PC*	75	482	"	"	680	657	"	"	102				
319	"	*M*	616	485	"	"	845	660	"	"	93	813	1924	"	839
320	"	"	619	487	"	"	833	662	"	"	88	815	1925	"	230

1924 Madras Weekly Notes = All India Reporter (*Concld.*)

MWN	A.I.R.			MWN	A.I.R.			MWN	A.I.R.			MWN	A.I.R.		
819	1924	*PC*	191	842	1924	*M*	778	876	1924	*M*	920	895	1924	*M*	855
820	"	*M*	913	844	1925	"	67	877	"	"	856	897	"	"	897
828	1925	"	233	857	"	"	227	878	"	"	863	899	1925	"	304
830	1924	"	904	859	1924	"	893	880	1925	"	64	913	1924	*PC*	231
833	"	"	867	861	1925	"	84	884	1924	"	890	915	"	"	226
835	"	"	842	863	1924	"	846	887	"	"	877	922	1925	*M*	229
836	"	"	893	867	"	"	858	892	"	"	902	923	"	"	257
838	"	"	861	869	"	"	779	893	"	"	895	924	"	"	292
840	"	"	906	870	"	"	873	894	"	"	851				

25 Cr. L. J. & 75 to 84 Indian Cases = All India Reporter.

Please refer to Comparative Table No. II in 1924 *LAHORE.*

TABLE NO. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1924, MADRAS SECTION with corresponding references of other REPORTS, JOURNALS or PERIODICALS.

N.B.—Column No. 1 *denotes pages of the* ALL INDIA REPORTER, 1924 MADRAS.
Column No. 2 *denotes corresponding references of other* REPORTS JOURNALS *or* PERIODICALS.

1924 Madras = Other Journals.

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1 F B	46	*M*	768	28 F B	46	*M*	650	41	24	*Cr L J*	721
	45	*M L J*	346		18	*M L W*	502	43	18	*M L W*	209
	1923	*M W N*	571		72	*I C*	671		1923	*M W N*	802
	74	*I C*	155		1923	*M W N*	849		73	*I C*	982
	18	*M L W*	757	30 F B	46	*M*	766	44	18	*M L W*	29
6 F B	46	*M*	631		45	*M L J*	230		1923	*M W N*	510
	45	*M L J*	135		18	*M L W*	612		74	*I C*	703
	18	*M L W*	1		1923	*M W N*	893	45	18	*M L W*	173
	1923	*M W N*	489		74	*I C*	959		1923	*M W N*	668
	73	*I C*	87		24	*Cr L J*	847		73	*I C*	948
	33	*M L T*	5	31	18	*M L W*	167	46	46	*M*	847
15 F B	46	*M*	758		76	*I C*	234		45	*M L J*	699
	45	*M L J*	224		25	*Cr L J*	138		18	*M L W*	414
	18	*M L W*	478	32	45	*M L J*	210		1923	*M W N*	750
	1923	*M W N*	519		18	*M L W*	17		75	*I C*	390
	74	*I C*	945		1923	*M W N*	406	49	46	*M*	791
	24	*Cr L J*	833		73	*I C*	956		45	*M L J*	186
18 F B	46	*M*	839	33	45	*M L J*	44		18	*M L W*	465
	75	*I C*	17		72	*I C*	815		1923	*M W N*	499
	45	*M L J*	208	38	45	*M L J*	329		74	*I C*	166
	33	*M L T*	231		18	*M L W*	160	56	45	*M L J*	231
19 F B	46	*M*	782		33	*M L T*	37		18	*M L W*	54
	45	*M L J*	274		1923	*M W N*	447		1923	*M W N*	408
	18	*M L W*	326		73	*I C*	540		75	*I C*	739
	1923	*M W N*	550	40	18	*M L W*	181		45	*M L J*	389
	74	*I C*	198		1923	*M W N*	451	57	76	*I C*	467
	33	*M L T*	21		33	*M L T*	184		18	*M L W*	392
22F B	46	*M*	659		74	*I C*	856	63	76	*I C*	375
	45	*M L J*	533		24	*Cr L J*	824		45	*M L J*	175
	73	*I C*	584	41	18	*M L W*	188	67	17	*M L W*	763
	19	*M L W*	6		1923	*M W N*	796		72	*I C*	559
	33	*M L T*	57		73	*I C*	961				

1924 Madras=Other Journals (*Contd.*)

A.I.R.	Other Journals		
73	[illegible]	M W N	524
	74	I C	968
74	45	M L J	66
	18	M L W	135
	1923	M W N	882
	73	I C	985
75	45	M L J	1
	32	M L T	323
	1923	M W N	652
	74	I C	58
79	46	M	811
	45	M L J	212
	18	M L W	243
	1923	M W N	677
	74	I C	4
80	18	M L W	58
	1923	M W N	412
	3	I C	946
81	46	M	815
	45	M L J	203
	18	M L W	183
	1923	M W N	786
	75	I C	406
84	18	M L W	399
	1923	M W N	747
	75	I C	115
86	18	M L W	133
	81	I C	219
	25	Cr L J	73
87	45	M L J	323
	18	M L W	30
	33	M L T	45
	1923	M W N	508
	73	I C	1041
88	18	M L W	177
	1923	M W N	545
	75	I C	336
90	45	M L J	153
	1923	M W N	681
	73	I C	1054
	47	M	136
91	45	M L J	255
	18	M L W	32
	1923	M W N	421
	73	I C	941
	24	Cr L J	717
92	45	M L J	156
	1923	M W N	450
	76	I C	212
	19	M L W	536
93	45	M L J	238
	1923	M W N	755
	76	I C	61
	19	M L W	619
94	45	M L J	228
	18	M L W	309
94	1923	M W N	567
	75	I C	170
32		M L T	249
75		I C	219
32		M L T	317
32		M L T	155
46		M	955
45		M L J	309
18		M L W	363
1923		M W N	761
76		I C	342
45		M L J	312
1923		M W N	672
77		I C	12
45		M L J	687
18		M L W	686
33		M L T	101
1923		M W N	753
75		I C	566
45		M L J	693
18		M L W	530
75		I C	1016
45		M L J	805
79		I C	968
45		M L J	724
76		I C	331
45		M L J	690
18		M L W	520
1923		M W N	633
33		M L T	1
47		M	160
77		I C	264
45		M L J	476
1923		M W N	636
74		I C	1018
45		M L J	813
18		M L W	870
33		M L T	207
47		M	171
76		I C	836
18		M L W	553
75		I C	613
18		M L W	324
1923		M W N	732
75		I C	465
18		M L W	451
33		M L T	18
46		M L J	254
76		I C	767
1923		M W N	720
45		M L J	735
33		M L T	92
18		M L W	849
47		M	250
79		I C	372
1923		M W N	564

A.I.R.	Other Journals		
123	74	I C	777
124	46	M	844
	45	M L J	321
	18	M L W	345
	33	M L T	44
	1923	M W N	565
	75	I C	334
125	18	M L W	907
	74	I C	120
	33	M L T	225
	1924	M W N	90
126	18	M L W	304
	1923	M W N	568
	74	I C	966
129	45	M L J	684
F B	18	M L W	689
	1923	M W N	768
	33	M L T	98
	75	I C	977
	25	Cr L J	65
130	47	M	63
	45	M L J	413
	18	M L W	577
	1923	M W N	817
	33	M L T	25
	75	I C	46
137	45	M L J	829
	18	M L W	780
	1924	M W N	27
	33	M L T	137
	77	I C	631
	47	M	525
144	18	M L W	747
	76	I C	269
145	18	M L W	652
	1923	M W N	835
	33	M L T	64
	76	I C	761
147	18	M L W	282
	76	I C	977
150	45	M L J	327
	18	M L W	354
	74	I C	139
151	18	M L W	588
	1923	M W N	647
	75	I C	881
154	45	M L J	424
	33	M L T	66
	75	I C	250
158	45	M L J	471
	18	M L W	515
	1923	M W N	739
	33	M L T	19
	76	I C	752
159	45	M L J	551

1924 Madras=Other Journals (*Contd.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
159	923	*M W N*	361	93	75	*I C*	985	227	45	*M L J*	808
	6	*I C*	306	95	18	*M L W*	288		18	*M L W*	949
	19	*M L W*	617		72	*I C*	798		33	*M L T*	189
160	45	*M L J*	718	97	46	*M*	866		1923	*M W N*	815
F B	18	*M L W*	717		45	*M L J*	332		25	*Cr L J*	566
	1924	*M W N*	18		18	*M L W*	366		81	*I C*	54
	33	*M L T*	106		33	*M L T*	40	228	18	*M L W*	651
	81	*I C*	57		75	*I C*	38		1923	*M W N*	837
	25	*Cr L J*	569	00	18	*M L W*	88		76	*I C*	1030
161	18	*M L W*	61		76	*I C*	861		25	*Cr L J*	310
	33	*M L T*	71	201	45	*M L J*	79	229	18	*M L W*	715
	76	*I C*	670		18	*M L W*	887		25	*Cr L J*	572
162	45	*M L J*	164		1924	*M W N*	3		81	*I C*	60
	18	*M L W*	130		33	*M L T*	175	230	45	*M L J*	845
	1923	*M W N*	872		77	*I C*	561		18	*M L W*	886
	72	*I C*	703	205	45	*M L J*	711		76	*I C*	829
163	45	*M L J*	160	S B	18	*M L W*	792		25	*Cr L J*	269
	18	*M L W*	636		33	*M L T*	122	231	45	*M L J*	514
	923	*M W N*	895		77	*I C*	39		18	*M L W*	348
	75	*I C*	572		47	*M*	653		1924	*M W N*	3
	47	*M*	120	207	1923	*M W N*	564		76	*I C*	811
168	18	*M L W*	247		75	*I C*	93	232	45	*M L J*	406
	74	*I C*	115	208	47	*M*	197		18	*M L W*	482
174	1923	*M W N*	657	S B	45	*M L J*	707		1923	*M W N*	695
	74	*I C*	1012		18	*M L W*	776		25	*Cr L J*	145
176	1923	*M W N*	634		33	*M L T*	119		76	*I C*	289
	74	*I C*	862		77	*I C*	216	234	46	*M L J*	71
	24	*Cr L J*	830	210	47	*M*	176		18	*M L W*	615
177	1923	*M W N*	679		45	*M L J*	822		1923	*M W N*	894
	77	*I C*	758		19	*M L W*	20		75	*I C*	901
178	1923	*M W N*	670		79	*I C*	779	235	18	*M L W*	236
	16	*I C*	126	212	45	*M L J*	409		73	*I C*	528
	19	*M L W*	613		18	*M L W*	560		24	*Cr L J*	640
	1924	*M W N*	636		33	*M L T*	3	236	47	*M*	222
180	18	*M L W*	696		1923	*M W N*	675		45	*M L J*	749
	73	*I C*	532		76	*I C*	756		18	*M L W*	796
185	45	*M L J*	804	214	47	*M*	215		33	*M L T*	152
	18	*M L W*	837		45	*M L J*	817		77	*I C*	70
	33	*M L T*	188		19	*M L W*	54	239	45	*M L J*	846
	1923	*M W N*	838		33	*M L T*	217		33	*M L T*	213
	79	*I C*	540		79	*I C*	809		1923	*M W N*	782
186	1923	*M W N*	660	217	46	*M*	736		25	*Cr L J*	75
	76	*I C*	769		45	*M L J*	263		75	*I C*	987
	45	*M L J*	680		1923	*M W N*	463	241	1923	*M W N*	770
187	45	*M L J*	385		75	*I C*	369		75	*I C*	830
	18	*M L W*	928	223	45	*M L J*	827	242	45	*M L J*	721
	33	*M L T*	227		18	*M L W*	868		74	*I C*	944
	1924	*M W N*	43		33	*M L T*	205		1923	*M W N*	720
	75	*I C*	838		76	*I C*	805	243	45	*M L J*	305
189	18	*M L W*	453	224	18	*M L W*	649		18	*M L W*	899
	76	*I C*	845		1923	*M W N*	779		1923	*M W N*	758
192	45	*M L J*	683		76	*I C*	76		74	*I C*	952
	18	*M L W*	960	225	18	*M L W*	876		24	*Cr L J*	840
	33	*M L T*	224		33	*M L T*	221				
	1924	*M W N*	51		76	*I C*	786	245	73	*I C*	376
	25	*Cr L J*	73	227	47	*M*	245	247	73	*I C*	275

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Jonrnals.		
252	45	*M L J*	339	299	45	*M L J*	199	336	33	*M L T*	103
	18	*M L W*	356		18	*M L W*	169		1923	*M W N*	772
	33	*M L T*	48		33	*M L T*	34		76	*I C*	1011
	1923	*M W N*	682		1923	*M W N*	357	338	18	*M L W*	946
	77	*I C*	347		72	*I C*	683		33	*M L T*	210
256	74	*I C*	958	301	18	*M L W*	491		1924	*M W N*	47
	24	*Cr L J*	846		73	*I C*	284		25	*Cr L J*	212
257	46	*M*	685	307	45	*M L J*	825		76	*I C*	644
S B	45	*M L J*	557		19	*M L W*	28	340	45	*M L J*	754
	1923	*M W N*	883		1924	*M W N*	14		18	*M L W*	718
	76	*I C*	721		76	*I C*	793		33	*M L T*	168
265	46	*M*	903	308	46	*M L J*	52		1923	*M W N*	913
F B	45	*M L J*	639		19	*M L W*	83		25	*Cr L J*	641
	18	*M L W*	823		33	*M L T*	191		81	*I C*	129
	33	*M L T*	110		1924	*M W N*	1	345	18	*M L W*	857
	76	*I C*	873		77	*I C*	214		33	*M L T*	196
	25	*Cr L J*	281	309	45	*M L J*	811		79	*I C*	395
271	46	*M*	919		18	*M L W*	874		47	*M*	673
F B	45	*M L J*	528		1923	*M W N*	839	350	45	*M L J*	728
	18	*M L W*	953		79	*I C*	325		18	*M L W*	743
	33	*M L T*	53	310	1923	*M W N*	699		33	*M L T*	182
	1924	*M W N*	14		77	*I C*	48		81	*I C*	310
	76	*I C*	886	312	46	*M*	929		25	*Cr L J*	790
274	17	*M L W*	648		45	*M L J*	545	351	45	*M L J*	842
	75	*I C*	850		18	*M L W*	933		1924	*M W N*	41
278	45	*M L J*	840		1923	*M W N*	878		25	*Cr L J*	209
	19	*M L W*	81		76	*I C*	992		76	*I C*	641
	33	*M L T*	204	316	18	*M L W*	625	352	46	*M*	948
	1924	*M W N*	37		32	*M L T*	137		45	*M L J*	399
	76	*I C*	840		76	*I C*	1042		18	*M L W*	485
279	1923	*M W N*	925	322	45	*M L J*	240		1923	*M W N*	743
	76	*I C*	905		18	*M L W*	233		74	*I C*	1029
	19	*M L W*	686		1923	*M W N*	756	354	18	*M L W*	656
281	46	*M L J*	12		74	*I C*	1003		1923	*M W N*	841
	33	*M L T*	243	323	45	*M L J*	543		76	*I C*	798
	1924	*M W N*	125		33	*M L T*	268	358	18	*M L W*	610
	77	*I C*	464		1923	*M W N*	876		1923	*M W N*	780
286	46	*M L J*	1		74	*I C*	949		76	*I C*	1006
	19	*M L W*	331		24	*Cr L J*	837	359	45	*M L J*	682
	33	*M L T*	235	324	45	*M L J*	849		1923	*M W N*	766
	1924	*M W N*	19		18	*M L J*	844		76	*I C*	896
	77	*I C*	740		33	*M L T*	106				
292	47	*M*	203		1923	*M W N*	811	360	47	*M*	150
	45	*M L J*	667		47	*M*	543		45	*M L J*	431
	1923	*M W N*	825		79	*I C*	651		18	*M L W*	333
	19	*M L W*	37	326	18	*M L W*	523		77	*I C*	542
	33	*M L T*	146		76	*I C*	789		1923	*M W N*	726
	79	*I C*	510	327	46	*M*	873	364	45	*M L J*	719
296	45	*M L J*	826		45	*M L J*	481		18	*M L W*	692
	76	*I C*	894		18	*M L W*	256		1923	*M W N*	781
297	47	*M*	79		33	*M L T*	80		76	*I C*	154
	45	*M L J*	675		1923	*M W N*	902	365	45	*M L J*	478
	18	*M L W*	838		74	*I C*	896		18	*M L W*	311
	33	*M L T*	126	336	47	*M*	164		1923	*M W N*	662
	1923	*M W N*	775		45	*M L J*	653		77	*I C*	148
	76	*I C*	1018		18	*M L W*	752	366	45	*M L J*	722

1924 Madras—Other Journals (*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
366	33	*M L T*	181	386	45	*M L J*	611	400 (2)	73	*I C*	381
	1923	*M W N*	831		18	*M L W*	647	406	73	*I C*	903
	47	*M*	688		33	*M L T*	72	411	47	*M*	87
	83	*I C*	852		1923	*M W N*	834	S B	46	*M L J*	86
367	45	*M L J*	651		76	*I C*	124		19	*M L W*	86
	18	*M L W*	739	387 (1)	18	*M L W*	884		1924	*M L W*	94
	33	*M L T*	125		33	*M L T*	230		34	*M L T*	317
	76	*I C*	750		79	*I C*	322		80	*I C*	108
368	18	*M L W*	836	387 (2)	47	*M*	229	420	47	*M*	262
	1923	*M W N*	840		45	*M L J*	553	F B	46	*M L J*	217
	79	*I C*	408		1923	*M W N*	745		19	*M L W*	142
369	47	*M*	139		25	*Cr L J*	215		34	*M L T*	65
	18	*M L W*	237		76	*I C*	647		1924	*M W N*	249
	1923	*M W N*	664	388	18	*M L W*	322		79	*I C*	928
	75	*I C*	189		1923	*M W N*	731	431	47	*M*	288
372	45	*M L J*	473		75	*I C*	260	F B	46	*M L J*	104
	18	*M L W*	517	389	45	*M L J*	731		19	*M L W*	179
	33	*M L T*	17		18	*M L W*	879		34	*M L T*	37
	1923	*M W N*	741		33	*M L T*	185		1924	*M W N*	182
	25	*Cr L J*	123		25	*Cr L J*	584		80	*I C*	92
	76	*I C*	187		81	*I C*	72	438	46	*M*	852
373	45	*M L J*	800	391	45	*M L J*	613	F B	45	*ML J*	516
	18	*M L W*	895		18	*M L W*	606		18	*M L W*	545
	33	*M L T*	194		33	*M L T*	77		1924	*M W N*	6
	1924	*M W N*	60		33	*M L T*	156		77	*I C*	580
	25	*Cr L J*	231		1923	*M W N*	697	442	46	*M L J*	209
	76	*I C*	695		25	*Cr L J*	210	F B	19	*M L W*	445
375 (1)	45	*M L J*	555		76	*I C*	642		34	*M L T*	18
	18	*M L W*	618	393	45	*M L J*	742		1924	*M W N*	224
	33	*M L T*	234		18	*M L W*	809		84	*I C*	616
	1923	*M W N*	767		33	*M L T*	130		47	*M*	357
	25	*Cr L J*	3		1923	*M W N*	919	446	46	*M L J*	282
	75	*I C*	691		81	*I C*	241	F B	19	*M L W*	374
375 (2)	47	*M*	61		25	*Cr L J*	753		34	*M L T*	163
	46	*M L J*	120	396	45	*M L J*	798		78	*I C*	120
	18	*M L W*	741		33	*M L T*	215	448	47	*M*	312
	1923	*M W N*	814		76	*I C*	813	F B	46	*M L J*	78
	25	*Cr L J*	554	397	18	*M L W*	694		19	*M L W*	468
	81	*I C*	42		33	*M L T*	166		33	*M L T*	278
376	18	*M L W*	350		25	*Cr L J*	56		1924	*M W N*	162
	74	*I C*	1044		75	*I C*	760		79	*I C*	1017
	24	*Cr L J*	852	398	45	*M L J*	689		46	*M L J*	258
378	45	*M L J*	716		18	*M L W*	685	449	19	*M L W*	381
	18	*M L W*	911		1923	*M W N*	754	F B	1924	*M W N*	344
	33	*M L T*	223		75	*I C*	876		77	*I C*	504
	76	*I C*	893	399	46	*M*	958		34	*M L T*	345
	1924	*M W N*	133		46	*M L J*	117		46	*M L J*	125
379	47	*M*	232		18	*M L W*	655	450	19	*M L W*	135
	45	*M L J*	602		1923	*M W N*	719		1924	*M W N*	117
	18	*M L W*	705		75	*I C*	604		80	*I C*	147
	33	*M L T*	159	400 (1)	45	*M L J*	844		46	*M L J*	74
	81	*I C*	203		18	*M L W*	808	453	19	*M L W*	294
	25	*Cr L J*	715		1923	*M W N*	746		80	*I C*	363
384	18	*M L W*	818		80	*I C*	376		46	*M L J*	42
	81	*I C*	312	400 (2)	19	*M L W*	221	455	19	*M L W*	34
	25	*Cr L J*	792		1924	*M W N*	281				

1924 Madras = Other Journals (*Contd.*)

A.I.R.	Other Journals		
455	55	*M L T*	252
	1924	*M W N*	142
	79	*I C*	608
457	19	*M L W*	16
	46	*M L J*	250
	1924	*M W N*	38
	79	*I C*	806
458	46	*M L J*	145
	1924	*M W N*	192
	78	*I C*	536
	19	*M L W*	597
	34	*M L T*	341
461	46	*M L J*	184
	19	*M L W*	450
	24	*M L T*	2
	1924	*M W N*	198
	78	*I C*	294
	46	*M L J*	82
464	19	*M L W*	168
	34	*M L T*	1
	1924	*M W N*	178
	7	*M*	403
	79	*I C*	806
	19	*M L W*	119
466	1924	*M W N*	207
	79	*I C*	894
	46	*M L J*	198
469	19	*M L W*	377
	34	*M L T*	62
	1924	*M W N*	241
	84	*I C*	622
	47	*M*	453
470	1924	*M W N*	6
	84	*I C*	665
472	46	*M L J*	49
	19	*M L W*	67
	33	*M L T*	254
	1924	*M W N*	42
	78	*I C*	90
	47	*M*	449
473	46	*M L J*	46
	19	*M L W*	69
	33	*M L T*	261
	1924	*M W N*	115
	79	*I C*	635
474	46	*M L J*	68
S B	19	*M L W*	125
	924	*M W N*	326
	34	*M L T*	332
	77	*I C*	772
	47	*M*	660
476	46	*M L J*	134
	19	*M L W*	197
	1924	*M W N*	122
	78	*I C*	296
	34	*M L T*	358
478	19	*M L W*	3[illegible]
	33	*M L T*	269
	1924	*M W N*	153
	25	*Cr L J*	241
	76	*I C*	708
	1924	*M W N*	5
479			
F B			
480	19	*M L W*	49
	76	*I C*	730
482	46	*M L J*	133
	1924	*M W N*	202
	79	*I C*	56
483	46	*M L J*	119
	19	*M L W*	298
	924	*M W N*	137
	77	*I C*	765
484	46	*M L J*	179
	34	*M L T*	15
	1924	*M W N*	222
	47	*M*	459
	84	*I C*	613
485(1)	46	*M L J*	51
	19	*M L W*	210
	1924	*M W N*	46
	76	*I C*	843
485(2)	19	*M L W*	129
	1924	*M W N*	35
	79	*I C*	798
487	19	*M L W*	201
	33	*M L T*	263
	1924	*M W N*	265
	25	*Cr L J*	442
	77	*I C*	730
489(1)	46	*M L J*	345
	19	*M L W*	233
	34	*M L T*	94
	1924	*M W N*	289
	78	*I C*	76
489(2)	46	*M L J*	150
	19	*M L W*	207
	1924	*M W N*	108
	78	*I C*	435
	34	*M L T*	357
491	46	*M L J*	245
	19	*M L W*	174
	1924	*M W N*	217
	77	*I C*	777
	34	*M L T*	347
493	46	*M L J*	182
	19	*M L W*	245
	1924	*M W N*	203
	34	*M L T*	315
	78	*I C*	414
494	46	*M L J*	415
	34	*M L T*	118
	1924	*M W N*	392
	79	*I C*	144
	47	*M*	483
	83	*I C*	91
509	46	*M L J*	32
	19	*M L W*	23
	1924	*M W N*	134
	83	*I C*	918
511	19	*M L W*	132
	1924	*M W N*	214
	78	*I C*	1012
512	19	*M L W*	164
	1924	*M W N*	265
	77	*I C*	764
513	46	*M L J*	56
	18	*M L W*	620
	33	*M L T*	73
	1923	*M W N*	789
	76	*I C*	1003
515	45	*M L J*	543
	75	*I C*	620
516	24	*Cr L J*	332
	72	*I C*	172
517	73	*I C*	537
518	32	*M L T*	118
	70	*I C*	329
520	44	*M L J*	361
	17	*M L W*	374
	32	*M L T*	118
	72	*I C*	325
521	46	*M L J*	36
	1924	*M W N*	138
	33	*M L T*	272
	78	*I C*	82
523	47	*M*	325
	46	*M L J*	60
	19	*M L W*	59
	33	*M L T*	255
	1924	*M W N*	146
	78	*I C*	91
527	46	*M L J*	192
	19	*M L W*	235
	33	*M L T*	275
	1924	*M W N*	220
	78	*I C*	829
529	47	*M*	446
	46	*M L J*	80
	19	*M L W*	251
	1924	*M W N*	163
	33	*M L T*	279
	78	*I C*	1017
530	47	*M*	411
F B	46	*M L J*	261
	34	*M L T*	17
	1924	*M W N*	346
	80	*I C*	163

1924 Madras=Other Journals (*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
537	19	*M L W*	20	559	34	*M L T*	244	587 (2)	25	*Cr L J*	354
	1924	*M W N*	270		1924	*M W N*	535		77	*I C*	290
	78	*I C*	176		84	*I C*	698	589	19	*M L W*	671
	34	*M L T*	55	561	47	*M*	369		1924	*M W N*	244
539	46	*M L J*	45	F B	46	*M L J*	201		78	*I C*	287
	1924	*M W N*	50		19	*M L W*	402	592	46	*M L J*	329
	25	*Cr L J*	290		34	*M L T*	50		19	*M L W*	238
	76	*I C*	962		1924	*M W N*	272		34	*M L T*	10
540	47	*M*	396		78	*I C*	98		1924	*M W N*	230
	46	*M L J*	40	565	46	*M L J*	353		78	*I C*	142
	19	*M L W*	292		19	*M L W*	397	595	19	*M L W*	46
	34	*M L T*	331		34	*M L T*	25		1924	*M W N*	164
	1924	*M W N*	141		924	*M W N*	382		79	*I C*	966
	25	*Cr L J*	374		77	*I C*	787	597	47	*M*	316
	77	*I C*	422	567	46	*M L J*	302		46	*M L J*	138
541	46	*M L J*	131		34	*M L T*	303		19	*M L W*	427
	34	*M L T*	314		77	*I C*	511		34	*M L T*	32
	1924	*M W N*	191	571	46	*M L J*	471		1924	*M W N*	167
	78	*I C*	407		19	*M L W*	484		79	*I C*	109
542	19	*M L W*	494		34	*M L T*	209	600	47	*M L J*	1
	79	*I C*	2		83	*I C*	985		19	*M W N*	510
	1924	*M W N*	451	576	19	*M L W*	369		34	*M L T*	168
544	46	*M L J*	464		34	*M L T*	160		1924	*M W N*	456
	34	*M L T*	149		1924	*M W N*	378		84	*I C*	148
	1924	*M W N*	324		83	*I C*	965	602(1)	19	*M L W*	394
	19	*M L W*	644	577	19	*M L W*	352		1924	*M W N*	359
	84	*I C*	626		34	*M L T*	312		75	*I C*	814
547	47	*M*	398		1924	*M W N*	359	602(2)	46	*M L J*	463
	46	*M L J*	295		83	*I C*	536		19	*M L W*	649
	34	*M L T*	298	578	46	*M L J*	383		34	*M L T*	224
	19	*M L W*	384		34	*M L T*	141		1924	*M W N*	355
	84	*I C*	629		79	*J C*	44		83	*I C*	548
549	46	*M L J*	324	582	46	*M L J*	350	603	19	*M L W*	290
	19	*M L W*	275		19	*M L W*	355		1924	*M W N*	306
	34	*M L T*	167		34	*M L T*	23		78	*I C*	70
	1924	*M W N*	305		1924	*M W N*	340	604	46	*M L J*	298
	25	*Cr L J*	370		77	*I C*	766		34	*M L T*	301
	77	*I C*	418	584	46	*M L J*	311		1924	*M W N*	204
550	47	*M*	462		19	*M L W*	211		78	*I C*	921
	46	*M L J*	314		34	*M L T*	307	605	46	*M L J*	288
	34	*M L T*	152		1924	*M W N*	238		19	*M L W*	434
	20	*M L W*	357		25	*Cr L J*	396		34	*M L T*	292
	83	*I C*	196		77	*I C*	444		78	*I C*	156
555	47	*M*	442	585	19	*M L W*	463	607	46	*M L J*	340
	46	*M L J*	447		34	*M L T*	353		19	*M L W*	395
	19	*M L W*	504		81	*I C*	190		34	*M L T*	89
	34	*M L T*	95		25	*Cr L J*	702		78	*I C*	564
	25	*Cr L J*	563	586	19	*M L W*	532	608	47	*M*	476
	81	*I C*	51		75	*I C*	888		46	*M L J*	291
557	46	*M L J*	343	587(1)	19	*M L W*	461		19	*M L W*	410
	19	*M L W*	388		81	*I C*	218		34	*M L T*	295
	34	*M L T*	90		25	*Cr L J*	730		77	*I C*	628
	1924	*M W N*	235	587(2)	46	*M L J*	325		46	*M L J*	361
	78	*I C*	133		19	*M L W*	272	610	19	*M L W*	455
558	46	*M L J*	497		34	*M L T*	165		34	*M L T*	110
	19	*M L W*	541		1924	*M W N*	303				

A.I.R	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
610	1924	*M W N*	329	623	46	*M L J*	450	657	77	*I C*	297
	80	*I C*	388		19	*M L W*	629	662	46	*M L J*	580
611(1)	46	*M L J*	240		34	*M L T*	216		19	*M L W*	316
	19	*M L W*	2[illegible]		78	*I C*	968		34	*M L T*	99
	1924	*M W N*	144	624	19	*M L W*	530		1924	*M W N*	458
	77	*I C*	547		25	*Cr L J*	94		83	*I C*	174
611(2)	19	*M L W*	249		76	*I C*	30	668	47	*M*	438
	34	*M L T*	22		1924	*M W N*	465		46	*M L J*	401
	1924	*M W N*	210	625	47	*M*	567		19	*M L W*	507
	78	*I C*	118		46	*M L J*	404		1924	*M W N*	375
612	46	*M L J*	255		19	*M L W*	533		34	*M L T*	97
	19	*M L W*	342		34	*M L T*	255		81	*I C*	623
	34	*M L T*	310		1924	*M W N*	376		25	*Cr L J*	975
	1924	*M W N*	240		78	*I C*	927	669	47	*M*	381
	78	*I C*	505	626	46	*M L J*	515		25	*Cr L J*	352
614	46	*M L J*	196		19	*M L W*	513		77	*I C*	240
	19	*M L W*	247		34	*M L T*	175	67	47	*M L J*	8
	34	*M L T*	6		1924	*M W N*	466		19	*M L W*	639
	78	*I C*	625	635	19	*M L W*	418		1924	*M W N*	541
615(1)	46	*M L J*	341		34	*M L T*	170		26	*Cr L J*	215
	19	*M L W*	367		1924	*M W N*	331		83	*I C*	999
	34	*M L T*	31		83	*I C*	955	673	47	*M L J*	4
	1924	*M W N*	361		46	*M L J*	453		19	*M L W*	650
	84	*I C*	200		19	*M L W*	582		1924	*M W N*	527
615(2)	19	*M L W*	392		34	*M L T*	285		80	*I C*	103
	1924	*M W N*	358		78	*I C*	832		47	*M*	641
	83	*I C*	702	640	47	*M*	428	676	46	*M L J*	560
	26	*Cr L J*	142		46	*M L J*	456		19	*M L W*	621
616	46	*M L J*	239		20	*M L W*	18		34	*M L T*	287
	19	*M L W*	372		34	*M L T*	218		1924	*M W N*	628
	34	*M L T*	1	644	1924	*M W N*	51		79	*I C*	1011
	1924	*M W N*	319		79	*I C*	953	677	47	*M L J*	155
	78	*I C*	165	645	19	*M L W*	502		20	*M L W*	69
617(1)	19	*M L W*	560		1924	*M W N*	454		1924	*M W N*	502
	80	*I C*	567		79	*I C*	418		81	*I C*	456
617(2)	19	*M L W*	564	646	46	*M L J*	345		47	*M*	706
	34	*M L T*	281		34	*M L T*	92	680	46	*M L J*	575
	1924	*M W N*	322		1924	*M W N*	338		20	*M L W*	103
	80	*I C*	554		77	*I C*	781		34	*M L T*	350
619(1)	46	*M L J*	468	648	46	*M L J*	368		1924	*M W N*	482
	19	*M L W*	683		34	*M L T*	114		80	*I C*	658
	34	*M L T*	200		1924	*M W N*	364		47		692
	1924	*M W N*	355		84	*I C*	122	682	46	*M L J*	590
	80	*I C*	355	649	1924	*M W N*	92		19	*M L W*	691
619(2)	46	*M L J*	380		78	*I C*	1007		34	*M L T*	249
	19	*M L W*	537	650	47	*M*	551		80	*I C*	228
	34	*M L T*	107		46	*M L J*	391		47	*M*	21
	1924	*M W N*	320		20	*M L W*	137	687	47	*M*	308
621	46	*M L J*	377		34	*M L T*	225		46	*M L J*	189
	19	*M L W*	668		1924	*M W N*	366		19	*M L W*	165
	34	*M L T*	271		83	*I C*	1022		34	*M L T*	47
	79	*I C*	343	657	47	*M*	384		1924	*M W N*	266
622	46	*M L J*	129		46	*M L J*	274		78	*I C*	831
	19	*M L W*	113		19	*M L W*	358				
	1924	*M W N*	58		34	*M L T*	56	689	20	*M L W*	63[illegible]
	79	*I C*	860		25	*Cr L J*	361		1924	*M W N*	491

1924 Madras – Other Journals (*Contd.*)

A.I.R.	Other Journals.			A.I.R.	Other Journals.			A.I.R.	Other Journals.		
689	47	*M*	633	715	1924	*M W N*	479	761	79	*I C*	850
	83	*I C*	960		79	*I C*	818		4	*M*	605
692		*M L J*	366	716	47	*M L J*	85	763	1924	*M W N*	362
	1924	*M W N*	373		20	*M L W*	207		34	*M L T*	202
	20	*M L W*	60		1924	*M W N*	623		46	*M L J*	363
	78	*I C*	573		47	*M*	850		19	*M L W*	678
693	20	*M L W*	87		83	*I C*	324		80	*I C*	541
S.B.	47	*M L J*	160	720	46	*M L J*	501	764	46	*M L J*	494
	1924	*M W N*	580		34	*M L T*	247		34	*M L T*	204
	35	*M L T*	53		80	*I C*	561		19	*M L W*	632
	81	*I C*	454	721	47	*M L J*	563		80	*I C*	491
	47	*M*	667		34	*M L T*	289	766	46	*M L J*	491
695	20	*M L W*	99		19	*M L W*	623		34	*M L T*	207
	45	*M L J*	154		79	*I C*	947		19	*M L W*	636
	1924	*M W N*	439	722	20	*M L W*	14		1924	*M W N*	631
	80	*I C*	85		80	*I C*	83		80	*I C*	573
	47	*M*	618	723	20	*M L W*	31	767	19	*M L W*	585
	35	*M L T*	50		79	*I C*	874		76	*I C*	173
696	46	*M L J*	285	729	19	*M L W*	219	768	20	*M L W*	98
	19	*M L W*	465		47	*M*	426		1924	*M W N*	548
	34	*M L T*	29		46	*M L J*	309		84	*I C*	547
	78	*I C*	173		1924	*M W N*	237	769	20	*M L W*	163
697	34	*M L T*	270		77	*I C*	303		47	*M L J*	240
	47	*M L J*	192		34	*M L T*	195		80	*I C*	620
	20	*M L W*	467		25	*Cr L J*	367		47	*M*	916
701	19	*ML W*	458	730	19	*M L W*	30	770	34	*M L T*	201
	46	*M L J*	357		1924	*M W N*	145		47	*M L J*	14
	34	*M L T*	112		76	*I C*	653		19	*M L W*	627
	1924	*M W N*	380		25	*Cr L J*	221		79	*I C*	899
	78	*I C*	938	731	19	*M L W*	587	771	19	*M L W*	115
703	20	*M L W*	74		46	*M L J*	407		46	*M L J*	122
	1924	*M W N*	582		1924	*M W N*	386		1924	*M W N*	151
	83	*I C*	94		34	*M L T*	257		80	*I C*	139
707	1924	*M W N*	342		79	*I C*	92	773	20	*M L W*	91
	46	*M L J*	374	735	19	*M L W*	391		47	*M L J*	150
	34	*M L T*	290		81	*I C*	44		80	*I C*	154
	83	*I C*	165		25	*Cr L J*	556		47	*M*	610
708	46	*M L J*	503	736	20	*M L W*	153		1924	*M W N*	648
	34	*M L T*	273		82	*I C*	399	776	19	*M L W*	545
	80	*I C*	378	741	20	*M L W*	122		1924	*M W N*	477
709	76	*I C*	809		78	*I C*	37		34	*M L T*	339
	19	*M L W*	660	749	19	*M L W*	567		84	*I C*	625
710	19	*M L W*	605		34	*M L T*	264	778	47	*M L J*	549
711	34	*M L T*	147		78	*I C*	52		1924	*M W N*	842
	47	*M L J*	20	754	46	*M L J*	505	779	20	*M L W*	538
	78	*I C*	1055		20	*M L W*	347		35	*M L T*	100
	1924	*M W N*	569		84	*I C*	107		1924	*M W N*	859
713	34	*M L T*	196	760	1924	*M W N*	438		82	*I C*	945
	19	*M L W*	608		20	*M L W*	717		47	*M L J*	528
	47	*M L J*	235		35	*M L T*	126	780	1924	*M W N*	701
	1924	*M W N*	633		26	*Cr L J*	97		82	*I C*	960
	80	*I C*	397		83	*I C*	657		47	*M L J*	393
715	47	*M*	651	761	34	*M L T*	241	782	20	*M L W*	387
	47	*M L J*	13		47	*M L J*	16		35	*M L T*	70
	34	*M L T*	309		20	*M L W*	45		47	*M*	942
	19	*M L W*	685		1924	*M W N*	520				

1924 Madras = Other Journals (*Contd.*)

A.I.R.	Other Journals.		
782	1924	*M W N*	779
	82	*I C*	929
783	46	*M L J*	482
	19	*M L W*	663
	34	*M L T*	234
	1924	*M W N*	565
	80	*I C*	557
786	46	*M L J*	181
	19	*M L W*	173
	1924	*M W N*	216
	78	*I C*	64
787	20	*M L W*	41
	34	*M L T*	238
	1924	*M W N*	480
	79	*I C*	886
	47	*M L J*	679
789	46	*M L J*	371
	19	*M L W*	499
	34	*M L T*	116
	1924	*M W N*	336
	84	*I C*	69
790	19	*M L W*	547
	1924	*M W N*	478
	80	*I C*	353
791	19	*M L W*	415
	4	*M L T*	335
	84	*I C*	128
792	75	*I C*	471
793	19	*M L W*	576
	81	*I C*	732
795	46	*M L J*	565
	20	*M L W*	58
	35	*M L T*	68
	34	*M L T*	248
	81	*I C*	626
	47	*M*	713
	25	*Cr L J*	978
796	34	*M L T*	283
	79	*I C*	958
797	47	*M L J*	201
	20	*M L W*	148
	1924	*M W N*	538
	80	*I C*	664
	47	*M*	700
799	20	*M L W*	330
	25	*Cr L J*	1084
	81	*I C*	908
800	1924	*M W N*	571
	82	*I C*	67
801	20	*M L W*	328
	1924	*M W N*	693
	82	*I C*	78
802	47	*M*	837
SB	47	*M L J*	242
	20	*M L W*	611
	1924	*M W N*	531
802	82	*I C*	17
805	20	*M L W*	202
	25	*Cr L J*	1041
	81	*I C*	817
808	47	*M*	846
	47	*M L J*	232
	20	*M L W*	481
	25	*Cr L J*	1096
	81	*I C*	920
810	47	*M*	833
FB	47	*M L J*	271
	82	*I C*	483
	20	*M L W*	977
811	20	*M L W*	243
	1924	*M W N*	598
	80	*I C*	618
812	47	*M L J*	302
	20	*M L W*	245
	1924	*M W N*	678
	81	*I C*	833
813	47	*M L J*	370
	35	*M L T*	82
	1924	*M W N*	763
	80	*I C*	942
815	47	*M L J*	199
	1924	*M W N*	490
	25	*Cr L J*	951
	81	*I C*	599
816	20	*M L W*	239
	25	*Cr L J*	1221
	82	*I C*	149
817	20	*M L W*	242
	81	*I C*	844
818	47	*M L J*	383
	20	*M L W*	453
	35	*M L T*	67
	1924	*M W N*	769
	82	*I C*	391
819	20	*M L W*	222
	84	*I C*	231
825	47	*M*	927
	47	*M L J*	379
	20	*M L W*	288
	35	*M L T*	74
	1924	*M W N*	765
	82	*I C*	414
827	47	*M L J*	256
828	20	*M L W*	478
	1924	*M W N*	440
	79	*I C*	845
829	47	*M L J*	305
	20	*M L W*	200
	1924	*M W N*	676
	83	*I C*	17
830	46	*M L J*	242
	19	*M L W*	193
830	34	*M L T*	337
	1924	*M W N*	212
	78	*I C*	857
832	47	*M L J*	469
	19	*M L W*	626
	34	*M L T*	233
	1924	*M W N*	630
	79	*I C*	718
833	47	*M L J*	598
	1924	*M W N*	487
	79	*I C*	619
834	47	*M L J*	477
	82	*I C*	430
836	47	*M L J*	428
	20	*M L W*	475
	1924	*M W N*	745
	80	*I C*	731
837	20	*M L W*	327
	84	*I C*	249
838	47	*M L J*	520
	20	*M L W*	399
	1924	*M W N*	788
	82	*I C*	584
839	47	*M L J*	495
	20	*M L W*	681
	1924	*M W N*	813
	84	*I C*	281
840	47	*M L J*	483
	35	*M L T*	84
	924	*M W N*	517
	84	*I C*	276
842	47	*M L J*	514
	20	*M L W*	795
	1924	*M W N*	835
	82	*I C*	107
844	20	*M L W*	321
	1924	*M W N*	691
	82	*I C*	123
845	1924	*M W N*	485
	79	*I C*	902
846	47	*M*	934
	47	*M L J*	460
	20	*M L W*	533
	1924	*M W N*	863
	80	*I C*	604
848	20	*M L W*	385
	82	*I C*	395
849	47	*M L J*	652
	20	*M L W*	323
	1924	*M W N*	600
	82	*I C*	14
850	1924	*M W N*	529
	84	*I C*	146
851	47	*M L J*	662
	20	*M L W*	618

1924 Madras = Other Journals (*Concld.*)

A.I.R.	Other Journals.			A.I.R.	Other Journals.			A.I.R.	Other Journals.		
851	1924	*M W N*	894	877	47	*M L J*	646	898 (2)	84	*I C*	325
852	1924	*M W N*	776		20	*M L W*	642	899	47	*M L J*	481
854	20	*M L W*	484		35	*M L T*	62		20	*M L W*	521
	1924	*M W N*	755		1924	*M W N*	887		1924	*M W N*	806
	82	*I C*	481		82	*I C*	499		25	*Cr L J*	1247
855	20	*M L W*	579	880	20	*M L W*	395		82	*I C*	175
	1924	*M W N*	895		1924	*M W N*	785	900	47	*M L J*	678
	82	*I C*	490		84	*I C*	131		35	*M L T*	102
856	20	*M L W*	562	882	47	*M L J*	656		1924	*M W N*	781
	1924	*M W N*	877		20	*M L W*	716		84	*I C*	513
	82	*I C*	933		35	*M L T*	124	901(1)	47	*M*	948
857	20	*M L W*	556	883	47	*M L J*	540		47	*M L J*	434
858	47	*M L J*	612		1924	*M W N*	522		20	*M L W*	465
	1924	*M W N*	867		82	*I C*	492		1924	*M W N*	747
859	47	*M L J*	535	885	20	*M L W*	378		35	*M L T*	81
	20	*M L W*	606		80	*I C*	892		82	*I C*	948
	1924	*M W N*	759	888	20	*M L W*	544	901(2)	47	*M L J*	522
	35	*M L T*	96		1924	*M W N*	762		20	*M L W*	622
860	20	*M L W*	529		35	*M L T*	99		1924	*M W N*	749
	1924	*M W N*	758	889	47	*M L J*	720	902	47	*M L J*	655
	82	*I C*	952		20	*M L W*	864		1924	*M W N*	892
861	47	*M L J*	517		1924	*M W N*	551		82	*I C*	488
	20	*M L W*	721		84	*I C*	265	903	20	*M L W*	656
	35	*M L T*	103	890	47	*M L J*	641		35	*M L T*	116
	1924	*M W N*	838		35	*M L J*	131		83	*I C*	122
862	1924	*M W N*	546		1924	*M W N*	884	904	20	*M L W*	433
	47	*M L J*	437		20	*M L W*	954		1924	*M W N*	830
	26	*Cr L J*	219	893(1)	47	*M L J*	530		82	*I C*	956
	83	*I C*	1003		20	*M L W*	870	906	47	*M L J*	537
863	47	*M L J*	683		1924	*M W N*	836		20	*M L W*	713
	20	*M L W*	559		80	*I C*	938		35	*M L T*	97
	35	*M L T*	110	893(2)	47	*M L J*	532		1924	*M W N*	840
	1924	*M W N*	878		20	*M L W*	526		82	*I C*	497
	82	*I C*	926		1924	*M W N*	859	907	47	*M L J*	558
865	47	*M L J*	431		82	*I C*	485		1924	*M W N*	553
	20	*M L W*	683	895(1)	47	*M L J*	661		82	*I C*	623
	1924	*M W N*	506		20	*M L W*	623	909	47	*M L J*	554
	82	*I C*	450		1924	*M W N*	893		20	*M L W*	390
866	20	*M L W*	486	895(2)	47	*M L J*	447		1924	*M W N*	782
	1924	*M W N*	748		20	*M L W*	669		82	*I C*	198
	35	*M L T*	72		26	*Cr L J*	223	911(1)	20	*M L W*	488
	82	*I C*	850		83	*I C*	1007		1924	*M W N*	547
867	20	*M L W*	451	896	47	*M L J*	439	911(2)	20	*M L W*	608
	1924	*M W N*	833		1924	*M W N*	675		35	*M L T*	122
	82	*I C*	942		82	*I C*	472	913	47	*M*	861
868	20	*M L W*	589		25	*Cr L J*	1304		47	*M L J*	503
873(1)	20	*M L W*	384	897	20	*M L W*	582		20	*M L W*	815
	26	*Cr L J*	221		1924	*M W N*	897		1924	*M W N*	820
	83	*I C*	1005		83	*I C*	130		83	*I C*	1009
873(2)	47	*M L J*	614	898(1)	47	*M L J*	664	918	1924	*M W N*	670
	1924	*M W N*	870		1924	*M W N*	768		82	*I C*	721
	20	*M L W*	902	898(2)	1924	*M W N*	545	920	20	*M L W*	546
									1924	*M W N*	876

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MADRAS HIGH COURT

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Full Bench

SCHWABE, C. J., OLDFIELD AND RAMESAM, JJ.

V. C. T. N. Chidambaram Chetti—Plaintiff—Appellant.

v.

Kandasami Goundan (dead) and another—Defendants—Respondents.

A. A. A. O. No. 106 of 1921, D/-6th April, 1923, against the decree of the Sub. J., of Dindigul in A. S. No. 8 of 1921.

Civil P. C., S. 11 and O. 21, R. 66—Omission to appear to settle terms does not bar plea that property was not liable to attachmen .

Where there is nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, t he non-applicant cannot be taken to be estopped by the principle of *res judicata* thereafter so as to prevent him from pleading that the pro erty was not liable to attachment in executio by reason of that non-attendance. [P. 6, C.]

K. S. Ganapathi Aiyar—for Appellant.

T. S. Ramaswami Aiyar and V. Sundaram Aiyar—for Respondents.

Order of Reference to Full Bench

Oldfield and Venkatasubba Rao, JJ.—Plaintiff, the present appellant, obtained a decree against Kathaperrumal Goundan, who afterwards died and was subsequently represented by Kandasami, his brother. Kandasami claimed property attached by plaintiff as his own and not that of Kathaperumal in his hands and his claim was rejected by the District Munsif. He, however, appealed successfully and this Second Appeal is against the order allowing his claim. It is opposed by his legal representative, to be referred to as respondent.

One ground, on which she opposes the appeal, that she is not, and Kandasami was not, a party to the proceedings and that therefere no second appeal lies, can be dealt with shortly. Kandasami's own appeal to the lower appellate Court involved the admission that he was or represented a party and the applicability of S. 47, Civil Procedure Code, and his representative cannot allege the contrary.

The substantial question for decision then is whether Kandasami's claim is concluded by his failure to advance it in the proceedings taken by plaintiff to bring the property now claimed to sale. That he advanced it only in his claim petition, Execution Application No. 171 of 1920, on 12th August, 1920, and not in the proceedings, which resulted in the District Munsif's order of 8th June, 1920, is not disputed. It is urged only that (1) the order of 8th June, 1920 can in no circumstances be regarded as adjudication actual or constructive against his right to the property and (2) even if that order is such an adjudication, it was not passed after any valid notice to him and he can now show that it was not, in spite of his failure to take proceedings in respect of it under O. 9 R. 13.

On the question whether the order of 8th June, 1920 was in effect an adjudication against Kandasami's claim and in favour of the liability of the property to sale in his hands

we have not before us the petition, which initiated the proceedings. But there is no reason for doubting what has throughout been assumed and not disputed that it was for attachment and sale of the property; and the text of the order of 8th June, 1920, "Proclaim and sell on 14th August, 1920. Upset price Rs. 1,000" shows what would ordinarily be the case, that the proceedings were to obtain an order for sale and to fix the terms of the sale proclamation and the date, on which the sale would be held; and, so far as plaintiff asked for an order for sale, the contention that the property was not liable under the decree on which Kandasami based his subsequent claim, would have been open to him and would, if established have resulted in the dismissal of the petition. His failure to adopt this ground of defence would accordingly, if S. 11, explanation 4 is applicable, debar him from adopting it later. Against this it is first urged generally that neither S. 11 explanation 4 nor the principle of constructive *res judicata* applies to execution proceedings. But, whether the explanation or any broader principle is applicable, this is unsustainable, at least, when, as was here the case, those proceedings are between parties to the suit or their representatives and result in an adjudication on a question in issue between them. This has been established since *Ramkirpal Shukul* v. *Mt. Rup Kuari* (1) and maintained in the very recent decision in *Rajah of Ramnad* v. *Velusami Tevar* (2), the latter case dealing directly with the consequence of failure such as plaintiff before us relies on, to adopt a ground of defence. It is then necessary only to make sure that the ground in question was open to Kandasami; and respondent in fact urges that it was not, because he was a party to the proceedings, not in their wider scope above referred to when the plaintiff's right to sell the property was in issue, but only for the settlement of the sale proclamation and decisions at that stage are administrative and not judicial. This also, however, is unsustainable. It is true that as this Court held in *Sivagami Achi* v. *Subramania Ayyar* (3) proceedings for the settlement of a sale proclamation under S. 287 of the former Code, corresponding with the present O. 21, R. 66, are of that character and therefore not appealable. But the reference there to such proceedings as excluded from the purview of the then S. 244, now S. 47, shows that they were not regarded as concluding the enquiry, if any is necessary, into the decree-holder's right to bring the property to sale. Such enquiry can be, and is held, if an issue entailing it is raised, in the disposal of the application for sale, the settlement of proclamation being a distinct stage therein, which in case of the making of a valid objection would never be reached; and the fact that orders passed in the course of that settlement are not appealable or binding in other proceedings cannot affect the character of those passed in the decision of the substantive question whether the sale shall be held at all. No doubt, and this is the tenor of the decision in *Subramania Aiyar* v. *Raja Rajeswara Dorai* (4), caution is necessary before orders of the latter class are treated as conclusive and the Court must be satisfied that the matter, in respect of which they are relied on, was in issue and that the party to be affected had clear notice that it would be so. But, although the notice alleged to have been given to Kandasami in the present case is not before us, it is not alleged and there is no reason for supposing that it was not in general terms and even if it referred specifically only to the settlement of the proclamation, it would still have been notice that a sale had been asked for, to which, until the passing of the order "Proclaim and sell" of 8th June

(1) [1886] 6 All. 269—11 I. A. 37—4 Sar. 489 (P. C.)
(2) [1921] 48 I. A. 45—19 A. L. J. 168—23 Bom. L. R. 701—33 C.L. J. 218—25 C.W.N. 581—40 M.L.J. 197—13 L. W. 290—(1921) M. W. N. 51—29 M.L.T. 345—59 I. C. 880 (P. C.)
(3) [1904] 27 Mad. 259—14 M. L. J. 57 (F. B.)
(4) [1916] 40 Mad. 1016—38 I. C. 627.

1920, he could and should have made his objection.

There remains the contention that all this is immaterial, because that notice in fact was not served. The service relied on was by affixture. and the lower appellate Court has now found, differing from the Court of first instance, that as a matter of fact it was insufficient. If it is open to us to act on that finding, which we should ordinarily accept, the order of 8th June 1920 and Kandasami's failure to advance his claim before it, will not stand in the way of his advancing it now. But we have to deal with plaintiff's contention that we cannot act on such a finding or disregard that order, because it has not been set aside in the only way authorized by law, proceedings under O. 9, R. 13. This contention is substantial and cannot be met by treating, as we are asked to do, the subsequent claim petition as an application under that provision for it does not contain the appropriate prayer or averments or anything to show how it was presented within the prescribed period of limitation, the contrary being *prima facie* the case.

The question is then whether O. 9, R. 13, applies to, and affords the only remedy open to a party, against whom an order has been made in his absence in, execution proceedings. In accordance with *Subbiah Naicker* v. *Ramanathan Chettiar* (5) this should be answered in the affirmative; and in fact such answer would exclude the anomaly involved in allowing the validity of an order passed *ex parte* to be disputed, perhaps after long delay, whenever it is necessary to dispute it in subsequent proceedings, after the period allowed by Article No. 164 Schedule 1, Limitation Act has elapsed. On the other hand it is said that O. 9, R. 13, does not in terms apply to proceedings other than suits and that there is authority irreconcilable with *Subbiah Naicker* v. *Ramanathan Chettiar* (5).

The first of these contentions was rejected in the case last mentioned on the ground that, although O. 9 refers only to decrees not orders, such orders as that then and now in question are decrees with reference to the definition in S. 2 of the Code; and it is now pointed out with some force that, although this may justify the application of Article No. 164 above referred to it is no answer to the consideration that the whole order including R. 13, is applicable in terms only to suits and therefore, it is to be inferred, to the description of decrees passed in them. And next reference has been made to the argument from the history of those provisions based by Jenkins C. J. in *Hari Charan Ghose* v. *Manmatha Nath Sen* (6) on the decision of the Privy Council in *Thakur Prasad* v. *Fakirullah* (7) in which what (with great respect) is the real and better justification for the conclusion in *Subbiah Naicker* v. *Ramanatham Chettiar* (5), the present S. 141 corresponding with the former S. 647, is referred to. With all due deference, that argument is not convincing, because first it is based on a conjecture as to the intention of the legislature, which is inconsistent with the plain and unrestricted terms of S 141, is unnecessary in order to explain them and would nullify the action of the legislature in deliberately omitting, when the Code was re-enacted in 1908, the explanation inserted in 1892. Next the case before the learned Chief Justice was an ordinary claim by a third party, to which S. 47 was inapplicable, the further remedy being by a suit, in which the previous order would not be conclusive. Last *Thakur Prasad* v *Fakirullah* (7) the foundation of the judgment, to adopt the only view reconcilable with *Ram Kirpal Shukul* v. *Mussumat Rup Kuar* (1) and *Rajah of Rammad* v. *Velusami Tevar* (2), decided only that the dismissal of an execution application not prosecuted by the decree-holder did not debar him from applying again, not that an order passed after notice to the judgment-debtor was not binding on him

(5) [1914] 37 Mad. 462--26 M. L. J. 189--(1914) M.W.N. 205--1 L.W. 251—22 I. C. 899.

(6) [1913] 41 Cal. 1—18 C.W.N. 343—19 I.C. 683.

(7) [1898] 17 All. 106—22 I.A. 44—5 M.L.J. 3—6 Sar. 526 (P. C.)

and did not require to be set aside, before the adjudication on any substantive question involved in it could be disregarded.

This failing, reliance is placed on the course of authority against the application of O. 9, R. 13 and the correctness of the decision of this Court already referred to. But, although it is true that *Subbiah Naicker* v. *Ramanathan Chettiar* (5), was dissented from on this point in *Bhubaneswar Prasad Singh* v. *Tilakdharilall* (8), and is irreconcilable with other cases cited therein and with *Ritukuer* v. *Alakhdeo Narain Sing* (9), that would not be material, if the conclusions reached after full consideration in our own Court were clear. It is true that the only one of those other cases which was decided in Madras, *Balasubramania Chetty* v. *Swarnammal* (10), would seem either irreconcilable with *Rajah of Ramnad* v. *Velusami Tevar* (2) above referred to or distinguishable on the ground that no previous adjudication in the particular matter in issue was in question. But the difficulty arises from *dictum* in it that S. 141 is intended to apply, to proceedings in Civil Courts, such as probate, etc., and not to execution, anticipating the reasoning of Jenkins, C. J., above referred to in *Haricharan Ghose* v. *Manmatha Nath Sen* (6) and negativing the foundation, on which it has been suggested that the conclusion in *Subbiah Naicker* v. *Ramanathan Chettiar* (5), might more properly have been based. *Balasubramania Chetty* v. *Swarnammal* (10), although reported after, was decided before, but is not referred to in *Subbiah Naicker* v. *Ramanathan Chettiar* (5) and it is doubtful whether the two decisions can be reconciled.

The question, whether they can be and, if not, which is correct is one for a Full Bench; and there is nothing to add except that the matter has since been considered in Madras so far as we have been shown, in two cases only, to both of which Sadasiva Aiyar, J., was a party; his decision in *Periakaruppan Chetty* v. *Chidambara Thambiran* (11) and *Kali Shethi* v. *Shama Rao* (12) being the one consistent and the other inconsistent with his previous conclusion in *Subbiah Naicker* v. *Ramanathan Chettiar* (5). In the second of these two cases however there was no reference to that or any recent authority.

The matter standing thus, we refer for the decision of a Full Bench the question:—

Whether O. 9 is applicable to proceedings in execution between parties to the decree or their representatives?

OPINION

Schwabe, C. J.—The present Appellant is the decree-holder. The Respondent is the legal personal representative of a brother of the decree-holder who had been brought upon the record for the purpose of execution. An application had been made for attachment of the moveable property of the original defendant, the judgment-debtor. Those proceedings had come to nothing by reason of the fact that the present Appellant failed to find the necessary expenses. Within a year of those proceedings, application was made for attachment of the immoveable property. By reason of the operation of O. 21, R. 22, no notice of those proceedings was required to be given to the representative of the judgment-debtor and no notice was given. An application was then made for the sale of the property and in due course a notice for settling the sale proclamation, in form No. 21 of Appendix E of the Code of Civil Procedure, was issued. That notice stated that the decree-holder had applied for a sale of the property and continued, "You are hereby informed that the 14th day of August 1920, has been fixed for the purpose of settling the terms of the proclamation of sale." That notice was served by affixing it to some place

(8) [1918] 4 Pat. L.J. 135—49 I.C. 617 (F. B.)
(9) [1919] 4 Pat. L.J. 330—5 P.L.W. 208—47 I.C. 154.
(10) [1913] 38 Mad. 199—25 M.L.J. 367—14 M.L.J. 196—1913 M.W.N. 685—21 I.C. 32.
(11) [1916] 3 L.W. 339—(1916) 2 M.W.N. 64—33 I.C. 443.
(12) [1916] 21 M.L.T. 297—5 L.W. 124—37 I.C. 229.

alleged to be the residence of the Respondent. The Respondent, who alleges that he never received the notice, did not attend on the date fixed for settling the terms of the proclamation. He was declared *ex parte* and the terms of the proclamation were settled in his absence. He then applied to the District Munsif for the release of the property on the ground that it was not liable to be attached. The District Munsif dismissed that application, and on appeal to the Subordinate Judge, the Subordinate Judge remanded it to the District Munsif to enquire into the facts as to whether or not the property was the property of the judgment-debtor, holding that the notice of the proceedings in which he has been declared *ex parte* was not properly served upon him. That raises an interesting point as to whether or not it was open on these proceedings to the District Munsif or the Subordinate Judge to discuss the question whether or not notice had been properly served or whether it was necessary for the Respondent to take some different form of proceedings to challenge that notice, but in the view we take of another point in this case, it is unnecessary for us to express any opinion on that point.

The appellant contended that the question of the ownership of this property was *res judicata* and that it had been decided or must be taken to have been decided on the hearing of the application for settling the terms. of the proclamation of sale. Under S. 11 of the Civil Procedure Code "no Court is to try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit." Several cases have decided that a matter must be taken to have been substantially in issue in a former suit or proceeding if the point was open and could have been raised in the former proceedings. In this case the Respondent had no notice at all that the matter of the ownership of the property would or could come up for decision on the hearing of the application for settlement of the terms of the proclamation of sale. He did not even get a draft of the proposed terms. All that he was told was that a certain date had been fixed for settling those terms, and it would be a very remarkable thing if, on receipt of such notice, it were to follow that, if he did not attend on that occasion, he must be taken to have attended and raised the question whether or not the property was the property of the judgment debtor. Our attention has been called to no authority in support of that contention and it seems to me to be quite wrong, because that was not the time for discussing the question of the ownership of that property, although it is possible that the Court would on an application then made have listened to some argument on the point nor did the terms of the notice that he got suggest that it was. Our attention has been called to the case of *Subbiah Naicker* v. *Ramanathan Chettiar* (5). But I think, on this point, the whole of that decision turns on these words: "Now the order of August 1909 was no doubt an *ex parte* order but it was passed after notice was issued to the 2nd defendant to show cause why such an order should not be passed and after the Court had satisfied itself on the affidavit and the return of the process-server that the notice had been duly served." If in this case the Respondent had been asked to show cause why the property should not be sold the reasoning of that decision would apply, but in this case by the formal notice that he got he was not asked to show cause as to anything and he had no intimation at all that the matter would be open to him to raise or that it would be discussed. Under those circumstances I cannot see that it is possible to hold that his non-appearance on that occasion amounts to a decision against him that the property was the property of the judgment-debtor.

Our attention has also been called to the decision of the Full Bench of this Court in *Sivagami Achi* v. *Subrahmanya Aiyar* (3) that what takes place on the hearing of the application to settle the terms of the proclamation of sale is more of an administrative character than judicial and that therefore no appeal lies against the decision of a Court on

that occasion as to what that proclamation is to contain. That being the decision of the Full Bench, unless it is possible to say that part of what takes place on that occasion is judicial and part administrative, it would be a strong ground for contending that the matter cannot be *res judicata* by reason of the non-attendance at a sitting of the Court, such sitting being held administrative and not judicial.

I desire to say that our decision in this case must be taken to be confined to the particular facts of this case that is to say, that where you have nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the respondent cannot be taken to be estopped by the principle of *res judicata* thereafter in respect of the liability of the property to execution by reason of that non-attendance.

On these grounds I think the Subordinate Judge was right in remanding this case to the District Munsif. The result will be that this case must go gack to the Referring Bench with that direction.

Oldfield J.—I agree, As one of the Referring Judges, I add that, speaking for myself, I am now clear that in stating the effect of the obligation imposed by the notice to Kandasami, we had not sufficient regard to the fact that it was given in proceedings which originated without notice to him of the attachment.

Ramesam, J.– I agree, but I wish to add a few words. The leading decision on the application of the principle of *res judicata* to execution proceedings is the decision of the Privy Council in *Mungal Pershad Dichit* v. *Grija Kant Lahire* (13). It was held in that case that, if after notice, a decision was passed on an execution petition, it would not be open to parties to object to that decision when a subsequent application is presented. In applying that case a Bench of this Court in *Subramanya* v. *Raja Rajeswara* (4) at p. 1026 say. "One principle seems to be clear, and that is, that the party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. In the present case no notice went to the Respondents to show cause why they should not be brought on the record as the legal representatives of the deceased judgment-debtor for the purpose of execution. They had no notice that any particular property was going to be attached. We must therefore overrule this plea." I entirely agree with the principle underlying these remarks. Another example of the application of this principle is the decision in *Sheik Bulan* v. *Rhamanjindra Bhuncjgaya* (14). Notice to the judgment-debtor to be present at the settlement of the terms of the proclamation cannot be regarded as raising the question of the liability of the property to be attached and therefore it cannot be said that the judgment-debtor was invited to object to that attachment. That being so, the order that followed cannot be regarded as an implied adjudication that the property was correctly attached. I agree with the order proposed.

(13) [1882] 8 Cal 51—8 I. A. 123—11 C.L.R. 113—4 Sar. 248(P.C.)

(14) [1887] 11 Bom. 537.

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Full Bench

SCHWABE, C.J., OLDFIELD, AND COUTTS TROTTER, JJ.

Kelu Achan and others—Defendants—Appellants.

v

Cheriya Parvathi Nethiyar and others—Plaintiffs and Defendants—Respondents.

S. A. Nos. 286 and 287 of 1920 D/-13th January 1923 against the decrees of the Dt. Court, South Malabar, Calicut in A. S. Nos. 25 & 24 of 1918.

Suits Valuation Act, S. 11—'Prejudicially affected' does not apply to the forum of appeal.

The argument, that the mere fact of undervaluation, involving a trial before the District.

Munsif, must be prejudicial to the unsuccessful party, because an appeal from him lies to a District Court and then to the High Court by Second Appeal where the questions of fact are not open to discussion, whereas, if the suit had been brought originally before the Subordinate Court, it would come by First Appeal to this Court, where questions of fact are open to discussion, is untenable. The clause in S. 11 of the Suits Valuation Act when referring to prejudicially affecting the disposal of a suit or appeal on its merits, is not considering at all the different rules of procedure that there may be an appeal from one Court to another Court. 30 M. L. J. 736 : 41 I. C. 167 and 63 I. C. 715, Foll. 36 B. 628 Cons. 5 Pat. L. J. 397 Dissent. [P. 14, C. 3]

Coutts Trotter, J:—**The object of S. 11 is to provide a machinery for curing the original lack of jurisdiction in such circumstances.** [P. 15, C. 1]

K. V. Madhavan Nair for K. P. M. Menon—for Appellants.

C. Madhavan Nair — for Respondents.

Order of Reference to a Full Bench.

Oldfield J.—*In S. A. No.* 286 *of* 1920.—The first question we have to decide is whether this suit was beyond the pecuniary jurisdiction of the District Munsif, by whom it was tried. The valuation for the purpose of jurisdiction is, under S. 8, Suits Valuation Act, (VII of 1887), the same as the valuation for the computation of Court Fees. The reliefs asked for and to be valued are, as appears from the pleadings, which are given at unnecessary length in the District Munsif's judgment, three :—

1. Removal of 1st Defendant from tavazhi management.

2. A declaration that a Karipanayam, dated, 2nd July, 1916, is not binding on any of the seventeen items in A schedule and a direction to Defendants in respect of items 1 to 15, which (it is not disputed) would be equivalent to a decree for delivery thereof.

3. A declaration in respect of another Karipanayam and a decree for surrender of it and connected documents.

There is no dispute as to the valuation of the first and third of these; and the question, it is agreed, is only whether the second should be valued as plaintiffs have valued it at Rs. 500 for delivery of items 1 to 15. with reference to the revenue payable thereon, under Court Fees Act, S. 7 (v) (*b*) and Rs. 10 for the declaration asked for, regarded as one relating to all the seventeen items under Schedule II, Art. 17 (iii); or whether it should be valued, as defendants contend under S. 7 (v) (*b*) for items 1 to 15 and under S. 7 (iv) (*c*) for the relief asked for in respect of items 16 and 17 at which the relief sought is valued in the plaint. The importance of the latter contention lies in the fact, which is not disputed, that it entails an enhancement of the total valuation of the suit beyond the District Munsif's pecuniary jurisdiction, since, as appears from the reference in plaint paragraph 11-B2, the value of the buildings on items 16 and 17 is over Rs. 3,000.

The lower appellate Court decided for plaintiffs, partly on the ground that the inclusion of a prayer in respect of items 16 and 17 was, as alleged by plaintiff's vakil before it, a mistake and that no relief was asked for in respect of them. But it is sufficient that the plaint was not in fact amended consistently with any such statement and that here Mr. Madhavan Nair for plaintiffs was ready to withdraw the claim to relief in respect of these items, which is certainly made in the plaint, only in case our conclusion as to jurisdiction should be against him. On the merits the matter is concluded by the decision in *Shidappa Venkatrao* v. *Rachappa Subrao* (1) in which I respectfully concur. That decision is based on the application of S. 17, Court Fees Act; and that section is applicable to the case before us, since there is, to my mind, no reason for following the opinion expressed in *Durga Prasad* v. *Purandar Singh* (2) and holding that the 'distinct subjects' referred to must necessarily be distinct causes of action. It further does not seem to me that the conclusion as to valuation in the Bombay case cited is affected by the judgment of the Privy Council in Appeal, *Rachappa Subrao Desai* v. *Shidappa*

(1) [1912] 36 Bom. 628—14 Bom. L. R. 757—16 I. C. 1005.
(2) [1904] 27 All. 186—(1904) A. W. N. 210.

Venkatrao (3). The reference to the real value of the property in suit as undisplaced for purposes of jurisdiction by the notional value was made in connection with the portion of the claim for which the fixed fee was payable under Sch. II; and it was in that connection there, as it is here, that the admissibility of the real value as determining jurisdiction was material, the succeeding paragraph relating to the other part of the suit. And in fact the decision in plaintiff's favour was given not on the ground that the technical objection relied on by defendant was unsubstantial but because owing to the failure to take it earlier, a merely technical objection could not prevail.

The valuation adopted by plaintiffs in the present case being incorrect for purposes of jurisdiction and the District Munsif therefore incompetent to try the suit, the question is whether this entails the success of the Second Appeal In *Rachappa Subrao Desai* v. *Shidappa Venkatrao* (3), it was sufficient that objection had not been taken to the jurisdiction on this ground until the argument in the High Court and it was therefore unnecessary for the Judicial Committee to refer in its judgment to the provision of law, S. 11, Suits Valuation Act, on which our decision must turn. For it is not disputed here that an objection was taken and an issue framed regarding it before the District Munsif, although (for reasons which are not clear) he said that an adjudication was unnecessary.

S. 11, Suits Valuation Act, provides that, where objection to the jurisdiction has been taken by reason of over or under valuation in the Court of First Instance, it shall receive effect, only if the Appellate Court is satisfied that "the over or under valuation has prejudicially affected the disposal of the suit on its merits." That language is general and certainly it is difficult to understand what special circumstances are contemplated in it, or to say whether it can be applied to a case, such as that before us, in which no prejudice to the disposal of the suit has been specified in the Memorandum of Appeal or in the argument. Yet in accordance with the ordinary canons of construction that language cannot be deprived of effect, as though the intention were that in all cases of incorrect valuation the proceedings in the Court of First Instance should be treated as invalid. The test contemplated in the language used cannot ordinarily be supposed to be the convenience or preference of the parties since they will seldom agree on those matters and it will be impossible to decide between conflicting local and personal considerations of an indefinite nature. It is then argued that, when (as in the present case) actual prejudice is not demonstrated, the Appellate Court must consider whether it can be presumed. But if prejudice based on presumption is contemplated by the section, it is still necessary to consider how any presumption can be made. None can be made, because the Court of a District Munsif is substituted for that of a Subordinate Judge, or *vice versa*, in consequence of the incorrect valuation, since, the powers of both to deal with litigation legitimately before them being the same, there is no substantial reason for presuming that the decision of the one is more likely to be right than that of the other, this being particularly exemplified in cases, such as the present, where the objection to valuation is sustained first in Second Appeal and the decision of both Courts on fact and law are the same; and this view has, in fact, been taken in *Raghava Chariar* v. *Raghava Chariar* (4). This failing, application may perhaps be found for the words of the section in cases, in which the incorrect valuation entails that the Small Cause, instead of the ordinary procedure will be followed, although it is doubtful whether, both procedures being regarded by the

(3) [1919] 43 Bom. 507—46 I. A. 24—10 L.W. 274—21 Bom. L.R. 489—29 C. L. J. 452—10 L. W. 274—24 C. W. N. 33—36 M. L. J.437—25 M.L.T. 298—17 A.L.J. 418—50 I. C. 280 (P.C.)

(4) [1910] 20 M.L.J. 726—8 M.L.T. 404—8 I.C. 545.

legislature as affording a satisfactory method of trial. there can be any question of prejudice to the disposal on the merits. The last suggestion made is that prejudice is contemplated as arising from the difference in the course of appeals, and the number of appeals which incorrect valuation will entail ; and in particular from the loss in cases of under-valuation of the right of appeal on the facts to the High Court. This possibility no doubt has not been considered in the decisions we have been shown. But first the forfeiture of a particular right of appeal, arising after the disposal of the suit, cannot be regarded as in the words of the section " prejudicially affecting the disposal of the suit on the merits." Next this possibility is irrelevant in cases of over-valuation ; and necessity for separate reference to them is, on the assumption involved, wanting. And thirdly this explanation is based on a presumption that adjudication on the facts must be prejudicially effective, if the hearing is by an inferior Court which is no more sustainable with reference to appellate than original proceedings. This also failing, it must be supposed, that the very general wording was adopted to provide *ex abundanti cautela* for any exceptional cases, in which prejudice to disposal on the merits may be demonstrable but of which the nature cannot be more exactly defined. In the present case no such prejudice has been alleged or shown to have occurred. I would therefore proceed with the hearing of the Second Appeal.

But as my learned brother differs and as the difference between us relates to a preliminary point requiring decision before we can proceed to disposal on the merits, I agree to refer to a Full Bench the question whether the Second Appeal should be heard on the merits or whether the plaint should be returned.

In S. A. No. 287 *of* 1920.—Our judgments also apply to this point, as it arises in the connected Second Appeal No. 287 of 1920. We make a similar reference in that case also.

Devadoss, J.—*In S. A. No.* 286 *of* 1920.—This is an appeal by the 15th Defendant against the decree of the District Judge of South Malabar, affirming the decree of the District Munsif of Alatur in O. S No. 328 of 1916, in which the plaintiffs sued for the removal of the karnavan of their tavazhi, the 1st defendant and for a declaration that certain alienations were not binding on the family, and that certain properties were the properties of the family of the plaintiffs, and the 1st defendant. The District Munsif granted decree in favour of the plaintiffs, and the District Judge has upheld it.

In the plaint several reliefs were claimed :

(1) the removal of the 1st defendant from the tavazhi management, (2) the appointment of the 2nd plaintiff or any other plaintiff as manager, (3) a declaration that a Karipanayom deed executed by the 1st defendant to the 2nd defendant, dated 2nd July, 1916, for Rs. 4,823-8-0 was not valid and binding on the plaintiff's and for possession of items 1 to 15, (4) a declaration that the amount of the Karipanayom deed executed by defendants 1 to 13 to the 14th defendant belonged to the tavazhi of the plaintiffs, (5) a direction to the 1st defendant to deliver to the plaintiffs all documents accounts, etc, and some other reliefs.

The plaintiffs valued the first relief at Rs. 1,233-5-4, the third at Rs. 500 being five times the annual assessment, the fourth at Rs. 100 and the fifth at Rs. 5.

The defendants pleaded that the suit was under-valued, that for the purpose of declaration, the valuation was the full value of the property, and that items 16 and 17, in respect of which a mere declaration was prayed for, were worth more than Rs. 3,000-0-0.

The District Munsif valued the first relief at Rs. 2,182-12-9, but held that the other reliefs were properly valued, and that he had jurisdiction to try the suit, and took evidence and decided it on the merits.

The 15th defendant who appealed against the decree of the District Munsif, raised the contention that the District Munsif had no jurisdiction to try the suit and that the suit ought to have been dismissed on that ground, but the District Judge overruled the

contention, holding that the under-valuation, if any, did not prejudicially affect the disposal of the suit on the merits.

It is argued before us that the District Munsif had no jurisdiction to try the suit, as the value of the reliefs claimed was over Rs. 5,000-0-0 and that the decree of the District Munsif should, therefore, be set aside.

It is admitted by the respondents that the value of all the reliefs claimed exceeded Rs. 5,000, that items 16 17 are worth more than Rs. 3,000-0-0, and that as a mere declaration was asked for in respect of them, the valuation for the purpose of jurisdiction should have been at their market value, and that in respect of the other items, plaintiffs claimed a consequential relief, and therefore, they were justified in valuing them at any figure which they thought proper under the Court Fees Act, S. 7 Cl. 4 (c).

The point for decision is whether the District Munsif's decree should be set aside on the ground that the value of the suit exceeded the pecuniary jurisdiction of the District Munsif. The appellant in support of his contention, relies upon a case reported in *Shilappa Venkatrao* v. *Rachappa Subrao* (1). In that case, the plaintiff valued, for the purpose of declaration, his plaint at Rs. 135 and filed it in the Court of the First Class Subordinate Judge who passed a decree in his favour. On appeal to the District Court a preliminary objection was taken that the appeal lay to the High Court as the value of the subject matter of the suit was above Rs. 5,000. The District Judge held that there was no failure of justice consequent on the lower Court's erroneous assumption of jurisdiction and that neither party was entitled to complain of want of jurisdiction and heard the appeal on the merits and dismissed it. The defendant preferred a Second Appeal to the High Court. Chandavarkar and Batchelor, JJ., held that the plaintiff had not properly valued the suit, and that the valuation for the purpose of jurisdiction was Rs. 69,016-9-0, and that, therefore, the appeal lay to the High Court. They set aside the decree of the District Judge and directed the appeal to be presented to the High Court, which, was done. The learned Judges heard the appeal on the merits and dismissed it. Against this decree of the High Court, the defendant preferred an appeal to the Privy Council and the judgment of the Privy Council is reported in *Rachappa Subrao* v. *Shilappa Venkatrao* (3). Their Lordships of the Privy Council dismissed the appeal holding that the plaintiff's valuation was incorrect, that the proper valuation for the purpose of declaration exceeded Rs. 60,000 and that:

"no objection was taken to the Court's jurisdiction in the written statement or the issues and it was not even suggested in the memorandum of appeal to the District Judge or the High Court."

and that it was

"because the defendant did not take the objection at the proper stage that he has been able to prolong the litigation commenced so far back as 1909 by an appeal to this Board."

"Their Lordships are of opinion that they would not be justified in assisting an objection of that type; and more than that, they hold that even the technicality on which the defendant relied could not prevail."

Under the Madras Civil Courts' Act, District Munsifs have jurisdiction up to Rs. 3,000 and appeals against their decisions lie to the District Court, and Subordinate Judges have unlimited pecuniary jurisdiction; but appeals, from their decisions lie to the District Court "except when the amount or value of the subject matter of the suit exceeds five thousand rupees in which case the appeal shall lie to the High Court." In this case, the valuation of the properties being admittedly over Rs. 5,000, if the suit had been brought in a Subordinate Judge's Court, the unsuccessful party would have had the right to appeal to the High Court.

The respondents' Counsel relies upon S. 11 of the Suits Valuation Act which is in these terms-I shall extract only portions of it:—

"(1) Notwithstanding anything in S. 578 of the Code of Civil Procedure, an objection that by reason

of the over-valuation or under-valuation of a suit or appeal, a Court of first instance or lower appellate Court, which had not jurisdiction with respect to the suit or appeal, exercised jurisdiction with respect thereto, shall not be entertained by an appellate Court, unless (*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or (*b*) the appellate Court is satisfied for reasons to be recorded by it in writing that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

" (2) If the objection was taken in the manner mentioned in clause (*a*) of Sub-sect. (1), but the Appellate Court is not satisfied as to both the matters mentioned in clause (*b*) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of First Instance or the Lower Appellate Court.

" (3) If the objection was taken in that matter and the Appellate Court is satisfied as to both those matters and had not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of the appeal. "

This section enacts that no objection on the ground of over valuation or under-valuation shall be entertained unless (1) the objection is taken in the Court of First Instance at or before the first hearing, or (2) the Appellate Court is satisfied for reasons to be recorded by it in writing that the over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits and if the Appellate Court is satisfied as to both these matters, then and then only it shall proceed to deal with the appeal as regards the question of jurisdiction. In the present case the objection was taken in the First Court in the written statement and before the first hearing and in the memorandum of appeal to the Appellate Court also the objection to jurisdiction was raised. It cannot be said that the disposal of the suit has in any way been prejudicially affected by the under-valuation. It is not easy to conceive of a case, where the disposal of a suit or appeal would be prejudicially affected merely by reason of over-valuation or under-valuation. Mr. Madhavan Nair found it difficult to suggest any instance where the disposal on the merits could be said to be prejudicially affected by reason of over valuation or under-valuation. He suggested that by proper valuation a suit may be brought in a Subordinate Court which may be able to enforce the attendance of witnesses of either party. It is difficult to see how a Court of a Subordinate Judge could enforce the attendance of witnesses which a District Munsif could not do. If it is suggested that the change of venue would be more convenient to one party or the other, that would not depend upon the pecuniary jurisdiction of a Court, so that instance is no instance at all. He relied upon a case reported in *Raghava Chariar* v. *Raghava Chariar* (4). In that case the facts were : the plaintiff and the defendant were executors of the will of one Krishnaswami Ayyangar. Under the will they were appointed co-trustees for the two widows and the minor adopted son of the deceased and also for carrying on a charity. The plaintiff sued to remove the defendant from the co-executorship and co trusteeship on the ground of his misappropriation of the trust funds and his failure to co-operate in the execution of the will and the trust. The defendant objected to the suit being within the Court's juri-diction both under the Trust Act of 1882 and on account of the whole of the trust property being of more than the Court's pecuniary limits. The plaint was returned for presentation to the proper Court, but the District Court reversed the order of the District Munsif and directed the Court of First Instance to receive the plaint and dispose of it on the merits. The District Munsif entertained the suit and found that the

defendant had failed to account for two sums of Rs. 1,306 and Rs. 115, and passed a conditional decree that, if the defendant did not pay the amount within three months, he would be removed from office. On appeal the District Court affirmed the decree of the District Munsif. On second appeal it was contended that the subject of the trust being admittedly above Rs. 20.000 in value, the District Munsif had no jurisdiction to try the suit. Sir T. Muthuswami Ayyar and Handley, JJ., held that: "the value of the trust property ought to have been taken as a guide to the determination of the question of jurisdiction. The objection was taken both in the Court of First Instance and in the Lower Appellate Court. According to S. 11 of the Suits Valuation Act we are precluded from entertaining the objection, unless we are satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. The mere change of forum consequent on the under-valuation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of the section; for that is the very case premised and provided for by the section. Reading the section together with S. 578 of the Code of Civil Procedure, we consider that the words 'prejudicially affected the disposal of the suit on the merits' must be construed in the same way as they would be construed with reference to any error, defect, or irregularity contemplated by that section. The effect of S. 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by Section 578, except that the objection must be taken either in the Court of First Instance or in the Lower Appellate Court. In the present case we do not consider that the under-valuation has prejudicially affected the disposal of the suit on the merits."

This case was followed by Madras High Court in *Ammalu Ammal* v. *Krishnan Nair* (5) and *Vedaji Baskara Tirumal Rao* v. *Subramania Gurukkal* (6) and in *Narayani Ammal* v. *Secretary of state* (7).

The question that presents a real difficulty is this :—Is the plaintiff justified in under-valuing a suit and bringing it in a Court which would not have jurisdiction over it, if properly valued, and thereby deprive the other party of the right to appeal on facts to the High Court? If a suit were valued at more than Rs. 5,000 it would have to be brought in the Subordinate Judge's Court and an appeal against the decree of the Subordinate Judge in such a suit would lie to the High Court on facts. But, by bringing such a suit in the District Munsif's Court, the right of appeal to the High Court is taken away; and the appeal in fact lies to the District Court, and a Second Appeal to the High Court lies only on questions of law. The object of the Madras Civil Courts Act in limiting the jurisdiction of Civil Courts is not without an object, and the defendant should not be deprived at the whim and fancy of a plaintiff of his right to appeal to the highest Court in the land on facts. If S. 11 of the Suits Valuation Act is strictly interpreted, an Appellate Court would be unable to interfere with the decree of a District Munsif, whatever might be the value of the property in suit, on the ground that the party appealing against the decree is unable to show that the disposal has been prejudicially affected by under-valuation. It is not easy to conceive of cases where the disposal could be said to be affected prejudicially on the merits merely by reason of under-valuation or over-valuation. It is strongly urged by the respondents' counsel that the legislature in enacting S. 11 in those terms did not want the decrees of Courts to be interfered with merely because the subject matter exceeded the pecuniary jurisdiction of such Courts. No doubt, a literal interpretation of Cl. (1) (*b*) of S. 11 would lead to the result. But it is difficult to hold that the legislature intended to give a plaintiff the right to sue in whatever forum he might choose, and

(5) [1921] 62 I. C. 715.

(6) [1919] 52 I. C. 992.
(7) [1917] 41 I. C. 167.

thereby to take away the right of appeal on facts to the High Court. Under the Madras Civil Courts Act, courts of different pecuniary jurisdictions are established. The very object of having Judicial Officers of different cadres would be defeated if the Court of the lower pecuniary jurisdiction could be allowed to try and dispose of suits, the subject matter of which exceeds its pecuniary jurisdiction. A defendant is entitled as a matter of right to have his case heard by a judge of a higher grade and of greater experience, if the value of the claim against him exceeds the pecuniary jurisdiction of the Court in which the suit is brought. Where there are two legislative enactments, one creating and regulating the jurisdiction of Civil Courts and the other mainly intended for fiscal purposes, the provisions of the former should not be lightly treated in dealing with questions of jurisdiction affecting rights of parties. Under S. 21 of the Civil Procedure Code an objection to territorial jurisdiction should be taken at the earliest opportunity, and an Appellate Court will entertain it only if there is a consequent failure of justice. In *Hamidunnissa Bibi* v. *Gopal Chandra Malakar* (8), the learned Judges after referring to various cases before and after the passing of the Suits Valuation Act, observe thus:

"It is no doubt a sound rule that Courts should not allow parties to evade the law relating to matters of jurisdiction and that where it is found that a party is intentionally exaggerating his claim in order to bring his suit in a Court which otherwise would not have jurisdiction to try it, before the merits of the claim have been gone into, the plaint should be returned to be presented to the proper Court. But this rule must be taken with qualifications, and the one important qualification is that embodied in S. 11 of the Suits Valuation Act, which is this, *viz*, that where a suit has been tried on its merits by the First Court and the over-valuation or under-valuation of the suit is not found by the appellate Court to have prejudicially affected a suit on its merits the objection as to jurisdiction should not be given effect to. A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction must be punished by having no costs allowed to him; but it would not, in our opinion, conduce to promote the ends of justice, if an appellate Court were to set aside a decision which is found to be correct on the merits, simply because the valuation of the suit has been designedly increased or decreased to evade jurisdiction."

Considering the high authority of Sir T. Muthuswami Ayyar, who decided the case reported in *Raghava Chariar* v, *Raghava Chariar* (4) and that of Mr. Justice Bannerjee in *Hamidunnissa Bibi* v. *Gopal Chandra Malakar* (8), one would be very reluctant to differ from their opinion. But, in none of the cases, so far as I have been able to examine them, the question of right of appeal on facts was raised. That question was specifically raised only in *Shidappa Venkatrao* v. *Rachappa Subrao* (1), where the learned Judges reversed the decree of the District Judge and directed the appeal to be presented to the High Court. This judgment of the Bombay High Court was affirmed by their Lordships of the Privy Council. If their Lordships thought that Sect. 11 of the Suits Valuation Act was an answer to the defendant's contention, I think they would not have rested their judgment on other grounds. While their Lordships refer to Ss. 8 of the Suits Valuation Act as regards the mode of valuation, and also to Sect. 7 as regards the computation of fees payable for certain suits, and Ss. 6 and 7 of the Court Fees Act as regards the fees payable in respect of reliefs, they rest their decision upon the fact that the objection was not taken at the proper time and that a defendant who did not choose to take the objection in the Court of first instance should not be helped. But for their Lordships decision reported in *Rachappa Subrao* v. *Shidappa Venkatrao* (3) I would have felt very great difficulty in not following the decision in *Raghava*

(8) [1897] 24 Cal. 661—I.C.W.N. 556.

Chariar v. *Raghava Chariar* (4) and other cases. It has not been shown by the appellant that the disposal of the suit on the merits has been prejudicially affected by the under-valuation. At the same time I feel strongly that the right of appeal to the High Court, which the defendant would have had if the suit had been instituted in the Subordinate Judge's Court, had been improperly taken away by the suit being instituted in the District Munsif's Court, and no party should have the right to take away the right of his adversary to appeal to the highest Court in the land on facts. It might be said that he got the right of a Second appeal which he would not have had if the suit had been filed in the Subordinate Judge's Court in the first instance. I do not think this argument needs serious consideration. A decision of a Bench of two judges of the High Court on facts, I consider, would be more satisfactory than the decision of a single judge of the District Court. On this ground, the under-valuation of the suit has prejudicially affected the defendant's right of appeal. Relying upon the decision of their Lordships of the Privy Council in *Rachappa Subrao Desai* v. *Shivlappa Venkatraao* (3), I respectfully dissent from the decision of Sir T. Muthuswami Ayyar and other learned Judges in the three Madras cases referred to above, and hold that the District Munsif had no jurisdiction to try the suit. Mr. Madhavan Nair offered to withdraw the suit so far as items 16 and 17 are concerned. I think in the view I take, he should not be allowed to cure the want of jurisdiction by withdrawing the suit in respect of a few items at this stage, depriving the defendant of the undoubted right to have his appeal of facts heard by the High Court and the suit tried by a Subordinate Judge.

The plaint should be ordered to be returned to the plaintiff, for presentation to the proper Court.

OPINION

Schwabe, C. J.—In this case the suit was commenced before the District Munsif and it appears that there was an under-valuation of the suit. If it had been properly valued, the case would not have gone to the District Munsif but would have gone to the Subordinate Judge, in the first instance and thence an appeal to the High Court instead of to the District Court and no second appeal to the High Court, as is the case in decisions from District Munsifs. This objection to jurisdiction by reason of under-valuation was taken before the District Munsif who held that he had jurisdiction and heard the case. There was an appeal from him to the District Court, the Lower Appellate Court in this case. The District Judge held also that the suit was not under-valued but he also held that, if the suit were under-valued, still its valuation had not prejudicially affected the disposal of the suit on its merits. That decision on appeal comes to this Court by way of Second Appeal and, there having been a difference of opinion, it is referred to a Full Bench.

The question turns on the proper interpretation of S. 11 of the Suits Valuation Act of 1887, which provides that objections to jurisdiction, by reason of over-valuation or under-valuation of a suit or appeal, are not to be entertained by an Appellate Court, unless the objection is taken in the Court of first instance or in the Lower Appellate Court and the Appellate Court is satisfied for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valution thereof has prejudicially affected the disposal of the suit or appeal on its merits. It is contended before us that the District Judge was wrong, because the mere fact of under-valuation, involving a trial before the District Munsif, must be prejudicial to the unsuccessful party, because an appeal from him lies to a District Court and then to the High Court by Second Appeal where questions of fact are not open to discussion; whereas, if the suit had been brought originally before the Subordinate Court, it would come by First Appeal to this Court where questions of fact are open to discussion. In my judgment, the clause of the Suits Valuation Act, when referring to prejudicially affecting the disposal of a suit or appeal on its

merits, is not considering at all the different rules of procedure that there may be an appeal from one Court to another Court. If, as has been contended before us, the mere fact of there being some different rules in the procedure on appeal must prejudicially affect the disposal of a suit on its merits, the section has really no meaning at all, because in every case from a District Munsif to the Lower Appellate Court, where there had been under-valuation the appeal would have to be allowed and a new trial ordered, because the trial on its merits was prejudiced and that, in my judgment, is absurd. There is ample authority of this Court that the Lower Appellate Court in such a case not only has jurisdiction to hear the appeal from a District Munsif who has exceeded his jurisdiction but that it must do so, unless it is satisfied, as required by S. 11 of the Suits Valuation Act, first, that the point was taken, and secondly, that the decision on the merits was prejudicially affected. See *Raghava Chariar* v. *Raghava Chariar* (4), *Narayani Ammal* v. *Secretary of State* (7), *Ammalu Ammal* v. *Krishnan Nair* (5). There is a decision to the contrary in *Mohini Mohan Misser* v. *Gour Chandra Rai* (9). With that decision I do not agree. The point was also discussed in *Sidappa Venkatrao* v. *Rachppa Subrao* (1), but the point at present before the Court is not decided there.

Our answer to the question, therefore, is that the second appeal must be heard on its merits. The same point arises in S. A, No. 287 of 1920 which is also referred to us and our answer in that case must be the same.

Oldfield J.--I agree.

Coutts Totter J.--I am of the same opinion and I should have thought that the contention put before us was absolutely unarguable, were it not that it apparently has commended itself to at least one Bench of Judges in this country. I take it that the object of S. 11 of the Suits Valuation Act is to provide a machinery for curing the original lack of jurisdiction in such circumstances. If it does not do that, it does nothing else : yet, it is argued before us that, if you once start a suit in one Court which decides prejudicially on the merits, the section has no power to cure the original lack of jurisdiction which remains uncured to the end ; that is to say, that section gives you something with one hand and immediately takes it away with the other. Mr. Ananthakrishna Ayyar did not contend otherwise than that the "Court of first instance" referred to in Sub sect. 1 (*a*) of S. 11 must mean not the Court in which the suit ought to have been started, but the Court in which it was, in fact, started. It seems to me to follow from that, beyond a possibility of question, that in Sub-sect. 1 (*b*) when we get to talking about "Appellate Court," that means not the Court in which the appeal should have been started in the first instance but the Court to which it did, in fact, go and ought to have gone, if the lack of jurisdiction were to be condoned. In this case in fact it was condoned. In my opinion, the only possible answer to this reference i e one proposed by my Lord.

Second Appeal directed to be heard on the merits.

(9) [1920] 5 Pat. L.J. 397--1 P.L.T. 390--56 I.C. 762.

** 1924 MADRAS 15

Full Bench

SCHWABE, C. J., OLDFIELD, RAMESAM, DEVADOSS AND COLERIDGE, JJ.

Ponnuswami Odayar and others—Accused--Petitioners.

v.

Ramasami Thathan — Complainant-Respondent.

Criminal Rev. Case No. 691 of 1922 and Criminal Rev. Petition No. 580 of 1922, D/-24th April 1922 from the judgment of the Sub-Div. 1st Class Mag., Mayavaram, in Criminal App. No. 21 of 1922.

Criminal P. C. S., 342-Does not apply to summons cases.

S. 342 has no application to summons cases although in summons cases where no objection

to a Magistsrate questioning the accused generally for the purpose of enabling him to explain the circumstances appearing in the evidence against him and in complicated cases especially where the accused is not represented by Counsel, it is a desirable course notwithstanding that it is not obligatory. Recent cases of the other High Courts reviewed and dissented from. [P. 17 C. 2]

K. Bhashyam and P. J. Kuppanna Rao—for Petitioners.

T. V. Muthukrishna Aiyar and M. S. Venkatarama Aiyar—for Respondent.

Public Prosecutor—for the Crown.

Opinion of the Full Bench.

Schwabe, C. J.—The Criminal Revision Case has been referred to the Full Bench on the question whether in summons cases the provisions of S. 342 of the Code of Criminal Procedure, are to be applied, that is, is the Court bound, for the purpose of enabling the accused to explain the circumstances appearing in the evidence against him, to question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The inconvenience of this course is manifest in view of the provisions of S. 364 of the Code of Criminal Procedure which require the taking down of any such question in full in the language in which the accused is examined, or, where that is not practicable, in the language of the Court or in English, and that the record shall be shown or read to him and, if necessary, interpreted. The great majority of summons cases are of a petty nature and a strict application of the section must necessarily involve a consumption of a large amount of judicial time. We are reliably informed that it would involve a considerable increase in the Magistracy and that, in fact, the section has in practice in this presidency not been treated as applying to summons cases. In Madras there is no authority on the point execept that in two recent cases single judges have felt themselves bound to hold that the section does apply by reason of the decisions of the Benches of other Courts referred to below. In other Courts there is considerable weight of judicial authority in favour of the application of the section, In *Emperor* v. *Farnandez* (1) Shah and Crump, JJ., gave a direct decision on the point and it was followed in *Emperor* v. *Gulabjan* (2) by Macleod, C. J. and Shah, J., the former pointing out the inconvenience and suggesting legislation as a remedy. In *Kaghu Bhumij* v. *King Emperor*, (3) in which the point was unnecessary for decision as it was a Sessions Case, Sultan Ahmed, J., held that the application of S. 342 was obligatory in sessions cases and expressed this opinion that it did not apply to summons cases for reasons which I will refer to later. Mullick, J., holding that the section was not obligatory in sessions cases stated that he failed to see any difference between warrant and summons cases. On this case being referred to Jwala Prasad. J., he held that it was obligatory in sessions cases and was clearly ofopinion that it applied to summons cases. In *Ghulam Rasul* v. *King Emperor* (4) Adami and Bucknill, JJ., held that the section applied to summons cases. *Emperor* v. *Fernandez* (1), had been reported in the meantime and the Court simply followed that decision. This case has also been followed by single judges in Lahore in *Muhammad Bakhsh* v. *Emperor* (5), and in Patna in *Parameswar Lal Mitter* v. *Emperor*, (6). It is open to this Bench to take a different view and we have to consider the matter for ourselves, of course, giving due weight to the authorities quoted above. S. 342 is one of the general provisions as to inquiries and trials, contained in Chapter XXIV, and being a general provision it must be applied to all cases, unless the special sections dealing with particular cases indicate that it is not intended to apply to

(1) [1921] 45 Bom. 672—22 Bom. L.R. 1040—22 Cr.L.J. 17—59 I. C. 129.
(2) 1922 Bom. 290—46 Bom. 441—23 Bom. L. R. 1203—23 Cr. L. J. 45—64 I. C. 669.
(3) [1920] 5 Pat. L. J. 420—I P. L. T. 241—21 Cr. L. J. 705—58 I.C. 49.
(4) [1921] 6 P. L. J. 174—2 P. L. T. 390—22 Cr.L.J. 427—61 I.C. 715.
(5) 1922 Lah. 45—4 L. L. J. 230—23 Cr.L.J. 154—65 I. C. 618.
(6) 1922 Pat. 296—3 P.L.T. 347—23 Cr.L.J. 440—67 I. C. 616.

them or unless, the words of the section itself give such indication. In my Judgment, both these grounds of exception are to be found in respect of summons cases. Looking at S. 342 it is a condition that the questioning directed is to take place before the accused is called on for his defence. The calling on the accused for his defence has a definite meaning both in sessions and warrant cases under Ss. 289 and 256, but when examining Chapter XX containing the provisions applying to summons cases, the expresison is not used. The prisoner in these cases does not "enter on his defence" but the Magistrate is bound "to hear the accused." That this distinction in phraseology is deliberate is clear from an examination of S. 451 relating to the trials of European British subjects which refers, in summons cases, to a time before he is heard in his defence under S. 244 and, in warrant cases, to a time before he enters on his defence under S. 256. (See on this point the Judgment of Sultan Ahmed J.) in 5 Patna L. J. at p. 426). In my judgment, the proper interpretation to be put upon S. 342 by reason of these words is that it is to apply only to those cases where under other sections of the Code the prisoner is to be called on for his defence. Again Chapter XX provides a complete procedure for the hearing of summons cases. Under S. 242 the accused is asked if he has any cause to show why he should not be convicted; but there is no sort of preliminary enquiry before framing a charge, as is the case in warrant cases, and before a case is committed to sessions. Then under S. 244 the Magistrate must hear the complainant and take all such evidence as may be produced in support of the prosecution and also hear the accused and take all such evidence as he produces in his defence. Under S. 244 after taking this evidence and such further evidence (if any) as he may cause to be produced, (and if he thinks fit) examining the accused he must give his decision. It is difficult to see where in these sections a formal examination under section 342 is to come in. It would have to be read somewhere in S. 233 and it would be remarkable that, if S. 342 was intended to be applied to summons cases, the Legislature should not have said at what stage in the application of Ss. 242 244, and 245 this further formal examination is to take place. I do not feel bound to read the provisions of S. 342 as intervening in the middle of the operation of these sections and in my judgment it has no application to summons cases. It is perhaps worth observing that in summons cases there is no objection to a Magistrate questioning the accused generally for the purpose of enabling him to explain the circumstances appearing in the evidence against him, and in complicated cases especially where the accused is not represented by Counsel, it is a desirable course notwithstanding that it is not obligatory.

As to the other points raised, the Criminal Revision case with this direction will be referred to the Referring Bench for disposal.

Oldfield, J.—I agree. The authorities referred to in the judgment just delivered seem to me to proceed, implicitly, or explicitly, on two assumptions, which with all respect I cannot follow:—that the entry by the accused on his defence, referred to in S. 342 of the Code of Criminal Procedure is identifiable with the hearing of the accused, referred to in Chapter XX, and that the language used in the section is applicable at all to summons case procedure. With all deference to my Lord I am not sure that the separate references in S. 451 to accused being heard in summons cases and entering on his defence in warrant cases assist the agument. For it is not clear that they correspond with more than the draftsman's adherence in 1884, when that part of the Code was amended, to the wording of the other portions now under construction. It is, however, in my opinion sufficient that the distinction to be inferred from the different wording used in each of those portions can easily be drawn, the hearing of the accused under S. 244 referring to the general hearing, to which he or his vakil on his behalf is entitled in the course of the trial. His entry on his

defence under summons case procedure takes place earlier, when under S. 242, after the particulars of the offence have been stated to him, he is asked if he has any cause to show why he should not be convicted. But, as the witnesses for the prosecution have not then been examined, there can be no question then or later of the requirements of S. 342 having been fulfilled.

Ramesam, J.—I agree with the judgment of the learned Chief Justice.

Devadoss, J.—I agree with the judgment of the learned Chief Justice.

Coleridge, J.—I agree.

✱ 1924 MADRAS 18
Full Bench

SCHWABE, C. J., OLDFIELD AND RAMESAM, JJ.

Pakkiam Solomon — Plaintiff—Appellant.

v

Chelliah Pillai—Defendant — Respondent.

R. C. No. 14 of 1922, D/-16th April, 1923, from the reference of Dt. J., Madura, D/-9th September, 1922.

(a) *Divorce Act, S. 2—Christian though ex-communicated is still a Christian.*

Schwabe, C. J.,—Although a person is excommunicated by the sect or the church to which he belongs he does not thereby cease to profess Christianity. The question of profession of Christianity is a question of his own action and not the action of his Church.

[P. 18, C. 2.]

(b) *Native Converts Marriage Dissolution Act (21 of 1866)—Conversion of one spouse—Marriage is not dissolved.*

The conversion to Christianity of one of two married Hindus does not dissolve the marriage. [P. 18, C. 2.]

T. M. Ramaswami Aiyar — for Petitioner.

Schwabe, C. J.—This is a suit for nullity of a marriage under the following circumstances. The respondent when a Hindu was married to a Hindu. The respondent changed his religion being converted to Christianity. No steps were taken by him to dissolve his marriage, but he then went through a form of marriage with the petitioner also a Christian. The petitioner now brings this suit on the ground of bigamy of her husband he having a wife alive at the time he went through the form of marriage with her.

The first defence raised is that the petitioner has no rights under the Indian Divorce Act because it is alleged that she does not profess the Christian religion. This is based on a resolution of the particular sect to which she belongs, in effect ex-communicating her. In my judgment although she may be ex-communicated by the sect or the church to which she belongs, she does not thereby cease to profess Christianity. The question of profession of Christianity is a question of her own action and not of the action of her Church. It is to be observed that the petitioner was the daughter of a Christian and no doubt was baptised as a Christian. I cannot see how it can be said that she ceases to profess the Christian religion because her church disapproving of her conduct have ex-communicated her.

The second defence raised is that at the time of this marriage there was no existing marriage of the respondent it being alleged that by reason of his conversion his then existing marriage became dissolved. That is not the law. It is quite clear from the Native Converts Marriage Dissolution Act (XXI of 1866) that the conversion to Christianity of one of two married Hindus does not dissolve the marriage. That Act provides for means to obtain dissolution of the marriage by application to the Court first of all for restitution of conjugal rights and then after the lapse of a year for dissolution of the marriage if conjugal rights are refused. Otherwise the conversion to Christianity of one of two spouses has no effect on the existing marriage.

It follows that the decree that the marriage is a nullity is correct and must be confirmed with costs.

Oldfield, J.—I have felt some doubt with regard to the first question raised by this petition, whether the petitioner can be said to have been professing the Christian religion at the time she presented it, within

the meaning of S. 2 of the Indian Divorce Act. My hesitation arises from the facts, evidenced by the resolution of ex-communication referred to by my Lord, that she had repudiated the authority of governing body of the Christian denomination, to which she belonged, and that she was by the resolution deprived of the spiritual privileges of the Christian faith in the only form, in which, so far as it appears, she has ever possessed them. The reply suggested is that, notwithstanding her withdrawal or exclusion from a particular denomination, she can still be heard to say that she professes an unsectarian Christianity. These words of the Act have always been difficult of interpretation ; and it is with some hesitation that I accept the suggestion made on her behalf. It is some justification for doing so that there is nothing before us as to her admission or re-admission to Hinduism, which presumably was originally her faith or that of her parents, and nothing to show whether such re-admission or admission is possible ; and there is further the fact that the policy of the law appears to require the application of the words of S. 2 to what may be a substantial class of persons in this country those who have abandoned a particular sect, but who still remain unattached to any religion other than Christianity.

In these circumstances I do not feel justified in dissenting from the judgment just delivered.

Ramesam, J.—I agree with the judgment of the learned Chief Justice. In my opinion the religion of a person is what the person professes and does not require recognition by the other persons belonging to that religion. A Hindu who professes to be a Hindu though he may be ex-communicated by all the existing Hindu castes is still a Hindu though probably he is subject to great social inconvenience. In this respect I do not think that there is anything peculiar to Christianity. If a person says that he is a Christian, though he does not belong to the existing Christian churches, he is still a Christian. Probably his creed is different from the existing creeds and he is subject to social inconvenience in respect of the performance of marriage and burials. Still he would be a Christian.

✱ ✱ 1924 MADRAS 19

Full Bench

SCHWABE, C. J., OLDFIELD AND RAMESAM, JJ.

Rajagopala Naidu—Plaintiff-Appellant.

v.

Ramasubramania Aiyar and another—Defendants—Respondents.

C. R. P. No. 288 of 1922, D/- 10th April, 1923, to revise the order, of the Addl. Sub. J., East Tanjore, Mayavaram, in O. S. No. 7 of 1921, D/- 20th February, 1922.

Court Fees Act, Sch. II Art. 17—(VI)—Mad. Act II of 1922, Sch. II Art. 17 B—Suit for possession — Temple has no market value.

A temple as such has no market value and for purposes of Court fees, a suit for the recovery of possession of a temple falls under Sch. II, Art. 17—(VI) and not under S. 7 (V) (e). [P. 22, C. 1]

K. S. Sankara Aiyar for *T. R. Venkatrama Sastriar* — for Petitioner.

The Govt. Pleader and *K. S. Venkatarama Aiyar*—for Respondents.

Order of reference to Full Bench.

Spencer, J.—The plaintiffs in this representative suit claim to have an exclusive right to manage certain Devastanams mentioned in the plaint and to appoint and remove a Dharmakartha for those temples whenever occasion arises. They pray for a declaration accordingly and ask for delivery of possession by defendants 1 and 2 of all the properties of the suit temples and for payment of certain amounts that may be found due on examination of accounts of the income and expenditure.

The question in this Civil Revision Petition is how such a suit should be valued. The Subordinate Judge has valued it according to the estimate made by a Commissioner of the value of the temples and all the properties attached to them which amounts to more than Rs. 2,00,000. The 1st

plaintiff as petitioner contends that he is not liable to pay Court-fees upon the valuation of the temple properties according to their market-value. He maintains that he can value the relief under S. 7, cl. 4 (c) of the Court-fees Act as he pleases, as the only right in issue in the suit is the right pertaining to trustees of managing the suit properties. In C. R. P. No. 862 of 1917, a similar question came before a Bench consisting of Mr. Justice Sadasiva Aiyar and myself, the question then being whether a plaintiff who sued for joint possession along with other trustees was bound to pay Court-fees *ad valorem* as in a suit for possession falling under S. 7, cl. 5, upon the market value of the temple and its properties. We made a reference to a Full Bench upon the point. When the reference came before the Full Bench the Civil Revision Petition was withdrawn. The question which was a very important one, upon which Sadasiva Aiyar, J., and I differed, thus remained undecided. Most of the authorities were collected in the reference made by my learned brother and myself, and after full consideration I expressed an opinion that the plaintiff's valuation was conclusive and should be accepted under S. 7, cl. 4 (*c*) and (*d*) and Art. 17, cl. (*vi*) of Schedule 2 of the Court-fees Act. I pointed out in that case that the plaintiff was only asking for such possession as he was entitled to on the footing of a trustee without having any personal interest in the trust property and for such possession as the holder of the office was capable of, the ownership of the temple properties being vested in the idol. If a plaintiff sets up any proprietary right over temple properties I was willing to concede that he must pay Court-fees valuing his relief of possession upon the value of the temple properties. I then held that the cases in *Sonachala* v. *Manika* (1) and Appeal No. 10 of 1911 were distinguishable and I quoted *Mohendra* v. *Denabandhu* (2), and certain other authorities for the proposition that if a plaintiff claims no higher right than that of administering endowed properties he should not be made to pay Court-fees on the same footing as a plaintiff who sues for possession claiming rights as proprietor. The question is an important one, and I am not satisfied that Appeal No. 10 of 1911 and S. A. No. 1410 of 1917 in which it was held that the temple and its properties must be valued were correctly decided. It is advisable also that in a matter where no party is more concerned than Government who are interested in the payment of the full Court-fees, the Advocate-General should have notice and should be heard in the matter.

I therefore refer to a Full Bench the question what are the Court-fees legally payable on the plaint in this suit O. S. No. 28 of 1920 in the Court of the Subordinate Judge of Mayavaram ?

Venkatasubba Rao, J:—I am also of the opinion that the question should be referred to the Full Bench. The matter was fully discussed and the authorities in support of the rival contentions were set forth in the referring judgments of my learned brother and Sadasiva Aiyar, J., in C. R. P. No. 862 of 1917, and I therefore refrain from covering the same ground again. But, there is one point to which I would like to advert. It has been stated that, in the present case, Court-fee was paid on the value of the subject-matter so far as it consists of "lands" under S. 7 (*c*) (5) of the Court-fees Act. The plaintiff, however, has not paid the fee payable on the market value of the temple in question. The Commissioner appointed valued the temple at Rs. 2,22,000, odd. The estimate was based, *inter alia* upon the cost of the materials used, on the ground that by that process the "market value" of the structure could be ascertained.

Whatever may be held to be the correct view in regard to the more general question discussed in the Judgment in C. R. P. No. 862 of 1917, it seems to me that there is considerable force in the argument of the learned Vakil for the appellant, that the structures constituting a temple which are the abodes of the idols, are not " houses " under S. 7 (*c*) (5) on

(1) [1885] 8 Mad. 516.
(2) [1914] 19 C.L.J. 15—21 I. C. 771.

which "a market value" can be placed under sub-clause (*e*). A "house" according to Murray's Dictionary, no doubt, includes a "place of worship, temple, or a church." I do not think we shall be justified in turning to English decisions for interpreting the word "house." as they deal with particular statutes where the word occurs. As Stroud, in his Judicial Dictionary, points out, a Church consecrated according to the rites of the Established Church was held not to be "a house" under S. 105, Metrop. Man. Act, 1885, whereas a Dissenting Chapel was held to be such a "house." Again, a Consecrated Church, though held not to be a "house" within the section just cited, was nevertheless held to be a "house" *qua* a building line which a local authority has a right to prescribe. I do not think we can derive much assistance from the definitions or interpretations given above in construing the word "house" in the section of the Court-fees Act.

I am of the opinion that under the Court-fees Act a temple which is mainly the abode of the deity cannot be said to be a "house" the "market value" of which is capable of being ascertained. A temple being *extra commercium* is *ex hypothesi* incapable of having a market value. It is well known that, to construct structures similar to numerous temples in India. sums amounting to lakhs or tens of lakhs of rupees would be required, and I do not think that the Legislature intended that a Court-fee should be levied on what is described before us as the "market value" of the temples. I am therefore inclined to hold that it is not possible to estimate at a money value, a temple and the idols in it and that, in any event, so far as the subject matter comprises the aforesaid, the case falls within Art. 17 B of Schedule II of the Court-fees Act V of 1922. (Mad. Amending Act.)

OPINION

Schwabe, C. J.—This is a reference to a Full Bench on the question of the Court-fee payable on a suit by the Plaintiff claiming to be a trustee of a temple against the Defendant who is in possession of the temple, also claiming to be a trustee. The property in question has been valued by the Plaintiff for purposes of Court-fee at a certain amount, but the Commissioner has reported that the amount is too small solely on the ground that the temple buildings ought to be valued at their cost of construction less, presumably, something for depreciation. It is contended by the Plaintiff that the temple buildings as such are not assessable at all for purposes of Court-fee. The section of the Court-fees Act alleged to be applicable is S. 7 (V) (e) which provides that, where the subject-matter is a house or garden, it has to be valued "according to the market value of the house or garden," It is first argued, and with considerable force, that the temple is not a house at all. I do not think it necessary to go into the question of what is and what is not "a house" or whether any part of this temple could be properly included within the proper definition of the word "house." I think it better to leave that question over until it arises definitely for decision, for we have not in this case the full facts as to the exact nature of the buildings in question and the use to which they are or can be put. But, it is further argued that this temple, even if it can be considered as a house, has no market value. "Market value" has been defined in England as meaning what it would fetch in the market under the state of things existing at the time, and that definition is to be found repeated with great clearness in *Manmatha Nath Miter* v. *Secretary of State* (3). That was a case under the Land Acquisition Act and what was acquired was a road and compensation was claimed in respect of that road based on the value of the land on which the road stood when it ceased to be a road, for agricultural or building purposes or the like; and their Lordships of the Privy Council made it quite clear that, apart from the fact that the Land Acquisition Act itself in terms prohibited such considerations, the principle of compensation based on

(3) [1898] 25 Cal. 194—24 I.A. 177—1 C.W.N. 698 (P.C.)

the "market value," which is the wording in that Act as well as in the Court-Fees Act, is that things have to be taken as they stand at the time.

Now, this temple is an ancient temple and its history dates at least thousand years back, and there seems to be no doubt, that the temple is devoted absolutely and in perpetuity to religious purposes. On those facts one has to enquire whether there is a market for such a thing. In my judgment, such enquiry results in the conclusion that there is no market and that it can have no market value at all. The principle applied by the Commissioner, when he has taken as the market value, what may be called the hypothetical construction value, is, in my judgment, entirely wrong. He has got to find the market value of the thing as a temple at the time. It is not suggested before us, on behalf of the respondent or on behalf of the Crown, who attended as *amicus curiae*, that in fact there is any market for such things. I think also that it would be conclusive against such a contention, that the property is inalienable and was devoted in perpetuity to religious purposes.

On these grounds, I come to the conclusion, that there is no market value at all for this temple as such. That being so, it does not come under that section of the Act, and has to be dealt with as a matter "not otherwise provided for"—under schedule II (17),—except that, apparently, there is in this case some market value for some part of the property claimed, and in respect of that the plaintiff has put on a valuation. There is no appeal in respect of that valuation by him, and therefore that valuation stands and must be taken as correct.

Taking this view of the case it is unnecessary to consider the question specially referred to us by the Referring Bench, namely, whether, on a claim by a trustee for possession of trust properties for the purposes of proper administration of that trust, he will have to pay Court-fee on the value of the trust property, or whether in that case he is only bound to pay the nominal amount of Rs. 10 or Rs. 15. This question had been referred on a former occasion to a Full Bench of this Court, but it was not decided then, and, owing to the facts of this case, it shares the same fate now.

The answer to the question referred to the Court is, the Court-fee legally payable are the fees already paid.

Oldfield, J.—I entirely agree.

Ramesam, J.—I agree.

✱✱ 1924 MADRAS 22
Full Bench

SCHWABE C. J., OLDFIELD AND COUTTS TROTTER, JJ.

Subraya Sampigethaya and others—Defendants—Appellants.

v.

Krishna Baipadithaya—Plaintiff—Respondent.

S. A. No. 498 of 1921, D/-12th March 1923, against the decree of the S. J., South Kanara in Appeal No. 122 of 1920.

T. P. Act, S. 6—Right of maintenance and residence of a widow who surrendered her life interest to nearest reversioner is inalienable.

By a document called a general power-of-attorney, the widow surrendered all her interest in her late husband's property in favour of the nearest reversioner of her husband in consideration of his agreeing to pay some debts of the husband and to maintain her during her lifetime. It further provided "if it is not convenient for me to live jointly with you, I should remain in the building where I now reside. In that event, except that for my food and clothing you should pay yearly 33 muras of kachlu rice and 12 muras of beltige rice charged on the following properties. I have no right to contract any debts as a charge on the said properties or have any claim to the return of the property".

Held, that this right to future maintenance is a purely personal right and is clearly inalienable. *Held* further that the right under a contract to a defined amount in cash or kind for future maintenance is property under the enabling words of S. 6, but the question whether it is an interest in property restricted in its enjoyment to the owner personally, such an interest under clause (b) of that section being inalienable, must depend on the facts of each particular case and must be ascertained by the ordinary rules of the interpretation of the contract; the question being, whether the intention of the parties was that the right should be personal and therefore inalienable. That intention is to be ascertained from the language of the document itself and the surrounding circumstances at the time of its execution. It must be considered as a contract to come into operation at once, and in the light of the sorrounding circumstances as

they then stood. What has in fact happened since is not a relevant consideration, except perhaps as an illustration of what may possibly have been in the contemplation of the parties at the time of this contract. [P. 35, C. 3]

C. V. Anantakrishna Aiyar (*with K. Srinavasa Rao*)—for Appellants.

B. Sitaram Rao—for Respondent.

Order of Reference to Full Bench

Oldfield, J.—I agree to a reference to a Full Bench in the terms, which my learned brother is about to state. In doing so, I commit myself to no opinion as to whether S 6, Transfer of Property Act, is to be interpreted with reference to public policy. For it is not clear that the considerations which arise correspond with any of the heads of public policy, which authority has hitherto recognized and which it is undesirable to multiply or that the refusal of the law to treat certain things and rights, of which a widow's right to future maintenance may be one, as property susceptible of transfer may not be a sufficient justification for interpreting the section in the manner proposed.

Spencer, J.—In this Second Appeal a question has arisen whether the sale of a right to maintenance which a Hindu widow executed in favour of the plaintiff was valid. The widow, who is named Lakshmi Hengsu, in 1904 surrendered by Exhibit B her husband's estate to the nearest reversioner subject to a condition by which she became entitled to food and clothing for life and a right of residence, the food to consist of 45 muras of rice of two descriptions charged on the liability of the surrendered properties; and nearly ten years later she conveyed under Exhibit A her right to collect future maintenance in the form of 45 muras of rice annually to the plaintiff in consideration of a sum of Rs. 1,000. The description of property in the document refers to another conveyance of the widow's right to collect arrears of maintenance which she executed on the same day.

Mr. Anantakrishna Ayyar who appears for the appellant concedes that the transfer of arrears of maintenance already accrued at the time of transfer is valid. But he argues that Exhibit B is invalid in so far as it purports to transfer future maintenance. In the lower Appellate Court in dealing with this point of law, the Subordinate Judge relied on an observation in *Rani Annapurni Nachiar* v. *Swaminatha Chettiar* (1) of Sir Arnold White, Chief Justice, and Munro, J. They state:

"It may be that voluntary alienations of rights for future maintenance should be prohibited as well as the taking of such rights in execution. The legislature has not thought fit to prohibit them. We are not prepared to say that, at any rate, where, as here, the amount payable is subsequently fixed by agreement or by decree, a transfer of a widow's right to maintenance from her late husband's estate is inalienable."

With due deference, I feel some difficulty in accepting that dictum as a correct statement of the law on the subject. So far as it makes an agreement to pay maintenance to a widow transferable it seems to be opposed to S. 6, (*d*) of the Transfer of Property Act which declares that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. On this section and clause there is a note in the commentary by Shephard and Brown on the Transfer of Property Act, which is so well accepted an authority that I do not hesitate to quote it. It says:

"The right to future maintenance cannot be attached in execution of a decree and it seems clear that such a right enjoyed by a Hindu widow cannot be made the subject of a sale or other transfer by her, since the right exists for her personal benefit only."

It may be doubted whether she could effectually transfer her interest in property allotted to her for her maintenance. As regards attachment of the right to future maintenance reference is made to *Diwali* v *Apaji Ganesh* (2) and S. 60 of the Code of Civil Procedure. In *Diwali* v. *Apaji Ganesh* (2), the decision proceeded upon the proviso against alienation contained in the deed of assignment.

(1) [1911] 34 Mad. 7—20 M.L.J. 785—8 M. L. T. 108—[1911] M. W. N. 505—6 I. C. 439.

(2) [1886] 10 Bom. 342.

But S. 60, clause (*n*) is quite clear. The Courts have consistently held that a right to future maintenance cannot be attached in execution. In *Nanammal* v. *The Collector of Trichinopoly* (3), the fact that the right to maintenance had ripened into a decree did not, in the opinion of Abdur Rahim, J., and Munro, J. who was also a party to *Rani Annapurni Nachiar* v. *Swaminatha Chettiar* (1), make the right to maintenance any more attachable. In *Palikany Mammad* v. *Krishnan Nair* (4), Sadasiva Ayyar and Moore, JJ., had no hesitation in holding that there could be no attachment of a right to future maintenance. As pointed out by Sadasiva Ayyar, J., in that case, the public policy of prohibiting transfers found in S. 6 of the Transfer of Property Act and the prohibition against attachment under Civil Procedure Code, both rest upon the same foundation. In England it was held in *Watkins* v. *Watkins* (5), that alimony granted to a separated wife was not alienable by her. Lindley, L.J., indicates the reason for this. He says the Court which orders it never loses its control over it and the doctrine of inalienability is based on the old ecclesiastical law. The learned Judges, who decided *Rani Annapurni Nachiar* v. *Swaminatha Chettiar* (1) evaded the application of the Transfer of Property Act by saying that the right to future maintenance was not in their opinion "property." Seshagiri Ayyar, J., in *Seshappa Heggade* v. *Chandayya Heggade* (6) also expressed an opinion that a right to maintenance would not be covered by clause (*d*) of S. 6 as it could not be described as an interest in property restricted in its enjoyment to the owner personally. But my learned brother, Oldfield, J., who sat with him pronounced an opinion only on the other question which arose as to the maintainability of the suit in a Small Cause Court. In *Annada Mohan Roy* v. *Gour Mohan Mallik* (7), Mookerjee, Acting Chief Justice, in deciding that the chance of a Hindu reversioner succeeding to the estate of the last full owner was not alienable property under clause (*a*) of section 6, discussed a definition of "property", a definition which could cover a widow's right to maintenance. He pointed out that when non-existent property is made the subject of a contract, the party who takes the agreement is in no better position when he attempts to defeat the application of the statutory provision by this means, as no Court of equity will assist him in his endeavour to accomplish his purpose which is opposed to public policy. In 12 C. L. J, there are two instructive cases, *Asad Ali Molla* v. *Haidar Ali* (8) and *Tara Sundari Debi* v. *Sarola Charan Banerjee* (9). Mookerjee, J., observed in the earlier case at page 133 that if a person is entitled to a monthly allowance under a deed the allowance can be attached by an execution creditor only after it has become due so that an assignee of a decree for arrears of maintenance can execute it against the judgment-debtor in the same manner as the original decree-holder and at page 154 where land has been granted in lieu of a right to maintenance the interest of the grantee is liable to be sold in execution of a personal decree. He quotes the decision in *Harris* v. *Brown* (10) by the Privy Council where a monthly allowance of Rs. 50 devised by Will for the maintenance of a daughter was transferred and the Privy Council treated the assignment as operative. In that case no question as to the illegality of the assignment by the legatee Flora Williams of this allowance was raised with reference to S. 6 of the Transfer of Property Act. The two cases *Enaet Hossein* v. *Nujeeboonissa Begum* (11) and *Maharajah Dheraj Mehtab Chand Bahadoor* v.

(3) [1909] 20 M. L. J. 97—5 I. C. 879.
(4) [1917] 40 Mad. 302—30 M.L.J. 361—34 I. C. 381.
(5) [1896] Prob. 222--65 L.J.,P. 75--74 L.T. 636--44 W.R. 677.
(6) [1919] 37 M. L. J. 402—53 I. C. 665.
(7) [1921] 48 Cal. 536--25 C.W.N. 496--33 C.L.J. 457--59 I.C. 496.
(8) [1910] 38 Cal. 13--14 C.W.N. 918-12 C.L.J. 130--6 I.C. 826.
(9) [1910] 12 C.L.J. 146—7 I.C. 80.
(10) [1901] 28 Cal. 621—28 I.A. 159—5 C.W.N. 729--3 Bom. L.R. 808--8 Sar. 92 (P.C.).
(11) [1869] 11 W.R. 138.

Sreemutee Dhun Coomaree (12), the latter relating to an annuity charged on an estate in favour of a brother which was held to be attachable in execution, are not very material to the question before us, as they were decisions prior to the passing of the Transfer of Property Act in which the provisions of the Civil Procedure Code alone were considered. In the present case the provisions for residence and clothing under Exhibit B. appear to be undoubtedly interests restricted in enjoyment to the widow Lakshmi Hengsu. As the allowance of rice was intended to be for her support after she had parted with her interest in the land and as it would come to an end at her death this also appears to be an interest restricted to her personally, and a transfer of such an interest is, in my opinion, prohibited on grounds of public policy by S. 6, clause (*d*). Whether after a decree has been obtained for arrears of past maintenance the decree-holder can assign the decree for execution is a matter which does not require to be decided on the facts of this case. As the decision in *Rani Annapurni Nachiar* v. *Swaminatha Chettiar* (1), appears to be at variance with S. 6 of the Transfer of Property Act and the other decisions already referred to, we refer the question to a Full Bench.

"Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her life-time even if charged upon specified immoveable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due."

OPINION

Schwabe, C. J.—The question referred to the Full Bench is:

"Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her lifetime even if charged upon specified immoveable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due."

I do not think that it is possible to give a general answer to this question, and I will confine myself to considering whether the assignment in this case is valid By a document called a general power- of attorney, the widow surrendered all her interest in her late husband's property in favour of the nearest reversioner of her husband in consideration of his agreeing to pay some debts of the husband and to maintain her during her life-time. The document then continues (according to a corrected translation):

"Besides maintaining me by giving me food and clothing, etc. until my life-time you should also perform my obsequies, etc., after my death. Henceforward, you should also perform the sraddhas of my husband, father-in-law and mother-in-law, making the necessary expenses therefor . . . . . If it is not convenient for me to live jointly with you, I should remain in the building where I now reside. In that event, except that for my food and clothing you should pay yearly 33 muras of kuchlu rice and 12 muras of beltige rice ch rged on the following properties, I have no right to contract any debts as a charge on the said properties or have any claim to the return of the property.

Whether the right to future maintenance, apart from a contract, or under a contract to provide clothing, board and residence in the house of the other contracting party is property at all within the meaning of section 6 of the Transfer of Property Act is a matter upon which there has been considerable divergence of opinion, but it is unnecessary to consider that here, as in my judgment, it is a purely personal right and is clearly inalienable.

The right under a contract to a defined amount in cash or kind for future maintenance is, in my judgment, 'property' under the enabling words of section 6 of the Transfer of Property Act of 1882. But the question remains whether it is an interest in property restricted in its enjoyment to the owner personally, such an interest under clause (d) of that section being inalienable. This

(12) (1872) 17 W.R. 254.

must depend on the facts of each particular case and must be ascertained by the ordinary rules of the interpretation of the contract; the question being, whether the intention of the parties was that the right should be personal and therefore inalienable. That intention is to be ascertained from the language of the document itself and the surrounding circumstances at the time of its execution. It must be considered as a contract to come into operation at once, and in the light of the surrounding circumstances as they then stood. What has in fact happened since, is not a relevant consideration except perhaps as an illustration of what may possibly have been in the contemplation of the parties at the time of this contract. The widow was surrendering her life-interest in the property in exchange for the agreement for maintenance, and it seems to have been quite clearly in the contemplation of the parties that the reversioner should continue in possession of the property and of the family house, and the fact that he has since sold the property does not help us to arrive at the true interpretation of the contract.

Examining the contract itself, we find that the first alternative form of maintenance provided was by residence in the house and by sharing the meals of the family. The second alternative was that, if she chose to live apart, she should receive definite amounts of paddy secured by a charge on the land. There is no provision for an election once and for all, and I see no reason why she should not at her will at one time live in the house, and at another live away and receive the paddy. This leads me to the conclusion that the intention of the parties to be derived from the document was that the rights under the contract should be personal and inalienable; for, she could not give to another the right of living and feeding with the reversioner's family.

I think that the view expressed above that this question must turn on the intention of the parties, reconciles most, if not all, of the apparently conflicting decisions on this question. The right to future maintenance properly so called. by which I mean the right to be maintained by the supply of clothing, board and lodging is inalienable, and so I understand the statements in the text-books, Trevelyan's Hindu law, II Edition, page 80, West and Buhler's Hindu Law, page 253 and Shephard and Brown Transfer of Property Act, page 209, and so, I think, may be explained the decision in *Rajat Kamini Debi* v. *Raja Satya Niranjan Chakrabarty* (13), where, on facts somewhat similar to these, it was held that a widow who released her life-interest in return for an agreement to pay her Rs. 100 per annum and supply her with 39 maunds of rice per annum could alienate her interest under the agreement; for, in that case, it was no part of the agreement that she should be clothed, fed or housed and therefore there was nothing personal about the contract at all. This too, was, I think the view of Mookerjee, J., who in two cases decided in the same month held that the widow's right to maintenance under one contract could be taken in execution and under another it could not. *Asad Ali Molla* v. *Haidar Ali* (8) and *Tara Sundari Debi* v. *Saroda Charan Banerjee* (9). The right to attach is governed by the Code of Civil Procedure, but in his judgments he discussed fully the inalienability of such right. In *Tara Sundari Debi* v. *Saroda Charan Banerjee* (9), in which he held the right inalienable and, therefore, not attachable, the payments were not to be made until the donee lived separately from the family, and he distinguishes between cases where the provision of land, money or goods is taken in lieu of maintenance without any restraint upon alienation where the land, money or goods are alienable and cases where the right is purely personal. In the latter, he considers that, even when the right is merged in a decree, it is not alienble. *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho* (14), *Enaet Hossein* v. *Nujeeboonissa Begum* (11) and *Maharajah Dheraj Mahtab Chand Bahadoor* v.

(13) [1919] 23 C. W. N. 824.
(14) [1866] 5 W. R. III.

Sreemuttee Dhun Commaree (12), I think may be reconciled on the same ground. *Rani Annapurni Nachiar* v. *Swaminatha Chettiar* (1) and the explanation of it in *Palikandy Mammad* v. *Kishnan Nair* (4). by Sadasiva Ayyar, J., do not assist me in arriving at the principle to be applied. The remarks of Seshagiri Ayyar, J., in *Seshappa Heggade* v. *Chandayya Heggade* (6), on this point were purely *obiter* but can properly be explained by limiting their application to cases of maintenance properly so called. I do not think that any useful purpose will be served by going in further detail into any of these cases or others to which our attention was drawn.

I answer the question referred by saying that this widow's right to future maintenance was inalienable.

Oldfield, J.—The question referred s stated in general terms, which, as the referring order of Spencer, J., and the argument before us shows, are liable to be applied to interests of different kinds and subject to different legal incidents. Some confusion has again been introduced by reliance on the exemption under S. 60, Civil Procedure Code, of a right to maintenance from attachment. But that exemption is inconclusive, when, as here, a transfer by act of parties is in question and when some of the descriptions of property enumerated in the section certainly are not, and it is not to be assumed that a maintenance right is, exempted from attachment. Authorities relating to attachment are accordingly irrelevent, except in so far as they deal with the only provision of law at present material, S. 6 (*d*), Transfer of Property Act, under which property cannot be transferred, if it is: "Restricted in its enjoyment personally to the owner." And on this account *Palikandy Mammad* v. *Kishnan Nair* (4), one of the decisions of this Court regarded as conflicting in the reference, is not of assistance, the prohibition against attachment having been relied on directly. The other *Rani Annapurni* v. *Swaminatha Chettiar* (1), proceeds on the view that a right to future maintenance is not property within the enabling words or an interest in property contemplated by paragraph (*d*) of S. 6. But, with all respect, we have not been shown that this view has been taken elsewhere; it is inconsistent with the statutory exclusion of such a right from property liable to attachment; and, if it were acceptable, explanation would still be necessary as to the law, by which the validity of a transfer of what is not property is recognized or can be tested at all.

Authority need not be cited to show that S. 6 (*d*) requires more than the termination of the interest in question with the life of its owner. But in the present case that requirement is complied with. For it is not conceivable that Exhibit B was meant to enable the widow to have some other person clothed or to introduce any stranger, she might nominate, to the family meals. The rights conferred on her are clearly personal; and it is therefore unnecessary to follow Mookerjee, J., in his exhaustive discussion in *Tara Sundari Debi* v. *Saroda Charan Banerjee* (9), of the questions (1) whether an interest created in lieu of and in discharge of a right to maintenance is assignable and (2) whether it is material that the right is enforceable by a charge on immoveable property. For as regards the first I agree that there is no question of a discharge in Exhibit B, the widow's option to return at any time to actual maintenance instead of a periodical allowance having been preserved, and as regards the second the only substantive right under transfer is the right to future maintenance already considered and no question of an impersonal interest in land available for the enforcement of that right can arise, except incidentally and in case a default takes place.

I concur in the opinion expressed by my Lord.

Coutts Trotter, J.—I am of the same opinion and have nothing to add.

1924 MADRAS 28
Full Bench

SPENCER, KUMARASWAMY SASTRY AND RAMESAM, JJ.

Muhammad Kunhi—Plaintiff 1.—Appellant.

v.

Packrichi Umma and others—Defendants—Respondents.

S. A. No. 1493 of 1919, and S. A. No. 506 of 1919, D/-21st February 1923, against the decree of the D. J., North Malabar in Appeal suit No. 656 of 1917.

Malabar Law—Marumakkattayam Mappillas of North Malabar—"Strisothu"—Custom of settling property on females and their female descendants to the exclusion of males not proved.

There is no custom among the Maramakattayam Mappillas of North Malabar by which males are treated as having no right to be consulted in the managements of the affairs of the tarwad or tavazi and no right to participate in the income of the tarwad or tavazi properties. This property cannot be settled as *Strisothu* on the female members of a tarwad or tavazhi to the exclusion of the males or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males. [P. 30, C. 2]

K. P. M. Menon—for Appellant.

C. Madhavan Nair (with B. Pocker)—for Respondents.

Order of Reference to Full Bench.

Spencer, J.—In these connected Second Appeals a question of law has been taken whether a course of devolution of property among females to the exclusion of males is unknown in North Malabar and is repugnant to Marumakkattayam law as followed by Mappillas in that district. The Subordinate Judge and the District Judge who heard the first appeals have come to different conclusions on the point, and the authorities to which the District Judge refers in his judgement are neither clear nor uniform.

In *Bivi Umah* v. *Keloth Cheriyath Kutti* (1), an instrument of gift which limited the descent of property to the female line was held by Collins, C.J., and Parker, J., to be valid. The learned Judges observe that the gift was of the class known as *Strisothu* or *henumula* and created an estate known to Marumakkattayam usage. They quote *Kunhacha Umma* v. *Kutti Mammi Hajee* (2), a Full Bench case, which is not however an authority upon the significance and legality of *strisothu* gifts. On the other hand in *Kunhamina* v. *Kunhambi* (3), Miller and Munro, JJ., refer to a similar gift to females excluding males as being an attempt "to create a perpetual succession confined to females, a course of devolution equally unknown to the Marumakkattayam and to the Muhammadan Law."

We might feel bound to follow this ruling, were there not certain observations in the judgment which indicate that the decision turned rather on a question whether the last survivor of a tenancy in common created by the gift deed had the power of disposing of the property to the exclusion of the descendants, if any, of the donees, than on the validity of the condition in the gift deed as to the exclusion of males, which the learned Judges describe as a condition of no real importance.

To a certain extent the statement that the condition in the gift deed excluding males was invalid was thus an *obiter dictum*.

The District Judge (Mr. Reilly) states in his judgment that he has come across instances in North Malabar of devolution of property being limited to females, and a case of a *strisothu* tarwad came before-Bakweell, J., and myself in *Thazhath Soopi* v. *Pallikkal Mariyoma* (4). Such an usage was judicially recognized by Mr. Thompson the District Judge of North Malabar, in Appeal Suit Nos. 641 and 647 of 1891 on the file of that Court which came on appeal to the High Court in Second Appeals Nos. 1127 and 1128 of 1892.

In view of the divergence of opinion both in the Courts below and in this Court as to the validity of such a provision occurring in a gift, I think that the question of law as stated above should be referred to a Full Bench of this Court.

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(1) [1910] M.W.N. 693—8 I.C. 567.

(2) [1893] 16 Mad. 201—2 M.L.J. 226 (F.B.)

(3) [1909] 32 Mad. 315—1 I. C. 195.

(4) [1920] 43 Mad. 393—38 M.L.J. 207–11 L.W. 200—27 M.L.T. 169—(1920) M.W.N. 279—55 I.C. 760.

Ayling, J.—I agree to the reference proposed by my learned brother, though I should personally be content to simply follow *Kunhamina* v. *Kunhambi* (3).

Judgment.—Opinions appear to be conflicting as to the validity among the Mappillas of North Malabar of a gift of property as *strisothu* or women's property which, it is said, means a gift to a female and her female descendants only, to the exclusion of her male descendants. In Second Appeal No. 1127 of 1892 Mr. Arthur Thompson, the District Judge of Tellicherry, expressed an opinion favourable to the legality of such a *strisothu* disposition but the High Court, Muthuswamy Ayyar and Best, JJ., disposed of the case on the ground that the suit of the male karnavan questioning it was barred by limitation.

Collins, C. J., and Parker, J., also regarded such dispositions as valid in *Bivi Umah* v. *Keloth Cheriyath Kutti* (1), and in Second Appeal No. 1502 of 1894 with reference to the documents now in suit. A deed of this kind came before Miller and Munro *Kunhamina* v. *Kunhambi* (3), where the question was whether a gift could be regarded as a gift to the females mentioned therein as tenants-in-common or a gift to the donee and her female descendants as a sort of tavazhi. The Court took the latter view which was sufficient for the disposal of the case. The learned Judges, however, observed incidentally that it had not been contended that the condition of enjoyment could stand so far as it excluded males altogether. For the purposes of the case, it made no difference whether males were excluded or included as the intention to create a tavazhi was clear and that was enough to invalidate a disposition by one of the female donees only. In *Thazhat Soopi* v. *Pallikkal Mariyoma* (4), it was not disputed that a woman, described as the Karnavathi, was the manager of the Marumakkattayam tarwad in question which is referred to by the learned Judges as a *strisothu* tarwad, but the question whether the male members of the family were excluded from ownership as well as rom management did not arise. Mr. Menon contended before us that this is the real meaning of a *strisothu* gift and that a *strisothu* tarwad in North Malabar is merely a tarwad in which the right of management is in the senior female instead of in the senior male, according to the system which prevails in the adjoining district of South Kanara with reference to Aliyasantana tarwads, and that otherwise the male members of the family have an equal interest with the females in the tarwad property. He also contended that the question had never arisen directly between the female members of a tavazhi claiming under such a gift and the male members. Coming now to the two suits, which have given rise to this reference, the District Munsif dealing with both suits purported to follow *Kunhamina* v. *Kunhambi* (3), and held that Marumakkattyam usage only knew of tarwads and tavazhs, and that its conception of a tarwad or a tavazhi is that it consists of a female common ancestor and her descendants, male and female in the female line, and that a tarwad or a tavazhi consisting of females only to the exclusion of male descendants of females was a thing so far unrecognized by Marumakkattayam usage. The appeal in one suit came before the District Judge, Mr. Reilly and the appeal in the other before the Subordinate Judge, the late Mr. K. V. Karunakara Menon. The latter observed in his judgment that it had rightly been conceded before him that the gift deed did not exclude males from participating in the income of the properties, and that all that was contended for was that the right of management was in the females. This contention he rejected observing that in *Kunhamina* v. *Kunhambi* (1), a gift like this had been held to create a tavazhi consisting of males and females and that the present gift must be taken to have been made to a tavazhi consisting of males and females. In the other appeal, the District Judge, Mr. Reilly, took a cempletely different view and held that Exhibit B created what was sometimes knewn as a *strisothu* tarwad or tavazhi consisting of a woman and her female descendants who alone have the right of

management and that it was unnecessary to consider whether the male descendants would have any right of maintenance. He regarded the observations of miller and munro, JJ., in *Kunhamina* v. *Kunhambi* (3), as the *obiter dicta* of Judges whose experience had lain in South and not in North Malabar, the usages of which vary in several respects. He further observed that instances in which the devolution of property was confined to the females of a family had come to his own knowledge among the Marumakkattayam Mappillas of North Malabar and that he understood that that course of devolution was recognized in South Kanara. Accordingly he held that the male members of the family were not entitled to question the sale by the female members under Exhibit I.

As we regard the decisions and other materials before us as inconclusive we have decided before disposing of the reference to call for a finding from the District Judge of North Malabar in Second Appeal No. 1493 of 1919, in which the question necessarily arises, as to whether according to the custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar property may be settled as *strisothu* on the female members of a tarwad or tavazhi to the exclusion of the males, or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males. Fresh evidence may be taken. Finding will be submitted in two months after the local vacation. Seven days will be allowed for objection.

ORDERS

Seeing that both sides were not ready on 25th July and applied for an adjournment and that the time allowed for returning a finding did not expire till 18th August, we think that the District Judge might properly have granted an adjournment.

Considering the importance of the question at issue, we are not inclined to decide it on the materials on record and we direct the District Judge to give the parties another opportunity for adducing evidence.

Opinion of the Full Bench

In calling upon the District Judge to record evidence of a custom or usage prevailing in Malabar of males being excluded from tarwads or tavazhies managed exclusively by females of certain Marumakkattayam Mappillas, we discussed in some detail all the decisions in which such a custom might be said to have been judicially recognized or its recognition refused, and we stated that we regarded them as inconclusive. The District Judge was therefore asked to return a finding on such evidence as might be produced before him to prove the existence of the particular custom in question. This he has done, and we agree with him in holding that it is wholly inadequate to prove the prevalence of any custom by which males are treated as having no right to be consulted in the management of the affairs of the tarwad or tavazhi and no right to participate in the income of the tarwad or tavazhi properties. It is not necessary to express any opinion as to the existence of tarwads in which the manager or Karnavathi is a female.

We therefore answer the reference made to us in the affirmative.

✱✱ 1924 MADRAS 30
Full Bench.

SCHWABE, C. J., OLDFIELD, RAMESAM, DEVADOSS AND COLERIDGE, JJ.

Dharam Singh—Petitioner-Accused.

v.

Emperor—Opposite Party.

Cr. R. C. No. 894 of 1922, (Cr. R. P. No. 747 of 1922) D/-24th April, 1923, from the Order of the Bench of Magistrate, 1st class, Coimbatore, in S. C. No. 182 of 1922, D/-16th November, 1922.

Criminal P. C., S. 262—Trial of summons cases—No difference between, Summary & ordinary trials.

There is no difference between summary trials of summons cases and the ordinary trials of summons cases. [P. 31, C. 1]

V. L. Ethiraj and M. C. Sridharan—for Petitioner.

The Public Prosecutor—for the Crown.

Order.—This case raises the same point as Criminal Revision Case No. 691 of 1922 [*Ponnusami Odayar* v.

Ramasami Thevan (1) [the only difference being that it was tried summarily under Chapter XXII. In our judgment, there is no difference between summary trials of summons cases and the ordinary trials of summons cases. This petition must be dismissed. The sentence is light but in the circumstances as he has already been released and only has a few more days to serve we reduce the entence to 11 days.

Petition dismissed.

(1) 1924 Mad. 15—46 Mad. 756—45 M. L.J. 224—(1923) M.W.N. 519 (F.B.)

✱ 1924 MADRAS 31

SPENCER, J.

W. T. Thiruvangadachariar—Complainant—Petitioner.

v.

M. S. Chockalingam Chetty and another—Accused—Respondents.

Criminal Rev. No. 748 of 1921 D/-6th February, 1923, from the order of the 3rd Presy. Mag., Madras, in C. C. No. 4408 of 1921 D/-20th July 1921.

(a) *Penal Code, Ss. 342 and 214—Absence of accused, no defence if instigation proved.*

It would be no defence against the charge under Ss. 342 and 114 Penal Code for the accused to say that he was not present at the actual arrest, if in fact he was instrumental in getting the arrest made, and, if after it was made, he instigated the bailift to wrongfully confine a debtor, in spite of a protection order in his favour. [P. 31, C. 2]

(b) *Criminal Trial—Compoundable offence—Damages awarded in a Civil suit—Criminal trial not justified.*

It is undesirable that an accused should again be put on his trial in a Criminal Court for a compoundable offence, after he has purged his offence in the Civil Court in the form of damages. [P. 31, C. 2]

C. Narasimhachariar—for Petitioner.

Nugent Grant—for Accused.

K. V. Madhavan Nair—for the Crown.

Order.—The accused were tried by the 3rd Presidency Magistrate in 1921, for getting the complainant arrested on a warrant and sent to the Civil Jail, when he possessed a valid protection order. The acts of the accused were taken as offences falling under Ss. 34, 341, 342, and 114, Indian Penal Code. The trial ended in the discharge of the two accused, and this is an application to set aside the discharge and to order further enquiry.

The reasons given by the Magistrate are (1) that the evidence shows that 1st accused was not present when the arrest was made; (2) the Bailiff who made the arrest takes the whole responsibility on himself; and (3) prosecution failed to make out a case against the accused.

The Bailiff (P. W. 3) no doubt stated in his evidence that he acted on his own interpretation of the protection order. But in his report (Ex. L. 3), he stated that the 2nd accused was worrying him to do his duty and to arrest the man and take him to jail; and prosecution witnesses 2, 4 and 6 stated in their evidence that accused 1 insisted on the complainant being taken to jail.

The Magistrate's observation that the prosecution had not made out a case against the accused is thus not justified by the record. It would be no defence against the charge under Ss. 342 and 114, Indian Penal Code for the 1st accused to say that he was not present at the actual arrest, if in fact he was instrumental in getting the arrest made, and, if after it was made, he instigated the bailiff to wrongfully confine a debtor, in spite of a protection order in his favour.

However, since the accused were discharged, a civil suit based on the same cause of action has been decided and the 1st accused has been mulcted in heavy damages for his ill-advised actions. The appeal has also gone against him. I think it is not necessary in the ends of justice that he should again be put on his trial in a Criminal Court for these compoundable offences, after he has purged his offence in the Civil Court. It would be a savour of vindictiveness to press further proceedings against him.

As regards the 2nd accused the same reasons cannot be urged in his favour. There is plenty of evidence that he was present at the arrest and that he pointed out the complainant as the person to be arrested. I set aside the order of discharge under S. 437, Criminal Procedure Code and direct the 3rd Presidency Magistrate to make further enquiries into his case.

Order modified.

1924 MADRAS 32

OLDFIELD AND VENKATASUBBA RAO, JJ.

Muthukaruppa Chetty—Appellant—Respondent.

v.

Paiya Kavundan and another—Respondents.

A. A. A. O. No. 113 of 1921, D/- 16th February 1923 against the decree of the Sub. J., Salem, in A. S. No. 307 of 1921.

(a) Civil P.C., S. 115—Declining jurisdiction.

Where the Lower Appellate Court held that the Dt. Munsif had no jurisdiction to allow the execution and it dismissed the execution application on the ground that it was made to a Court not having jurisdiction.

Held · that, in doing so, it declined jurisdiction within the meaning of S. 115. [P. 32, C. 1]

(b) Civil P. C., S. 38—Transfer of area—jurisdiction to execute.

The area, in which the judgment-debtor lived, was transferred from the jurisdiction of the principal Dt. Munsif of Salem, who passed the decree sought to be executed, to that of the Dt. Munsif of Namakkal.

Held: the latter Court hsd jurisdiction to execute the decree. 42 M. 821 Foll.

K. Sankarasastri—for Appellant.

B. Sitarama Rao—for Respondents.

Judgment.—This is an appeal by a decree-holder against the decision of the Lower Appellate Court passed at the instance of the judgment-debtor, here respondent, and setting aside the decision of the District Munsif of Namakkal that he had jurisdiction to execute the decree.

The decree was passed on the Small Cause side and it is urged first that no Second Appeal lies. That objection must be sustained. But we have been asked to treat the appeal as an application in revision. We think that we are entitled to do so. It is contended that the Lower Appellate Court did not decline jurisdiction or assume jurisdiction, which it had not, but simply made a mistake in a question of law relating to jurisdiction. That view is not in our opinion correct. The Lower Appellate Court held that the District Munsif has no jurisdiction to allow execution and it has dismissed the execution application on the ground that it was made to a Court not having jurisdiction. We think that, in doing so, it declined jurisdiction within the meaning of s. 115

On the merits, the question arises from the transfer of the area, in which the judgment-debtor lives, from the jurisdiction of the principal District Munsif of Salem, who passed the decree sought to be executed, to that of the District Munsif of Namakkal in whose Court the application for execution has now been made. It is urged that only the former Court has ever had jurisdiction to execute the decree and the decree-holder's proper course is to apply for a transfer of the decree to Namakkal. That contention is inconsistent with the decision in *Seeni Nadan* v. *Muthusamy Pillai* (1). We are asked to distinguish that decision on the ground that it relates to the execution of a decree for a sale of immovable property. But we can find nothing in the language used in the judgments there to show that such a distinction was in the minds of the Learned Judges or that they were considering the question, except as it was referred to them, perfectly generally. It may be noted that the previous case in connection with which the reference was made, *Subbiah Naicker* v. *Ramanathan Chettiar* (2), related to a money decree; and if this distinction had been thought material, it is difficult to believe that nothing would have been said regarding it.

We are not able, on principle, to see why it should be material and we do not think it necessary to add anything on the question of principle to the judgments of the Full Bench or in particular to the very clear statement of law contained in the judgment of Ayling, J. The result is that the appeal against the appellate order is allowed with costs here and in the Lower Appellate Court, the District Munsif's order including the portion relating to costs before him being restored. He will proceed with the execution according to law.

Order set aside.

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(1) [1919] 42 Mad. 821—11 L.W. 63—37 M.L.J. 284—(1919) M.W.N 640—26 M.L.T. 223—53 I.C. 213 (F.B.)

(2) [1914] 37 Mad. 462—1 L.W., 251—26 M.L.J 189—(1914) M.W N. 205—22 I.C. 899.

** 1924 MADRAS 33

SPENCER AND DEVADOSS, JJ.

V. S. V Subbiraya Mudali—Plaintiff—Appellant

v.

Thangavelu Mudali and others—Respondent.

A. S. Nos. 333 to 393, 398, 400 to 408 of 1918, D/- 23rd, 25th, 28th, 29th, 30th and 31st August, 1922 and 14th and 19th September, 1922 against the decrees of the Dt. Court, Chingleput, in O. S. Nos. 18 of 1916 etc.

(a) *Hindu Law—Joint family—Buying property is not legal purpose.*

No member of a joint family has a right to incur debts for buying property. [P 34 C 1]

(b) *Hindu Law—Joint family—Trade assets as also other property is liable if money got on its score.*

Where an accredited agent of the family, who carries on a business on behalf of the family, contracts debts for purposes of the trade, the purpose for which he contracts the debt is a family purpose because the trade is a family concern and the creditors are entitled to go against the whole of the family property and a minor member is bound inasmuch as the debt in borrowed for a family purpose.

[P 35 C 1,2]

T. R. Ramachandra Iyer and *S. Krishnamachariar*—for Appellant.

T. Narasimha Aiyangar, N. S. Rangaswami Aiyangar, E. S. Chidambaram Pillai, A. Rangaswami Mudaliar and *R Subramania Iyer*—for Respondents.

Devadoss, J.—This is an appeal against the preliminary decree of the District Judge of Chingleput in Original Suit No. 18 of 1916 by the plaintiff, who sued the defendants 1 to 5 for partition of the family properties and impleaded certain alienees and creditors as defendants. The 1st defendant was the father of the plaintiff and defendants 2 and 3. 4th defendant is the brother's son of the 1st defendant. 5th defendant is the mother of the plaintiff. Defendants Nos. 6, 31, 32, 33, 34, 35, 37 and 39 are alienees. The rest are creditors.

The plaint allegations are :—the 1st defendant was the manager of the joint family of which plaintiff and defendant Nos. 2 to 4 were members. The properties set out in B schedule are the joint family properties. The plaintiff's family carried on a cloth trade under the name and style of V. S. Varadaraja Mudaly in shop No. 154. The 2nd defendant who was at enmity with the rest of the family carried on a separate trade in another shop under a different Vilasam. He contracted debts and purchased some properties, and the plaintiff is not liable to pay from his share of the family property the debts contracted by the 2nd defendant, which were not for family purposes and which could not bind the family.

C. Schedule properties were purchased by the 2nd defendant and the plaintiff did not claim any share in them : but stated that should the Court hold that the 2nd defendant purchased them out of the family funds, the plaintiff would be entitled to his share in them also.

The 1st defendant died before notice of the suit could be served on him. 2nd defendant was *ex-parte*. 3rd defendant filed a written statement supporting the plaintiff's case. 4th defendant supports the case of the creditors. The creditors and alienees pleaded that the 1st defendant was too old to manage the family concern, that 2nd defendant was managing the affairs of the family, that the trade carried on by him was a family trade, the debts were incurred for purposes of the trade, that the plaintiff, the 1st defendant and other members of the family were benefited by the trade, and the debts are binding upon the plaintiff and the plaintiff cannot question the alienations made by the 2nd defendant.

The learned District Judge in a very careful and elaborate judgment held that the trade carried on by the 2nd defendant was a family trade and that the debts were contracted and the alienations were made for purposes which could bind the family and gave a preliminary decree for partition and directed that Rs. 300 should be paid for the marriage expenses of the plaintiff. The plaintiff now appeals in *forma pauperis* against that portion of the decree which declares that his share is liable for the debts contracted by the 2nd defendant, and the alienations are binding upon him. Original Suit No. 18 of 1916 was tried along with several other suits brought by

the creditors against plaintiff and defendants 1 to 4 for recovery of the amounts due to them and the evidence was recorded by consent in O. S. No. 18 of 1916. The main judgment is in O. S. No. 18 of 1916 and the learned District Judge has written separate judgments in the other suits dealing specifically with the case of each plaintiff.

The issues common to all the cases are issues Nos. 6, 7, and 15 They are :—

(1) Whether the 1st defendant was not the manager of the family or whether the 2nd defendant was constituted its manager ?

(2) Whether the trade referred to in paragraph 6 of the plaint is also family business ?

(3) Whether the plaintiff and defendants 1 and 4 undertook to pay the debts alleged to be due to defendants 7, 8 and 9 and if they did, whether any objection in respect thereof is supported by consideration ?

It was agreed at the bar that issues 6, 7 and 15 which are dealt with by the Dt. Judge in his judgment in O. S. No. 18 of 1916 should be tried first, and after their disposal the appeals against the decrees in favour of the creditors should be heard and decided.

[The judgment then dealt with evidence and proceeded as follows.]

It was next urged that the 2nd defendant had no right to incur debts for buying property. No member of a joint family has a right to incur debts for buying property. But in this case there is no specific evidence except in the case of the loan of the 14th defendant that any money which was borrowed was utilised for buying property. It may be that the 2nd defendant thought the was making a large income and was investing a portion of the income upon immoveable property. If there is specific evidence that any loan was given for the purpose of buying property it may be contended with some show of reason that that loan could not bind a minor member of the family unless it was shown that the buying of property was a necessary purpose.

Mr. Ramachandra Ayyar urged that the plaintiff being a minor member of a joint Hindu family which carried on trade, his share of the trade assets alone could be made liable for debts contracted for trade purposes, and he relied upon *Sanka Krishna Murti* v. *The Bank of Burma* (1). In that case it was held that a minor member of a joint Hindu family was liable on a bill drawn by the manager, his liability being limited to his share in the business, on the analogy of S. 247 of the Contract Act (IX of 1872). Mr. Justice Wallis (as he then was) in the course of the judgment quotes the well-known observations of Sausse, C: J., in *Ramlal Thakursidas* v. *Lakshmichand Muniram* (2) "the power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade," and observes : "This does not seem to mean more than that it is unnecessary to enquire whether there are minors or not." The principle of that decision is, that on a bill drawn by the managing member, a creditor could obtain a decree only against the trade assets of a minor member of a joint Hindu family. That case does not consider what the trade assets are. If credit is got on the strength of the family possessing immoveable property it cannot be said that the assets of the trade are limited to the goodwill, stock in trade and outstandings This is quite clear from a decision reported in *Muthaya Pillay* v. *Tinnevelly South Indian Bank* (3), where a Bench of this Court held that the minor's liability was not confined to the trade assets alone. The learned Judges observe at page 342, after referring to the cases reported in

(1) [1911] 35 Mad. 692—(1911) 1 M. W.N. 385—21 M.L.J. 620—11 M. L.T. 56—11 I.C. 79.
(2) [1861] 1 Bom. H.C.R. (Appx.) 51.
(3) [1917] 5 L.W. 341—37 I.C. 230.

Ramlal Thakursidas v. *Lakshmichand Muniram* (2), *Raghunathji Tarachand* v. *The Bank of Bombay* (4), and *Chalamayya* v. *Varadayya* (5). "Those decisions held in clear terms that in the case of an ancestral business all the members of the family including the minors are liable for debts incurred in the course of the business to the extent of their share in the family property and that seems to be only reasonable, because a business like the one in question is carried out on the credit of the entire family property. The family property is swelled by the profits earned in the business and it would be not only unjust to confine liability to the extent of the appellant's share in the assets of the business but it would be impossible in a case of this nature to say what is the extent of the property embarked on the business. The decision in *Raghunathji Tarachand* v. *The Bank of Bombay* (4) lays down "where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family." Chandavarkar J, says at page 81: "Where a minor is a coparcener in a joint family, his share in the family property is liable for debts contracted by his managing coparcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose or purposes incidental to it* must here give way to the expression *trading purpose or purpose incidental to it* having regard to the nature and objects of the family business." It is therefore clear that where an accredited agent of the family, who carries on a business on behalf of the family, contracts debts for purposes of the trade, the purpose for which he contracts the debt is a family purpose because the trade is a family concern and the creditors are entitled to go against the whole of the family property and a minor member is bound inasmuch as the debt is borrowed for a family purpose. It would be quite different if it could be established that the loan was not given for the purpose of the trade but for some other purposes which was not necessary for carrying on the trade. This principle is made quite clear by a later decision of the Madras High Court reported in *Thammanna Chinna Lakshminarasimham* v. *Akarapu Venkanna Chinniah* (6). There Sir Abdur Rahim, Officiating C. J. and Odgers J, held that "in the case of trading families like the Kometti Chetties, if monies are borrowed for the purpose of an ancestral business carried on by the members of the joint family, all the members of the family including minors are liable for the re-payment of such sums, to the extent of their share in the whole family including the assets of business." They follow the ruling in *Muthaya Pillai* v. *Tinnevelly South Indian Bank* (3), and observe. "This view of the law is followed in the case just referred to in *Malaiperumal Chettiar* v. *Arunachala Chettiar* (7). where it is laid down that the ordinary presumption in the case of such business is that the entire family property is embarked in the business and forms part of the assets of the business. It is unnecessary to pursue this matter further as it is quite clear that a minor member is bound to pay out of his share of the family property the debts contracted for *bona-fide* trading purposes when the trade is a family trade managed by the managing member or some one deputed by the managing member to do so.

Mr. Ramachandra Ayyar relied upon *Sahu Ram Chandra* v. *Bhup*

(4) [1909] 34 Bom. 72—11 Bom. L.R. 255—2 I.C.173.
(5) [1898] 22 Mad. 166—9 M.L.J. 3.
(6) [1920] 38 M. L. J. 55—11 L. W. 55—27 M.L.T. 83—(1920) M.W.N. 112—55 I. C. 64.
(7) [1917] 6 L W. 417—41 I. C. 224.

Singh (8), as supporting his contention that a minor is not bound to pay out of the family property the debts contracted by the managing member. That case was one of alienation and it was held in that case that the father could alienate joint family property for necessity or for an antecedent debt. That case has no application to the present as the 2nd defendant was managing the family trade and contracted debts for the purpose of carrying it on. The trade carried on by the 2nd defendant has been shown to be one that was started in the life-time of the grand father and carried on by the plaintiff's uncle Singaravelu Mudaliar till his death, and afterwards continued by the 2nd defendant. The family is a trading family and there is nothing to show that the assets of the trade were confined to the stock in trade and outstandings. Evidently the family property was acquired out of the savings from the income of the trade and it cannot be said after a number of years that the immoveable property of the family became dissociated from the trade in such a way as to make the trade a separate entity altogether from the family property. There may be cases where the family trade is carried on without any reference to the family property but in this case the income of the immoveable property belonging to the family was brought into the trade, was credited in the books kept for the purposes of the trade and the expenses of the family were met from the trade funds. It cannot be contended in this case that the family property was not embarked on the trade carried on by the family. It must therefore be held that the plaintiff's share in the family property is liable for such of the debts as were incurred for the purposes of the trade If it could be shown that any particular debt was not incurred for the purposes of the trade but for some purpose of the 2nd defendant without any reference to the family or for an object which was not a family purpose then it might be contended with success that that debt could not bind the minor's share in the family property.

As regards the alienations, there is no appeal in respect of the alienations in favour of the 6th and 31st defendants. The alienation in favour of the 32nd defendant is attacked by the plaintiff. The property covered by this alienation is a house. This was purchased in 1902 in the name of the 2nd defendant under Ex. 57 (*a*), and was sold in 1912 to 32nd defendant under Ex 57. In 1902 the 2nd defendant had no business of his own and the property must have been purchased in his name out of family funds. The learned District Judge thinks that the 2nd defendant was the ostensible owner of the property and the other members did not object to the sale. When a person buys from a member of a joint Hindu family who is not himself the manager he should take care to see that the person selling has a good title to convey. The fact that there is a recital in Exhibit 57 that it is the self-acquisition of the 2nd defendant would not by itself give a good title to the vendee if the 2nd defendant had no right to sell. The vendee, 32nd defendant, did not take the trouble to get a sale-deed from the managing member of the family, the 1st defendant, or at least to get the consent of the other members of the family to the sale by the 2nd defendant. It is usual to obtain the attestation of even divided members when property is sold by a person who was once a member of a joint Hindu family. In Exhibit 57 there is no attestation by any one member of the plaintiff's family. I therefore hold that the 32nd defendant is not a purchaser in good faith and the sale in his favour cannot prevail against the plaintiff.

As regards improvements, he made them at his own risk. He did not act as an ordinarily prudent man would do and therefore cannot claim the value of the improvements made by him.

As regards alienation in favour of the 33rd and 34th defendants, here also

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(8) [1917] 39 All. 437–44 I. A. 126–21 C. W. N. 608–1 P. L. W. 557–15 A. L. J. 437–19 Bom. L. R. 498–26 C. L. J. 1–33 M. L. J. 14–(1917) M.W.N. 439–22 M.L.T. 22–6 L.W. 213–39 I.C. 280 (P. C.)

a house was sold by the 2nd defendant and it has changed hands. The house was purchased under Ex. 76 (*b*) in 1907 by the 2nd defendant and was sold under Ex. 76 (*c*) on 12—3—1908. The learned District Judge says there is no evidence that the family ever objected to the alienation by the 2nd defendant. The question is whether the 2nd defendant had power to sell. In the light of the decision of their Lordships of the Privy Council in *Sahu Ram's* case (8). I cannot hold that the 2nd defendant could give a valid title to the property against the plaintiff. The alienation is not binding on the plaintiff.

The next alienation is that of a mortgage in favour of the 35th defendant. The mortgage is for Rs. 5,000 but consideration to the extent of Rs. 1,500 has failed. The mortgage (Ex. 58*b*) was on the 17th August, 1915. A junior member of a joint Hindu family has no right to alienate property belonging to the family. No doubt a father could sell for an antecedent debt, but a brother stands in a different position ; and when he is not the managing member he could not alienate family property even for an antecedent debt. If he is the accredited agent of the family he could alienate only for family necessity. No doubt the family was in embarrassed circumstances. But in the case of this alienation there is no evidence that it was made for the purpose of staying off the evil day. It cannot bind the plaintiff.

The next alienation is a mortgage in favour of the 37th defendant. By Ex. 39 (*a*) dated 2—9—1915, 4th defendant mortgaged some of the family property. 4th defendant was only a junior member of a joint Hindu family and he could not convey more than his share in the family property. It is in evidence that the mortgagee is the husband of his maternal aunt, and there was no need to make that alienation. It can only bind the 4th defendant's share and the plaintiff's share is not bound by the alienation.

The next alienation is in favour of the 39th defendant. It is also a mortgage. By Ex. 75, 4th defendant mortgaged the properties belonging to the family. The same remarks apply to this as to Ex. 39 (*a*). The 4th defendant had no right to convey more than his share of the family property in favour of the mortgagee. The plaintiff's share is not bound.

In the result the preliminary decree of the lower Court will be modified by declaring that the alienations in favour of defendants Nos. 32, 33, 34, 35, 37 and 39 do not bind the plaintiff's share of the family property. The plaintiff is entitled to proportionate costs from defendants Nos. 32, 34, 35, 37 and 39.

The question of costs and the reliefs in respect of the debts will be decided after the connected appeals are heard.

Spencer, J.—I agree.

[Appeals Nos. 387 to 396, 398 and 400 to 408 of 1918 coming on for hearing on Monday, the 18th September, 1922, and this day and Appeal No. 386 of 1918 coming on again for hearing this day, the Court delivered the following].

Judgment.—Appeal No. 387 of 1918 ;—In this appeal the only question argued was whether the plaintiff was entitled to claim interest at the contract rate from the date of plaint to the date of decree. The Court has a discretion in the matter and the learned District Judge has allowed interest according to law. The case in *Ramachandra* v. *Devu* (9) is relied upon as shewing that the Court has no discretion in the matter but there is a later decision of the learned Chief Justice and Seshagiri Aiyar, J. in *Rajagopala Chetty* v. *Kunlappa Chetty* (10) to the effect that the Court has a discretion in the matter under S. 34, C. P. C. Therefore the learned District Judge's order is correct and the appeal is dismissed with costs.

Decree modified

(9) [1889] 12 Mad. 485.
(10) [1915] 28 I. C. 429.

1924 MADRAS 38

KRISHNAN, J.

Kanniappa Mudaliar—Appellant.

v.

B. Chinnaswami Chettiar and another—Respondents.

Civ. Rev. Pet. No. 882 of 1922 D/- 5th March 1923 from the order of the Sub. J., Chingleput, in O P. No. 6 of 1922, D/- 8th December 1922.

Muncipal Election Rules...Madras Gazette Notification No 1120 dated 23rd November 1920—R. 14 (1)—Absence of polling officer's initials—Vote is not invalid.

A vote is not invalid and should not be rejected on the sole ground that it does not bear the polling officer's initials even though it is proved that in all other respects it is a properly recorded vote by duly qualified voter. Rule 14 Cl. (1) is not a mandatory rule the infringment of which will render the vote necessarily invalid. The rule is evidently intended to identify the ballot paper as one given out by the polling officer. If the paper can be so identified by other evidence the absence of the initials may be disregarded.

[P, 39 C, 1]

T. R. Ramachandra Iyer and *S. Srinivasa Aiyar*—for Appellant.

A. Krishnaswami Aiyar — for Respondents.

Judgment.—This revision petition arises in connction with the election of the Councillor for Ward No. 5 of the Conjeevaram Municipality in October last. The petitioner before me Mr. Maudaliar and the 1st Respondent Mr. Chettiar were rival candidates. The latter got two more votes than the former and would in ordinary course have been declared elected but the Chairman held 2 of his votes to be invalid on the ground that the ballot papers on which such votes were recorded, Exs, A and B, did not bear the intials of the polling officer as required by rule 14 Cl. (1) of the rules framed by the Governor-in Council for the conduct of Municipal elections and published in the Fort Saint George Gazette as notification No. 1120 dated 23rd November 1920. Having done so he proceeded to act under rule 28 and draw lots as the number of votes for the 2 candidates had become equalised; and as the drawing resulted in Mr. Mudaliar's favour he declared him duly elected. Thereupon Mr. Chettiar filed an election petition before the Subordinate Judge of Chingleput claiming that the 2 votes in question were valid ones and were wrongly excluded. The learned Subordinate Judge has found as a fact that the 2 votes were actually given by two duly qualified voters who voted at the election and that the ballot papers. Exs A and B themselves were the outer foils of 2 counter foils in the voting paper book kept by the polling officer and that there could be no question that the votes were genuine votes recorded by two voters entitled to vote. The only objection urged to the reception of these votes was, as already stated, that they did not bear the polling officer's initials. No other rule or provision is said to have been infringed. In these circumstances the Subordinate Judge held that it was wrong to reject the votes as invalid and that they should be counted in Mr. Chettiar's favour. That made the number of votes in his favour larger than the number Mr. Mudaliar got. Consequently he set aside Mr. Mudaliar's election and declared Mr. Chettiar as properly elected. The revision is against that order.

From what is stated above it is clear that the question to be considered is whether a vote is to be treated as invalid and rejected on the sole ground that it does not bear the polling officer's initials even though it is proved that in all other respects it is a properly recorded vote by a duly qualified voter. The decision of the point is obviously material in the present case as the result of election entirely turns on it.

The learned vakil for the petitioner contends that the mere absence of the polling officer's initials on the ballot paper is sufficient by itself to invalidate the vote and he relies upon the ruling in *Shyam Chand Basak* v. *Chairman, Dacca Municipality* (1). In that case the question was not one of the invalidity of a vote given at an election properly held as here but on the invalidity of the whole election itself on the ground of its having been held out of the proper hours fixed for it. There the election was

(1) [1919] 47 Cal. 524—30 C.L.J. 270—24 C. W. N. 189—53 I. C. 741.

begun later and continued later in the morning and begun earlier in the afternoon than the time fixed for it. The question before the learned Judge was whether that irregularity vitiated the election *in toto*. After an elaborate discussion of the case law on the point the learned judges held that the condition infringed was not a mandatory one and that the election could be upheld if it was shown that its result was not affected by the error or irregularity committed, the burden to prove which was on the person supporting the election but if there was reasonable ground to believe that the result was affected by the irregularity the Court should set it aside. If I may say so respectfully I entirely agree with the views expressed in this case. Though the ruling is not strictly in point as we are dealing with a case of a vote being challenged and not the election itself the principles laid down may be applied to the present case and applying them it will follow that if nothing more appeared than that rule 14 Cl. (1) was infringed as regards the two votes that would be a *prima facie* ground for rejecting those votes: but if it is proved by evidence that the votes were given by duly qualified voters on ballot papers supplied to them by the polling officer they should not be rejected. In this case such evidence is forthcoming and the learned Subordinate Judge has found that the votes are genuine and I must accept that finding in revision; on that finding I am of opinion that the Subordinate Judge's view that the votes should be counted is correct,

I do not consider rule 14 Cl. (1) as a mandatory rule the infringement of which will render the vote necessarily invalid. The rule is evidently intended to identify the ballot paper as one given out by the polling officer. If as in this case the paper can be so identified by other evidence the absence of the initials may, I think, be disregarded. The difficulty in any particular case will be to prove such identity.

Rules 13, 14 and 15 show how votes are to be recorded. When a person presents himself to vote he is given under rule 13 a signature slip on which his name and number in the electorial roll are entered at which he has to sign or put his thumb impression on, if, as in this case, there is no question of the voter's identity. Under rule 14 the voter is then given a ballot paper with the initials of the polling officer on its back and the polling officer has also at the same time to enter the voter's number on the electorial roll in the counter-foil and put his initials against his name in the electorial roll. Under rule 15 the voter who has got the ballot paper secretly puts a mark against the name of the candidate he votes for and folds and deposits the paper in the ballot box. These rules are evidently intended to enable a person who is a duly qualified voter to give his vote secretly and freely, on the ballot paper supplied to him by the polling officer, to the candidate he approves of. So long as this object is shown to have been attained in spite of the infringement of any rule, such infringement cannot, I think, justify the rejection of the vote; more particularly when the infringement is not by the voter but by the polling officer for whose default he cannot properly be held responsible.

Rule 17 provides what irregularities necessarily invalidate a vote; there is no reference in this rule to the failure on the polling officer's part to initial as required by rule 14 as invalidating a vote. It is clear therefore that rule 14 is not a mandatory rule the non-compliance with any part of which would necessarily invalidate a vote. In the corresponding Ballot Act of 1872 in England there is a provision in part 1 Sec. (2) which requires the ballot paper to be officially marked on both sides and the second paragraph of that section says that any baliot paper that has not the official mark on its back shall be void and not counted. A question arose in England, whether the absence of the official mark on the front of the ballot paper would vitiate a vote, or not, in the case of *Ackers* v. *Howard* (2). Their Lordships held that a ballot

(2) [1886] 16 Q. B. D. 739—55 L. J., Q. B. 233—54 L. T. 651—34 W. R. 609.

paper conforming in other respects to the requirements of the Ballot Act was not void because it has not the official mark on its face. That case is very similar to the one before us. In the *Isiington* case (3) it is observed by Kennedy J. that "an election ought not to be held void by reason of the transgressions of the law, committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election where the Court is satisfied that the election was, notwithstanding these transgressions, an election really and in substance conducted under the existing election laws, and that the result of the election, that is, the success of the one candidate over the other, was not, and could not have been, affected by these transgressions." It may be said with equal force and justice that a vote ought not to be held void on account of the mistake of the polling officer, in the conduct of the election, made without any corrupt motive where the Court is satisfied that the vote was really given in substantial accordance with the election rules by a duly qualified voter to a candidate.

For the above reasons I would hold that on his findings of fact the Subordinate Judge's view is correct and dismiss this C. R. P. with costs.

Petition dismissed.

(3) [1901] 5 Com. and H. 125.

1924 MADRAS 40

SPENCER, J.

Avudayappa Mudaliar—Petitioner—Accused.

v.

Emperor—Opposite Party.

Criminal Rev. Case No. 696 of 1922 D/- 6th February, 1923 from the order of Sub-Divisional Magistrate, Ramnad, in Cr. A. No. 48 of 1922.

Penal Code, S. 447—Offence committed within Court compound is not criminal trespass.

Where the accused wrongfully restrained the complainant, an arrack renter, from going and bidding at the arrack sales held in the Sub-Magistrate's office, and abused him :

Held, that the facts constitute the offences defined in Ss. 341 and 504 but no offence under S. 447 is made out on these facts. [P. 40 C. 2]

F. S. Vaz—for Accused.

The Public Prosecutor-for the Crown.

Order—The petitioner has been convicted of offences punishable under Ss. 341, 447 and 504 I. P. C for having wrongfully restrained the complainant, who is an arrack renter, from going and bidding at the arrack sales held in the Sub-Magistrate's office, Sattur, and for having abused him.

The facts that the petitioner pushed and obstructed the complainant and intentionally insulted him have been found to be proved by the evidence in the judgment of the Magistrate who tried the case and the Magistrate who heard the Appeal. The facts found by them constitute the offences defined in Ss. 341 and 504. The language found to have been used by the petitioner towards the complainant was such as would provoke any person of ordinary temper to commit a breach of the peace. The conviction under the sections must therefore stand.

The joinder of a charge of criminal trespass (S. 447) in the circumstances of the present case was in my opinion uncalled for. The offence of criminal trespass is compoundable under S. 345, Cr. P. C. by the person in possession of the property trespassed upon. There is no suggestion that the accused entered the Court compound, which is a place open to the public, with the intention, of intimidating, insulting or annoying the Sub-Magistrate, assuming that he was the person in possession. Even if it be taken for granted that when the accused entered the compound he intended to commit an offence, the prosecution has not proved that the Court compound was at the time in possession of a complainant who could compound the offence under S. 345 Cr. P. C. Vide *Chandi Pershad* v. *Evans*. (1). Moreover there was no complaint of trespass from the Sub-Magistrate. S. 447 appears to have been added in order to enhance the gravity of the other two offences.

I quash the conviction under the section and reduce the sentence to the amount of imprisonment already undergone by the accused.

Sentence reduced.

(1) [1895] 22 Cal. 123.

✱ 1924 MADRAS 41

AYLING AND ODGERS, JJ.

Marimuthu alias *Mari*, in re.

Criminal App. No. 63 of 1923 and Criminal Rev. case No. 858 of 1922, D/- 15th February 1923, from the S. J. Trichinopoly, in S. C. No. 38 of 1922.

Penal Code, S. 304—Kicking a prostrate woman—Knowledge that death would be caused is inferred.

The accused made a confessional statement in which he stated that he and his wife had a quarrel in the forest and that he slapped and then kicked her and unintentionally caused her death. There was nothing to suggest that the wife was suffering from any disease;

***Held*: that he must have kicked the woman with tremendous force to produce such an effect, and that a man who so kicks a prostrate woman on the side must be credited with the knowledge that he is likely thereby to cause her death, even if he be exonerated from the more definite intention or knowledge required by S. 303, and that in kicking the deceased accused knew that he was likely to cause death and therefore he was guilty of an offence under S. 304 I. P. C. (latter portion). [P. 42 C. 2, P. 43 C. 1]**

S. Venkatachala Sastri — for the Crown.

P. Markandeyulu—for Accused.

Ayling, J.—The accused in this case was tried before the Sessions Judge of Trichinopoly, on charges under Ss. 324, 302, 304 and 325, Indian Penal Code, in connection with the death of his wife. The Sessions Judge convicted him for an offence under S. 323 and sentenced him to one year's rigorous imprisonment but acquitted him on the other charges. Against this acquittal Government had appealed under S. 417, Code of Criminal Procedure, and in the same connection the case was taken up in revision under the orders of a learned Judge of this Court.

The case against accused, as disclosed in the prosecution evidence is as follows. The deceased, a young woman of 19, was on bad terms with her husband, the accused, and had on several occasions returned to her parents' house complaining of his ill-treatment. She was last brought back from there within a week of her disappearance. On the 9th July, she was sent for, to visit her sick mother and accused agreed to let her go; but, before starting for the latter's village went with her to a Muniyanar temple situated just outside a reserved forest. She wanted to worship there; and he wanted to cut a ploughshare in the adjacent reserve. They were seen together by two witnesses (P. W. Nos. 2 and 3) near the temple and just inside the reserved forest, before sunset that evening. The woman was never seen again alive; but a female skeleton was found some days later in the reserved ferest, which was suspected to be that of deceased. Accused was arrested on suspicion and produced all the woman's jewels including her *tali*.

He subsequently made a confessional statement (Exs. J 1. to J-3), which he repeated in the committing Magistrate's Court (Ex. K) though he retracted it before the Sessions Judge. In this, he stated that he and his wife had a quarrel in the forest and that he first slapped and then kicked her and so unintentionally caused her death

The Sessions Judge found the confession to have been freely and voluntarily made and attached no importance to accused's allegations of ill-treatment, or his retraction before the Sessions Court. He accepted it as a true version of what occurred and in this view of the facts held that no intention to kill or even cause a grievous hurt could be attributed to accused and accordingly convicted him only of voluntarily causing simple hurt.

It will be seen from the above that apart from the confessional statement, there is quite a strong case against accused for conviction under the more serious sections (Ss. 302 and 304, Indian Penal Code.) The statement is incriminatory, in so far as it shows that accused caused his wife's death; but it is exculpatory in so far as it tends to palliate accused's action by eference to the manner and circumstances attendant and the intention to be ascribed to accused. It is in the latter aspect that it has most practical importance. The medical evidence throws no light on the cause of death. None of the bones of the skeleton were found to be fractured; and although

the skull was separated from the trunk, this may well have been the work of wild animals. The Sessions Judge had deduced from this that accused could not have used his axe in killing his wife and having further regard to the absence of any very deadly ill-feeling has accepted in its entirety the version of the occurrence put forward by accused in Exs. J-1 to J-3. and K.

I cannot help feeling considerable doubt, as to whether these statements contain the whole truth, and whether accused has not at any rate considerably minimised the violence he used to cause his wife's death. A slap on the cheek and a kick (or even kicks) on the side are not likely to have caused the immediate death of a healthy young woman of 19. However, in all the circumstances of the case and particularly as the matter came before us by way of revision and appeal against acquittal, I am loth to say that the Sessions Judge was not justified in accepting accused's version of what occurred. I shall therefore proceed on the assumption that it is correct, and only consider whether accepting it, accused should have been convicted of a more serious offence than causing simple hurt. This is the story in accused's own words as given in Ex. K.

"I got angry and beat my wife on her cheek with my hand. She fell down saying' be ruined, be dammed.' Saying 'has it come to this with you because I keep you in the house as a Mahomedan woman and supply you with all necessaries in the house.' I gave a kick forcibly. It struck on the side of my wife. I stopped for a while and observed. There was no breathing or talking,"

Now, the slap on the cheek could have done little harm, though it would seem to have been forcible enough to knock the woman down; but the kick (or kicks) on the side would seem to have caused practically instant death. There is nothing to suggest that she was suffering from any disease; and I think we may fairly infer that he must have kicked the woman with tremendous force to produce such an effect, and that a man who so kicks a prostrate woman on the side must be credited with the knowledge that he is likely thereby to cause her death. even if he be exonerated from the more definite intention or knowledge required by S. 302, Indian Penal Code. It is beside the point to say, as the Sessions Judge does, that "illfeelings between accused and his wife were certainly not such as to make the accused wish for the death of his wife," in cold blood; accused probably entertained no such desire. But he says that just before this he had taxed her with consorting or at any rate, flirting with other men and she had in effect replied "what does it matter?" ("on accouut of their coming and going, what is lost?). He then struck her on the cheek and she fell down abusing him. In such circumstances he may well have felt considerable anger, and it is wrong to argue that he could not have meant to kill his wife, because he had no sufficient motive to do so.

The learned vakil who argued the case for accused before us has relied on the judgment of Straight, J., in *Empress of India* v. *Idu Beg* (1), to show that at the worst accused can only be convicted of causing grievous hurt (Section 325, Indian Penal Code; and not of murder or culpable homicide. I do not think it supports any such conclusion. The learned Judge in that case, was at great pains to explain the scope of Section 304-A Indian Penal Code, and in particular to show that it did not cover 'cases of direct violence wilfully inflicted". It is only in the latter part of his judgment that he deals with the question of what intent or knowledge should be ascribed to the accused, on the facts of the particular case before him. And he says:

"I should certainly not have disturbed the order of the Judge, had he convicted of culpable homicide not amounting to murder, on the ground that there must have been knowledge

(1) [1881] 3 All. 776—(1881) A.W.N. 132.

that death would be a likely result. At the same time I am willing to accept his conclusion that there was no such knowledge, though further than this, I cannot adopt this view."

In other words, he accepted, though apparently not without some doubt the lower Court's finding that the accused in that case did not know that death was a likely consequence of his act. Such a decision can hardly in this respect be any guide to another Court dealing with another case.

For myself, I think that in the present case a conviction for causing grievous hurt would be illogical as well as inadequate to the facts. The only category of S. 320, Indian Penal Code, which could possibly be applied is the eighth "any hurt which endangers life" and I do not think this phrase was intended to apply to cases, in which life was not merely "endangered but actually taken away." But, however this may be, the circumstances seem to me to fully justify the inference that in kicking the deceased, accused knew that he was likely to cause death and I hold him guilty of an offence under S. 304, Indian Penal Code, (latter portion). His subsequent conduct in stripping his dead wife of her jewels and even cloth and leaving her naked body in the jungle are incompatible with any very light sentence, and I would therefore impose a sentence of five years' rigorous imprisonment.

Odgers, J.—I agree that under the circumstances we should accept the finding of the Sessions Judge that the confession of the accused is a true statement of the facts which occurred. According to this, the accused and his wife had a quarrel and he taxed her with intimacy with other men. He got angry, slapped his wife with such force that she fell down. She cursed him in so doing and he "gave a kick forcibly on her side" She died immediately. There is no evidence or even plea of the existence of disease. The question is what on these facts is the intention to be imputed to the accused? S. 299 (last clause) defines culpable homicide as causing death with the knowledge that he is likely to cause death.

The only kind of grievous hurt (S. 320) which could by any possibility be applicable to this case is the eighth, *viz.*, any hurt which endangers life.

Here the accused "kicked forcibly." The confession says only one kick; but there may well have been more, at any rate the violence of the single kick must have been very severe. In *Empress of India* v. *Lalu Beg*, (1) which was brought to our notice and strongly relied on for the accused, the blow was a single one and the learned Judge (Straight, J.) said he would have disturbed the order of the District Judge had he found the accused guilty of culpable homicide not amounting to murder, on the ground there must have been knowledge that death would be a likely result. That was a case of S. 304-A and all it actually decided was that cases of direct violence wilfully inflicted do not fall within that section. In the present case the kick not only endangered life but on accused's own showing caused immediate death and it appears to me that it was administered with such violence that the accused must be taken to have known that it was likely to cause death, there being no evidence of any other contributory cause.

I therefore agree with the judgment of my learned brother and with the sentence proposed by him.

Sentence enhanced.

✱ 1924 MADRAS 43

ODGERS, J.

Visvanatha Asari —Plaintiff — Appellant.

v.

Sami Asari alias *Margasahaya Asari*—Defendant—Respondent.

Civ. Rev. Pet. No. 783 of 1921 D/-23rd February, 1923 to revise the order of the Sub. J., Chingleput, in M. P. No. 5 of 1921.

Civil P. C., O, 17 R. 3—Plaintiff present through pleader—Adjournment refused—Case must be disposed of on merits.

Where at the hearing of the suit the plaintiff was not absent but was represented by a pleader, who asked for an adjournment, which was refused:

Held that in such a case the suit cannot be dismissed for default; but a judgment must be written and the case disposed. 35 M. 267 Foll. [P 44 C 1]

S. Ranjaswami Aiyangar and S. Subramania Aiyar—for Appellant.

D. V. Neelameghachariar—for Respondent.

Judgment.—In this case, it is contended that the order of the Subordinate Judge is wrong, in that it disposed of the suit on the merits; whereas as the plaintiff was absent, he ought to have proceeded under O. 17, R. 2 of the Code of Civil Procedure and dismissed the case for default, instead of under O. 17, R. 3. As against this, it appears that the plaintiff was not absent, but was represented by a pleader, who asked for an adjournment, which was refused. *Patinhare Tarkatt Rama Mannadi* v. *Vellur Krishnan Menon* (1), is authority for the proposition that in such a case the suit cannot be dismissed for default; but a judgment must be written and the case disposed of. No authority is cited to the contrary. It is further contended that no revision lies, as this is not an *ex parte* decree; but the remedy of the petitioner is to proceed by way of appeal from the decree against him The petition cannot, therefore, be brought against the order refusing restoration of the suit, on the ground that the suit was dismissed for want of evidence and was not dismissed *ex parte*.

As I must hold that the plaintiff was present by his pleader in this case, *Vaiyuntathamal* v. *Valliammal* (2) is authority for holding that O. 17, R. 3 is applicable and the learned Subordinate Judge was right in the order he made. I am inclined to think that the other point taken for the respondent, is also sound, on the authority of *Chenroyan* v. *Rama Chetti* (3), but in view of my finding on the other point, it is not necessary to say anything more, with regard to that.

Assuming a revision petition will lie, I hold that the order of the Subordinate Judge was correct and there is no ground to interfere with it.

This Civil Revision Petition is dismissed with costs,

Petition dismissed.

(1) [1903] 26 Mad. 267.
(2) [1917] 41 Mad. 256—6 L.W. 337—(1917) M.W.N. 743—41 I.C. 719.
(3) [1916] 3 L.W. 524—33 I.C. 660.

1924 MADRAS 44

OLDFIELD AND RAMESAM, JJ.

Kachi Reddi Nagireddi—Petitioner.

v.

Saki Reddi and others—Respondents.

Civ. Mis. Pet. No. 3370 of 1922, D/-22nd December, 1922.

Limitation Act (Amending Act 26 of 1920) S. 3 (1)—Time for furnishing security—Extension of more than 60 days is not allowed.

High Court has no power to extend time for furnishing security for more than 60 days.

C. S. Venkatachariar—for Petitioner.

W. Kothandaramiah—for Respondents.

Order.—A preliminary objection has been taken that we have no power to extend time or excuse delay in this case and we think that the objection must be sustained. The delay in question is, it is not disputed, more than 150 days. To enable us to excuse it, a power more extensive than that conferred by S. 3 (i) of Act XXVI of 1920, whould be necessary. But we cannot hold that we have such a more extensive power, or any general power when in that section the Court's discretionary power, to extend time for excuse shown, is recognised, subject to any explicit restriction to a period of 60 days. The petitioner has reliance also on the concluding words of Cl. 9 of the order in council, dated 9th February, 1920, as conferring an un-restricted power, but those words can be understood as authorising the Court's use of its discretion to the extent specified in the Act and there is no necessity to read them as authorising more. The objection must be allowed. The Petition is dismissed with costs.

Petition dismissed.

✱ ✱ 1924 MADRAS 45

OLDFIELD AND VENKATASUBBA RAO, JJ.

(*Bommadevara*) *Satyanarayana Varaprasada Rao*—Appellant.

v.

Venkata Lakshmi Narasayamma and another—Respondents.

A. A. O No. 359 of 1922, D/- 2nd March, 1923, against the order of the Dt. Court, Kistna, at Masulipatam, D/- 22nd September, 1922.

(a) *Civil P. C., S 11—Compromise decree—Proceedings under Guardians and Wards Act are not binding.*

Where under a compromise the petitioner (father) acquiesced in the retention of the custody of the minor by the respondent (mother).

Held: that the authority delegated by a natural guardian to any other person to retain the custody of the minor is revocable although the compromise has been embodied in a decree. 38 M. 808 Ref. [P 45 C 2]

(b) *Guardians and Wards Act, S. 25—Prayer by father to appoint himself or some other person as guardian should be granted.*

Where the minor aged 4 years was in the custody of the mother, and the father and the mother were on bad terms and the father applied for removal of the minor from mother's custody and for appointment of himself or some other fit person as guardian.

Held: the petition should be treated as one under S. 25 and there was no reason why the petition should not be granted.

[P 46 C 1,2]

E. L. Thornton, A. Krishnaswami Iyer and N. Rama Rao—for Appellant.

V. Ramadoss and A. Krishna Mohan—for Respondents.

Oldfield, J.-This is an appeal against an order of the District Judge of Kistna, dismissing a petition by the Zamindar of South Vallur, headed as under the Guardians and Wards Act. It is not clear what was the particular provision of the Act the petitioner desired to proceed under; nor is it clear why the learned District Judge said that the petitioner was proceeding under S. 7 of that Act. The 1st prayer in the petition is that the petitioner or some other fit and proper person shall be appointed guardian of the infant and the 2nd. which is at present material, is that the infant shall be removed from the custody of the respondent and placed in charge of a guardian to be appointed. It does not seem to have been recognised by those concerned that the relief which a father can appropriately claim is under S. 7, or under S. 25, not under S. 19 which has also been referred to before us. The two first mentioned deal with the appointment or declaration of a guardian; but the last applies only to persons other than the father, who, however can apply only in case they show that the father is unfit for the guardianship. We accordingly consider the petition directly with reference to the 2nd prayer above referred to and S. 25 of the Act. It may at once be said that we intend remanding the petition to the lower Court; and it may then be worth while for the petitioner to consider whether his prayers or averments need amendment in any way.

Turning to the lower Court's judgment, we regret that we are unable to understand on what ground exactly it dismissed the petition. There is first some reference to the relations between the petitioner and his wife, in whose custody the minor at present is and to the fact that under a compromise Ex. A, the petitioner acquiesced in the retention of the custody of the minor by the respondent. No doubt something has been said of this here, on behalf of the respondent, the suggestion being that the arrangement was not revocable. A sufficient answer to that is a reference to the dictum of the Judicial Commitee is *Annie Besant* v. *Narayaniah* (1) that the authority delegated by a natural guardian to any othor person will be revocable, subject to an exception. which the lower Court has not considered and which may be held not to have been established in the present case. There is therefore nothing found by the lower Court, or on record before us to show that the petitioner's abandonment of the

(1) [1915] 38 Mad. 807—41 I.A. 314—27 M.L.J. 30—18 C.W.N. 1089—1 L.W. 520—(1914) M.W.N. 585—16 M.L.T. 165—20 C.L.J. 253—16 Bom.L.R. 625-12 A.L.J. 1155—24 I.C. 290 (P. C.)

minor to the respondent's custody is not revocable. It is suggested that it makes some difference that Ex. A has been embodied in a decree. To speak strictly, however, it has not been shown us that the material portion of Ex. A. is headed as presented in a partition suit, which was pending and it does not appear that it was, or indeed could have been treated as the basis for an order in the guardianship petition, which also was pending. The learned Judge then states: "The sole question for consideration under S. 7 of the Act is the welfare of the minor" and next says that he does not rely on certain photographs, which indeed have not been pressed on us here. He next refers to a statement in an affidavit of the petitioner in the other proceedings that "so long as his wife chooses to keep away from him, he will act as he pleases." We are not clear as to the meaning of that, or that it entails anything more than that he may marry a second wife, not that he conducts himself in a manner disqualifying him for the custody of his child. That is followed by the mention of the failure. We must, presume that the petitioner had the chance of going into the box and that the respondent's vakil had indicated his wish to cross-examine him, but that he did not offer himself for cross-examination, although it is fair to say that this is disputed here on the petitioner's behalf. It however goes very little way towards supporting the petitioner's case. There is then a finding that there is nothing against the respondent's character. There is lastly the definite and admissible ground mentioned in the lower Court's order that the age of the minor is about four and the fact that he may properly be looked after by his mother for the present. We do not however think that this is sufficient to justify the District Judge, in refusing to give the child to the custody of its father. Each case must of course stand or fall with reference to its particular circumstances. But when there is nothing established against the father, the petitioner, except that he and the respondent have during the past been on bad terms and have been engaged in litigation, that is not in our opinion sufficient.

That however was considered sufficient by the lower Court and it is, we recognise, possible that on that account the respondent did not produce anything in support of her allegations that the petitioner was unfit to have the custody of the child. In these circumstances, we think it right to set aside the order of the lower Court and remand the petition, for rehearing in the light of the foregoing, after the respondent has been given an opportunity to produce any evidence, which she may desire to adduce in support of her allegations, a similar opportunity being of course given to the petitioner.

Costs to date in this Court and in the lower Court will follow the result and will be provided for in the order to be passed.

Order set aside.

Petition remanded.

✱ 1924 MADRAS 46

DEVADOSS, J.

D. K. Kannisa—Defendant—Petitioner.

v.

Devichund—Plaintiff—Respondent.

Civ. Rev. Pet. No. 397 of 1922, D/-19th April, 1923, from the order of the Court of Small Causes, Madras, in U. C. S. No. 22 of 1922, D/-8th May, 1922.

(a) *Presidency Small Causes Court, Rules of- O. 37, R. 1 Form 13—Three days period is unreasonable.*

Though form No. 13 is sanctioned by O. 37, R. 1 yet the direction given in the summons of giving 3 days for obtaining leave to defend before date of hearing is unreasonable and *ultra vires.* [P. 48 C. 2]

(b) *Interpretation of Statutes—Rules and bye-laws if unreasonable are void.*

Rules and bye-laws made by statutory bodies should be reasonable; otherwise they would be *ultra vires* and *void.* In the case of rules framed for the guidance of Courts greater reasonableness and fairness is expected. [P. 48 C. 1]

P. *Venkataraman aRao*—for Petitioner.

P. C. Sundaram Ayyangar—for Respondent.

Judgment.—This is an application udner S. 115 of the Code of Civil Procedure to revise the decree of the Court of the Small Causes, Madras, in U. C. S. No. 22 of 1922.

The facts are these:—The plaintiff brought a suit on a promissory note executed by the defendant. Summons in form No. 13 was served upon the defendant on the 3rd May, 1922. He applied for leave to defend on the 5th May, 1922. The hearing of the case was fixed for the 8th May, 1922. The learned Chief Judge rejected the application for leave to defend on 8th May, as not having been filed three clear days before the date of hearing and decreed the plaintiff's suit. The defendant has preferred the Civil Revision Petition.

The Plaintiff does not appear to oppose the petition. It is contended that the direction contained in the summons is *ultra vires*; and the decision, therefore, of the learned Judge, is without jurisdiction. The direction in the summons is:

"Leave to appear may be obtained on application to the Court, supported by affidavit showing that there is a defence to the suit on the merits, or that it is reasonable that he should be allowed to appear in the suit. The day.....of.....19.....is fixed for your appearance before..... Judge of this Court and the said application and the affidavit must be filed in the Office of the Registrar and copies thereof must be served on the plaintiff or his pleader, not later than three clear days before the said date."

O. 37, R. 1 (1) of the rules of the Court of Small Causes, Madras, reads thus:—

"All suits upon bills of exchange, hundis or promissory notes, may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed. The summons shall be in Form No. 13 in appendix I and it shall not be necessary to serve a copy of the plaint on the defendant."

R. 2 (1) is:

"the Court shall upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application."

The question now is whether the direction in the summons that an application for leave to defend must be filed in the office of the registrar and copies thereof must be served on the plaintiff or his pleader, not later than three clear days before the said day is valid or not. In the first place, there is no provision that summons should be served upon the defendant sufficiently early to enable him to apply three clear days before the date of hearing. If the summons be served on the morning of the day of hearing giving no opportunity to the defendant to comply with the direction contained in the summons, could his right to apply for leave to defend be taken away? There is nothing in the rules, which prescribes the penalty for not applying within the time fixed. In the case of applications coming under Art. 159 of the Limitation Act, the period is ten days, and the time begins to run from the date of the service of summons. But in this case the rule makes no reference to the date or to the time of the service of the summons, but insists upon an application for leave to defend being filed three clear days before the date of hearing. There is no remedy open to the defendant, if he is not served so as to give him sufficient time to apply three clear days before the date of hearing. Though form No. 13 is sanctioned by O. 37, R. 1, yet one has to see whether a direction given in the summons or a time fixed for doing an act by the Court is reasonable or unreasonable. If the rules provide for an extension of time for proper reasons, the direction would not be unreasonable; but where it gives no option to the Court to give relief in

cases of real hardship where the defendant is not to blame, it cannot be held to be reasonable. No doubt, in the case of small causes expedition and saving of time are aimed at, in framing the rules : but the rules should not be such as to make it impossible of compliance, in some cases however honest and *bona fide* may be the attempt on the part of the defendant to comply with the rule. As the plaintiff did not appear, I asked Mr. Sundaram Aiyangar to argue the case as *amicus curiae* for the respondent, and he did his work very satisfactorily. He has drawn my attention to the cases reported in *Stiles* v. *Galinski*, *Nokes* v. *Corporation of Islington* (1) and *Arlidge* v. *Islington Corporation* (2) and *Johnson* v. *Croydon Corporation* (3). Those are the cases in which the Court held that rules and bye-laws made by statutory bodies should be reasonable; otherwise, they would be *ultra vires* and void. In the case of rules framed for the guidance of Courts of Justice ,one should look for a greater degree of reasonableness and fairness. He drew my attention to a case in *Quazie Mahummudar Rohman* v. *Sarat Chandra Dutt* (4) in which Stanley, J., sitting as a single Judge held that he had no power to extend the time prescribed for filing an application for leave to defend a suit, under Chapter 39, of the Civil Procedure Code of 1882. The learned Judge quoted S. 4 of the old Limitation Act and held that he had no power to extend the time. He distinguished a case decided by Pontifex, J., in which that learned Judge extended the time for filing an application for leave to defend on the ground.

" as the defendant lived at Peshawar, the time within which the defendant might obtain liberty to appear and defend should have been 28 days instead of 10 days, the time contained in the form described in the 4th Schedule to the Code."

In *British India Steam Navigation Co.* v. *Sharafally* (5), a Bench of this Court held that as the Small Cause Court was open on certain days during the vacation for the receipt of plaints, petitions and other papers, the Court could not be treated as closed and an application for appeal to the Full Bench which could have been filed on the days the Court was open could not be filed after the close of the vacation. Though S. 148 of the Code of Civil Procedure, Madras which is a new section giving power to a Court to extend any period of time fixed or granted by the Court, for doing any Act prescribed or allowed by the Code, has been extended to the Small Causes Court, yet, the learned Judge had no jurisdiction to extend the time fixed in the summons by the Court, for filing an application for leave to defend, by reason of the definition of the word 'code' in O. 1 (a), R 4 (2). Though form B is according to R. 1 of O. 37, it cannot be said to form part of the rules. If the direction as regards the filing of an application for leave to defend is intended to be made part of O. 37, R. 1, it should have been made clear and a provision should have been made to meet cases, where the defendant could not possibly have three clear days, owing to the service on him within three days of hearing. Taking all the circumstances into consideration, I hold that the direction in the summons is unreasonable and therefore *ultra vires* and the Court by complying with an illegal rule has acted without jurisdiction.

I therefore set aside the order of the learned Chief Judge and direct him to restore the case to his file and to receive the application for leave to defend and to dispose of it according to law.

The costs of this application will be borne by the plaintiff.

Order set aside.

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(1) [1904] 1 K.B., 615.
(2) [1909] 2 K.B. 127—78 L.J., K.B. 553—100 L.T. 903—7 L.G.R. 649—73 J.P. 301—25 T.L.R. 470.
(3) 16 Q.B.D. 708—55 L.J.,M.C. 117—54 L.T. 295—50 J.P. 487.
(4) [1901] 5 C.W.N. 259.
(5) 1923 Mad. 435—44 M.L.J. 100—17 M.L.W. 705—70 I.C. 888.

** 1924 MADRAS 49

PHILLIPS AND DEVADOSS, JJ.

Kondal Rayal Reddiar—Plaintiff—Appellant.

v.

Ranganayaki Ammal—Defendant—Respondent.

App. No. 353 of 1920, D/-2nd March 1923, against the decree of the Dt. Court of South Arcot, in O. S. No. 25 of 1919 D/- 31st March 1920.

Restitution of conjugal rights—Hindu Law - Principles to be followed—Legal cruelty in England and in India—Fear of bodily injury is not necessary—Cessation of marital relations is good cause—Personal violence to wife is not justified.

Courts in India have jurisdiction to entertain suits for restitution of conjugal rights and to grant relief when the parties are Hindus or Mahomedans. 38 C. 37, Ref. and they are enjoined to decide according to justice, equity and good conscience. [P. 51 C. 1]

Cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in would undermine the health of the wife, is sufficient justification for refusing to the husband a decree for restitution of conjugal rights. When a husband, who is guilty of a course of conduct which would be regarded as cruel to the wife, comes before a Court seeking its aid to compel his wife, to submit to his embraces it is the duty of the Court to see whether the health of wife is likely to suffer by forcing her against her will to live with him. [P. 54 C. 1,2]

In a case of restitution of conjugal rights by the husband the facts found were :—

1. The husband charged the wife with the attempted murder of her husband by poison.

2. He insulted her on more than one occassion and called her by the most vile epithet

3. He treated her with loathing and disgust and abused her when she took some butter-milk to him, and he expressed his disgust by getting up from his unfinished meals.

4. He sent word through a servant that if she went back to him she would be dragged out by a Pariah and slippered.

5. He threatened her with violence by saying that he would lash her to pieces with a knife and allowed the second wife to abuse her and to say that she (meaning the 1st defendant) deserved to be made to stand in the road and be spat on by the passers by, that it was enough that she had not wrong its (child's) neck and thrown it into the well and that if she touched the child again she would be beaten with broom stick.

6. He used personal violence by pushing her by neck. The mother-in-law and the paternal aunt who treated her with kindness turned against her after the charge of an attempted murder was ventilated by the husband.

It was further found that the husband had no marital relations with his wife (1st defendant) for a period of more than 7 or 8 years.

Held : **that these circumstances are sufficient to make out cruelty under English Law.** [P. 55 Cs. 1,2]

Held : **further that it would be cruel now to force the wife to go back to her husband against her will.**

No doubt, some times the Hindu Society overlooks personal violence to the wife by the husband, but when a Court's intervention is asked for, the Court should not be guided by the public opinion in a country village, but by what is just and equitable in the circumstances. [P. 55 C. 2]

T. M. Krishnaswami Aiyar and T. M. Ramaswami Aiyar—for Appellant.

S. Swaminathan—for Respondent

Judgment.—This is an appeal by the husband against the decree of the District Judge of South Arcot, dismissing his suit for restitution of conjugal rights against the 1st defendant, his wife, on the ground that he was guilty of legal cruelty The plaintiff's case is that he married the 1st defendant about 18 years ago, that he lived with her as husband and wife till she left him, that he had to marry a second wife as the 1st defendant had no issue, that the 1st defendant left him about 19 months before he filed his plaint, at the instigation of the 2nd defendant, her father, and the other defendants have induced her to stay away from the husband and that he was entitled to restitution of conjugal rights against the 1st defendant. The 1st defendant pleaded that the husband was guilty of cruelty, that she was ill-treated by him, that he falsely charged her with an attempt to poison him and that when she went to the husband's house at the request of her father, he pushed her out by the neck and threatened to slipper her if she ever crossed his threshold. The learned District Judge has believed the evidence of the defendants and their witnesses and refused the plaintiff any relief.

M. T. M. Krishnaswami Iyer who appears for the appellant contests the finding of fact and argues that on the facts found no legal cruelty has been established. The admitted facts are that the 1st defendant was married to the plaintiff when she was

quite young, that she lived with him as man and wife for about ten years, that as she had no issue the plaintiff married a second wife about 1913, that the 1st defendant continued in her husband's house for about five years after the second marriage and has left the husband's protection. She filed a petition for maintenance on 14th November, 1918 before the Sub-Divisional Magistrate of Tindivanam and he passed an order in her favour on 22—2—1919 and the revision petition by the plaintiff against that order was dismissed by the High Court on 28—7—1919. He filed his suit on 7—4—1919.

The plaintiff as his 1st witness swears that he lived with the 1st defendant as man and wife till she left him without any ostensible reason. His suggestion for her leaving him is that her father applied to him for a loan of Rs. 1,000 for the purpose of prosecuting a case against one Kamalatchi Ammal and he refused to lend him money whereupon the father took the daughter away and refused to send her back. He denies the allegation that he suspected his wife of an attempt to poison him and denies the acts of cruelty. The plaintiff is a man in well-to-do circumstances and seems to be very influential in his own village. His evidence is supported by P. W. 3 his paternal aunt, a widow living in his family. The other witnesses on his side do not throw any light on the matters in dispute. On the other hand, the 1st defendant has been examined as D. W. I and she says that there were no marital relations between her and the plaintiff after he married his second wife, that he would not even speak to her, that he took away her jewels on some pretext, that she was made to do household work like a servant, that he abused her when she took some butter-milk to him to be taken with his food, that he did not drink the butter-milk but he got up from his unfinished meals and said that he would not drink from her hand even in the next birth, that he would not allow her to touch the child of the second wife though the child was attached to her, that when he suffered from a slight ailment, he charged her with having put poison in his coffee, that he used very violent language to her, that he and his mother gave directions that she should not enter the kitchen which was the only room she had entered up to that time after the second marriage and that she unable to bear the cruel treatment left the house, and went to Korakady to live with her father and mother and that the father after sometime brought her to her husband's house and when she entered the house he came from inside and necked her out. Her evidence is supported by that of her father as regards her being pushed out by the neck when he took her to the husband's house. D. W. 4, the Village Munsif of the place against whom no serious motive has been alleged says that he was sent for on one occassion by the plaintiff, that when he went to his house his mother and paternal aunt showed him a Karandagum (a small metallic box), and asked him to open it and he did so and it emitted a bad smell. He was told that the 1st defendant was keeping that medicine for poisoning her husband. He asked that the 1st defendant should be sent for and as she was unable to go to him she sent word that it was kept by her for stomach-ache and he was afterwards told that she proved the innocuousness of the medicine by taking it herself. The other witnesses support the evidence of the 1st defendant that the husband considered her to be a disgusting woman and said that he would have no relations with her.

The learned Dt. Judge after carefully examining all the evidences has come to the conclusion that her version of the case is better entitled to weight than that of the plaintiff. I have no hesitation in agreeing with him inasmuch as no arguments have been put forward on the side of the plaintiff which could in any way induce me to consider that the learned Judge has not correctly appreciated the evidence in the case.

The next question pressed by the appellant is that the acts of cruelty found are not sufficient to establish a good defence to the plaintiff's suit for restitution of conjugal rights. It is

now settled that Courts in India have jurisdiction to entertain suits for restitution of conjugal rights and to grant relief when the parties are Hindus or Mahomedans, Vide *Surjyamoni Debi* v. *Kali Kanta Das* (1). But the difficult question is under what circumstances would a Court be justified in refusing to grant the relief asked for in such a case. In this case the parties are Hindus. Mr. Mayne in his book on Hindu Law sums up the law thus: "When the marriage is once completed if either party refuses to live with the other, the case is no longer one for specific performance of contract but for restitution of conjugal rights." (S. 96) "Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there, or such continued ill-usage as would be termed cruelty in any English matrimonial Court." (S. 456). Mr. Krishnaswami Iyer strongly pressed on our attention the case of *Russell* v *Russell* (2), and contended that a mere allegation of commission of an offence would not amount to cruelty and that his client though hastily thought that the 1st defendant was capable of poisoning him, he repented of it and that inasmuch as he was anxious to live with her he entertained no fear of her poisoning him and therefore she was not entitled to live away from him. He also contended that the only act of actual cruelty in the popular sense was her being shoved out when she went to his house after leaving him for a time. In this connection, it must be remembered that the plaintiff does not admit having made an unfounded charge but denies having made it. He does not plead that he has forgiven his wife or that he was misled into thinking that she was capable of committing a heinous offence but totally denies having made any such charge. Therefore, there can be no repentance on his part and the way in which this case has been pressed shows that he is anxious to have a decree in his favour without any regard to the welfare of his wife. In *Russell* v. *Russell* (2) the House of Lords held that "a false charge of having committed an unnatural criminal offence brought by a wife against her husband although published to the world and persisted in after she did not believe in its truth, is not sufficient legal cruelty to entitle the husband to judicial separation." The case was decided by a majority of 5 Lords against 4. Before considering the English authorities it is to be borne in mind that the Matrimonial Law of England is the Canon Law of the church and matrimonial causes were heard and determined by Ecclesiastical Courts. According to Canon Law strict monogamy is the rule. The Roman Church even now does not recognise divorce. The Anglican Church though it allows divorce is still leaning towards strict monogamy. It was only under the Matrimonial Causes Act 20 and 21 Vict. Chap. 85 that the King's Courts were given jurisdiction to entertain matrimonial causes and by S. 22 they were directed to determine them as far as possible on the principles of the ecclesiastical law. That jurisdiction is now exercised by the Probate Division of the High Court of Justice. The legislature did not alter the Canon Law except in a few matters and the judges who administer the law are bound by the precedents which were established in the Ecclesiastical Courts. To import the Ecclesiastical law of England whole sale into India is as injudicious at it is inequitable. In the Christian countries monogamy is the rule. No man or woman can marry a second time when the first marriage is subsisting. In England therefore if a wife or husband refuses to cohabit or to render to one another marital duties, the other party cannot have any relief except such as is granted by the Courts and that is the reason why Courts were strict in enforcing the marital duties and were jealous of the rights of the parties to the marriage and would not allow any violation of the marital tie, and compelled the recalcitrant party to submit to the embraces of the other, and forced them to live as man and wife. In India the Hindu Law permits a man to have more than one wife at

(1) [1901] 28 Cal 37—5 C.W.N 195.
(2) [1898] A.C. 307—67 L.J.,P. 69.

the same time, but among the higher castes, a woman can marry only once. When a man marries more than one wife and ill-treats one of his wives in such a way as to make it impossible for her to live with him not merely with any degree of comfort but without danger to her health, the question for consideration is should the Court enforce the strict rule of English Ecclesiastical law or should it consider whether the circumstances of each case would justify its using its power to compel the wife to live with her husband who hates and loaths her, and when by such residence her health is likely to be seriously impaired. The Courts in India are enjoined to decide according to justice, equity and good conscience in cases where no specific rule exists and they naturally look to the English decisions for guidance. The common law of England furnishes precedents which are in conformity with equity, justice and good conscience. But the Ecclesiastical law of England is not the common law of England and the former is applicable to a sate of things which does not obtain in India and therefore great care should be exercised in importing wholesale in India the strict principles of the Ecclesiastical law of England which are embodied in the decisions of the English Courts. Even in England the tendency of the latter cases is to relax the extreme stringency of the rules of Ecclesiastical law as regards marital rights and duties in order to give relief where a Court of equity would consider such relief to be proper.

With these preliminary remarks I will examine the cases relied upon by the appellant. In *Russell* v. *Russell* (2), the wife brought a suit for restitution of conjugal rights and the husband resisted it on the ground of cruelty by the wife. The cruelty proved was "that from that time after the trial, although she had heard the verdict in favour of her husband at the close of the trial, that she thenceforth wrote letters, made statements, pursued her husband, practically insisted on the same charge not by one single act or by any single letter, but by a continuance and persistence in conduct of that sort." The charge was that he was guilty of an unnatural offence. The case was tried before Pollock B with a jury. He pronounced a decree for a judicial separation. The Court of appeal held that the husband was not entitled to a decree for judicial separation. Two of the learned Lords Justices, Lopes and Lindley, define cruelty thus : "There must be danger to life, limb or health, bodily or mental, or reasonable apprehension of it." The leading judgment in that case was delivered by Lord Herschell who held that the wife's persistence in making a false charge against her husband knowing the charge to be false, however culpable such conduct was, did not amount to legal cruelty. He followed the dictum of Lord Stowell in *Evans* v. *Evans* (3) and held that the plaintiff's act did not amount to legal cruelty. Lord Stowell in the course of the judgment in *Evans* v. *Evans* (3) observes : "I take it the rule cited by Dr. Bever from Clarke and the other books of practice, is a good general outline of the Canon Law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it and I have heard not one case cited in which the Court granted a divorce without proof given of a reasonable apprehension of bodily hurt." After an examination of a number of cases Lord Herschell observes at page 455. "I think the law of restitution of conjugal rights as administered in the Courts did sometimes lead to results which I can only call barbarous. I need seek no better illustration of this than the case of *Holmes* and *Holmes* decided in 1755 which is relied on for the proposition that the Courts can only refuse restitution on grounds which would justify a divorce. Conduct of a most

(3) [1790] 1 Hagg. Cons 35.

revolting character on the part of the husband was held to afford no answer to his claim for a restitution of conjugal rights. Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it would still be to my mind unsatisfactory that a husband who, though stopping short of cruelty in that sense, had by result and outrage driven his wife to leave him, should without repentence for the past or any assurance of amendment for the future, be able to invoke the assistance of the Court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation. One would think that the Court may well refuse to afford its assistance to one who acted thus, and notwithstanding the decision to which I have referred there are not wanting dicta of eminent Judges, and notably, of Lord Stowell, that something short of legal cruelty 'might bar a suit for restitution.' However that may be, the matter is of less importance than it formerly was, as the legislature has interposed ; and even if the Court is still bound to make a decree for restitution, it is no longer bound to enforce it as before." Lord Davey who agreed with Lord Herschell was obliged to confess. "My only duty is to say whether the appellant's contention is conformable to the principles on which the Ecclesiastical Courts formerly acted and gave relief. I am constrained to say that in my opinion it is not.."

Considering the rigour of the Ecclesiastical Law the legislature interposed and made it optional with the Court to enforce the decree for restitution of conjugal rights by imprisonment. O. 21, rule 32 of the Civil Procedure Code prescribes the mode in which a party could be compelled to obey a decree for restitution of conjugal rights ; but I am not aware that the Court could refuse the execution of a decree unless it be that the health of the party against whom the decree is sought to be executed, would suffer by such restitution. The latitude given to the English Courts has only been recently given to the Indian Courts by O. 21, R. 33, C. P. C. as regards the execution of decrees in such cases. Lord Halsbury who differed from the majority says at P. 420 : "In the view the Ecclesiastical Courts took of the sanctity and perpetual obligation of the rights between spouses, it is intelligible enough that they should have sternly enforced the duty of continued cohabitation except in such cases as, to use the phrase continually recurring, "when the facts show an absolute impossibility that the duties of married life can be discharged." With regard to the conduct of the plaintiff, he observes. "For my own part I believe an accusation of this kind is an incurable injury to the person against whom it is directed." Lord Hobhouse who was also in the minority in considering what would be 'cruelty' observes as follows. "That violence and bodily danger are for the most common forms of cruelty accounts for the frequent repetition of the formulæ relating to such cases. But we find not only judicial recognition that there may be other forms of cruelty but judicial dicta and decisions taking a wider range and quite irreconcilable with the rigid line by which it is now sought to confine the jurisdiction of the Court ;" and after an examination of the cases on the point, he says. "The conclusion I draw from the authorities is that there is no rigid rule to exclude from the consideration of Judge or jury a case where acts cruel in their nature are so grave as to destroy the foundations of conjugal life. I do not think that any rule can be laid down less wide than that of Lord Stowell : "That the causes must be grave and weighty and such as to show an absolute impossibility (meaning of course a moral impossibility) that the duties of married life can be discharged. The fact, that violence and personal danger are far the most common grounds alleged for separation, has led to repeated statements of the doctrine of danger in terms applicable and appropriate to those cases. But they are only one class of the broader category indicated by Lord Stowell."

In *Bray* v. *Bray* (4) Sir John Nicholl

(4) Hagg. E.C.P. 163.

observes with regard to the conduct of the husband who accused his wife of the most abominable inter-course that can possibly be conceived, no less than incest with one of her nearest relations. " It is not I think possible to conceive cruelty of a more grievous character (except perhaps great personal violence) than the accusation made by this husband against his wife."

Cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. In *Kelly* v. *Kelly* (5) it was held " if force whether physical or moral is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree it is legal cruelty and entitles her to a judicial, separation." In that case, the husband adopted a deliberate system of conduct towards his wife with the view of bending her to his authority. No physical violence was found against the husband but only a course of conduct which was a kind of tyranny to the wife. Channel B. in the course of the judgment observes. " It would be difficult to frame a definition of legal cruelty which should be applicable to all the cases which may arise. The object of the matrimonial Court in exercising its jurisdiction in decreeing judicial separation for cruelty is to free the injured consort from a cohabitation which has been rendered, or there is imminent reason to believe will be rendered, unsafe by the ill usage of the party complained of. It is obvious that the modes by which one or two married persons may make the life or health of the other insecure are infinitely various, but, as often as perverse ingenuity may invent a new manner of producing the result, the Court must supply the remedy by separating the parties. In *Bethune* v. *Bethune* (6) the President of the Probate Division Sir James Hannen gave a decree for divorce on the ground of adulterv coupled with cruelty, the cruelty consisting of a long course of systematic neglect and insult. The law is summed up in Halsbury's Laws of England, Vol. 16 S. 976 "A course of conduct calculated to break the spirit of the sufferer (more usually the wife) continued till health breaks down or is likely to break down under the strain sometimes .termed 'constructive cruelty' is also a ground for relief," and reliance is placed for the proposition upon a number of cases. In India there are three cases in which it was held that it was not necesary to prove physical violence in order to deny the husband a decree for restitution of conjugal rights, *Thompson* v. *Thompson* (7) and *Armour* v. *Armour* (8).

The facts proved in this case are sufficient in my opinion to deny the plaintiff the relief claimed by him. When a husband, who is guilty of a course of conduct which would be regarded as cruel to the wife, comes before a Court seeking its aid to compel his wife to submit to his embraces, it is the duty of the Court to see whether the health of the wife is likely to suffer by forcing her against her will to live with him. The observations of Lord Brougham in *Paterson* v. *Paterson* (9), seem to be peculiarly applicable to the present case. "If the husband, without any violence or threat of violence to the wife—without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health—were to exercise mere tyranny, to utter constant insults, vituperation, scornful languge, charges of gross offences, (utterly groundless) charges of this kind made before her family, her relations, her friends, her servants, insulting her in the face of the world,

(5) L.R. 2 P.D. 59—39 L.J., Mat. 31.

(6) [1891] P. 205—60 L.J.,P. 18 — 63 L.T. 259.
(7) [1913] 39 Cal. 395—15 I. C. 886.
(8) [1906] 1 A.L.J. 318.
(9) 3 H. L. Cas. 308.

and of her own domestics, calling upon those servants to join in those insults, and to treat her with contumely and with scorn—if such a case were to be made out or even short of such a case, viz., injurious treatment which would make the married state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Chancery Courts of this country would so far relax the rigour of the negative rule, at present somewhat vague, as to extend the remedy by a divorce a *mensa et thoro* to a case such as I have put". This observation was made before the Matrimonial Causes Act gave a salutory relief in hard cases. The facts found in this case are:

(1). The husband charged the wife with the attempted murder of her husband by poison.

(2). He insulted her on more than one occasion and called her by the most vile epithet.

(3) He treated her with loathing and disgust and abused her when she took some butter-milk to him, and he expressed his disgust by getting up from his unfinished meals.

(4) He sent word through a servant that if she went back to him she would be dragged out by a Pariah and slippered.

(5) He threatened her with violence by saying that he would lash her to pieces with a knife and allowed the second wife to abuse her and to say that she (meaning the 1st defendant) deserved to be made to stand in the road and be spat on by the passers-by, that it was enough that she had not wrung its (child's) neck and thrown it into the well and that if she touched the child again she would be beaten with broom stick.

(6) He used personal violence by pushing her by neck. The mother-in-law and the paternal aunt who treated her with kindness turned against her after the charge of an attempted murder was ventilated by the husband. I think these circumstances are sufficient to make out cruelty under English Law. But in India where the conditions are different it is not necessary to implicitly follow the precedents of the Ecclesiastical Courts in considering what is equitable in the circumstances. The Indian Courts are Courts of justice, equity, and good conscience and though a decision of the House of Lords is to be regarded with the utmost respect, yet it is not binding upon the Indian Courts and where the decision rests not upon the principles of Common Law but upon the peculiar principles of the Ecclesiastical Law of England, the Courts in India are not bound to follow the decision; for the simple reason that the Ecclesiastical Law of England is not the law of this country and monogamy, so far as the husband is concerned, is not the rule of Hindu Law. The Hindu Law does not recognise any divorce. It permits a husband to have as many wives as he likes. The husband in this case had no marital relations with his wife (the 1st defendant) for a period of more than 7 or 8 years and it would be cruel now to force the wife to go back to her husband against her will.

Mr. Krishnaswamy Aiyar argued that the plaintiff was anxious to have his wife back, that he had repented of his past conduct and that he is willing to treat her as a wife should be. He also urged that in country places personal violence towards the wife by the husband is excusable and that we should not apply to the parties the principles which would govern a case where the parties are educated and enlightened. I am not prepared to believe that domestic relations in the moffusil and in the country places are as described by Mr Krishnaswamy Aiyar. No doubt, some times the Hindu society overlooks personal violence to the wife by the husband, but when a Court's intervention is asked for, the Court should not be guided by the public opinion in a country village, but by what is just and equitable in the circumstances. In this case the plaintiff is a man of influence in his own village. There is no public opinion at all in that place. Is there safety or security for the wife if the husband chooses to charge her again with an attempt to poison him and hands her over to the Police on his becoming slightly ill and for which illness he could not find any reason

There is no guarantee that the suspicion which he once entertained will not be revived again if he or his second wife or his second wife's child should fall ill. If he was really anxious to have his wife back, he could very well have gone to her and offered to treat her properly. When the maintenance proceedings were before the Sub-Divisional Magistrate, he suggested that the parties should settle the matter out of Court and the plaintiff in order to make out that he was willing to settle the matter sent his bandyman to fetch his wife and she rightly refused to go with him as she thought that the plaintiff was attempting to dupe her. If he was in earnest he could have sent his paternal aunt or any of his female relations to fetch her. I am not prepared to put any faith in the protestations of Mr. Krishnaswami Iyer on behalf of his client. A Hindu wife looks upon her husband as her lord and master and she has no happiness outside her husband's house. Knowing the conditions in India as we do, I am not prepared to believe that a Hindu wife would stay away at the instance of her father or other relations when there was no sufficient reason for her conduct, for she considers her husband's home is her proper place and she would not leave it without the gravest reason as she has nothing to look forward to, here or hereafter. There is a civil suit pending in which the wife seeks to recover her jewels from the husband. I am satisfied that the plaintiff has brought this suit only to satisfy his vanity and to defeat the order made in favour of the wife for maintenance and this suit is not a *bona fide* attempt to get back his wife to continue the marital relations. I consider that the facts establish sufficient cruelty on the part of the husband which would justify the Court in refusing the plaintiff the relief he seeks. The case might perhaps be different if the Court is aked to dissolve the marriage; but in a case of restitution of conjugal rights, the Court need not consider what would be sufficient to grant a divorce according to the matrimonial law of England. On the other hand, before passing a decree in favour of the husband the Court should be satisfied that by giving its aid to him it does not thereby endanger the life, limb, liberty or the health of the wife. If there is danger to any of these, the Court would be amply justified in refusing to give a decree for restitution of conjugal rights.

The learned Judge has decreed separate residence to the wife. There is no counter-claim by the defendant to the plaintiff's suit and I do not see how the Court should grant a decree for separate residence when there is no proper claim for it. That portion of the decree of the lower Court should be expunged.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 MADRAS 56

OLDFIELD AND VENKATASUBBA RAO, JJ.

Govinda Kaviraj Purohita—Applicant.

v.

Gauranga Saw and others—Respondents.

Stamp Reg. Nos. 20595 and 20954 of 1922 and S. A. 580 of 1922, D/-16th February, 1923, against the decree of Dt. Court, Ganjam, in A. S. No 442 of 1919.

Civil P. C., O. 1 R. 10--& S. 153—Respondent dead at the date of filing appeal--Respresentatives cannot be added.

Where the respondent, whose name was entered in the appeal as presented, was found to have died before the presentation and the appellant applied to substitute for his name those of his legal representatives.

Held: that an appeal cannot be presented against a person who has ceased to exist and that the appellant should file another appeal and have the delay due to his mistake, committed in good faith, excused. [P, 57 C. 1]

C. Sambasiva Rao—for Applicant.

B. Jagannada Dass-for Respondents.

Judgment.—These are applications to the Court to amend the cause title in a Second Appeal and to excuse the delay in seeking that relief. It will of course be unnecessary to consider the second application, unless the first

succeeds The circumstances, in which the amendment is asked for are that the respondent whose name is entered in the appeal as presented died before the presentation. We are now asked to substitute for his name those of his legal representatives. The objection to this is that an appeal cannot be presented against a person who has ceased to exist. O. 1, R. 10 is relied-on; but we do not see our way to apply it here since it refers only to suits instituted in the name of a wrong person, and we do not think that it is applicable to a case such as the present. The power conferred by S. 153 is general; but again we do not think we ought to use it, while another course is open to the petitioner, that course being to file another appeal and to have the delay due to his mistake, committed in good faith, excused.

Taking this view we must dismiss these applications and also the Second Appeal on the ground that no such proceeding as an appeal against a party, who is deceased, is authorised by the Code. There will be no costs in the Second Appeal; but the petitioner will pay the respondent's, costs in the petitions.

Petitions dismissed.

✱✱ 1924 MADRAS 57

KUMARASWAMI SASTRI, J.

Visvanathan Chetty and others—Plaintiffs—Appellants.

v.

S. Ethirajulu Chetty and others—Defendants—Respondents.

C. S. Nos. 20 and 88 of 1921, D[-30th August, 1922.

(a) *Limitation Act, Art. 10—Equity of redemption is not capable of physical possession.*

where the sale was of the equity of redemption:

Held the property cannot be said to be capable of physical possession within the meaning of Art. 10 and limitation began to run from the date of the registration of the deed of sale. 9 All 334 Foll. [P 60 C 2]

(b) *Limitation Act, Art. 10—No notice of registration is necessary.*

Where the Legislature expressly states that limitation begins from registration without any reference to whether the transaction was with or without notice Courts cannot go into any question of notice in dealing with the question. [P 61 C 1]

(c) *T. P. Art., S. 60—Right of pre-emption or specific performance is no defence.*

Having regard to the provision of the Transfer of Property Act as regards the right of redemption and of S. 54 as regards the effect of a contract for sale, it can be no defence to a suit for redemption to state that the defendant has got a right to purchase the property under a contract which right he is unable to enforce owing to the bar of limitation. 13 Mad. 490; 20 Mad. 305 Not foll. 24 M. 449; 40 Mad. 1134; 33 M.L.J. 252; 29 Mad. 336; 16 M.L.J. 395 (F.B.) Foll. [P 61 C 2]

In suits for possession under title it is no defence to say that the defendant has got a right to enforce specific performance of a contract. A suit under S. 60 of the T.P. Act which is absolute in its terms and applicable to all mortgages and which gives an absolute right to redeem cannot be met by an agreement of pre-emption which, under S. 54 of the Act, confers no right to immoveable property, especially, when a suit to enforce the right of pre-emption is barred under Art. 10. [P 61 C 2]

(d) *Minor — Preemption, minor is not entitled to.*

The moment minor (pre-emptor) plaintiff elects to buy the property he affirms the contract and the same legal consequences follow as if there was a contract to buy and it is difficult to distinguish the case from the case of an ordinary contract to purchase. Althouh there is no mutuality in its inception, when the plaintiff elects to purchase the property and gives notice of his intention to buy it becomes a contract like any other contract to purchase immoveable property and is governed by the same principles which govern other contracts, 39 Cal. 232; (P.C.) applies therefore to such cases. There being no mutuality pre-emption cannot be decreed. [P 62 C 2]

(e) *Preemption. — Prohibiting alienation & refusal to pre-empt bar relief.*

Where the plaintiff not only did not express his willingness to pre-empt, but prohibited the alienation.

Held the right of pre-emption was not exercised and plaintiff could not get a decree for pre-emption. 39 All. 127; 42 All. 402 Foll, [P 62 C 2]

V. Radhakrishnayya — for Appellants.

P. Venkatramana Rao—for Respondents.

Judgment.—This (C. S. No. 20 of 1921) is a suit by the plaintiff for the enforcement of pre-emption alleged to be conferred on him by two deeds of mortgage dated 27th November, 1915 for Rs. 2,500 and 25th April, 1914 for Rs. 3,000 executed by the 1st defendant in favour of the plaintiff who was then a minor and represented by his father and natural guardian,

Kumaraswami Chetti. The 2nd and 3rd defendants are impleaded as alienees of the mortgaged property with notice. The case for the plaintiff is that the 1st defendant executed the two deeds of mortgage in favour of the plaintiff, then a minor, that the first deed of mortgage contained the following covenant;—"that the mortgagor will, not, during the continuance of the security, in any way or manner deal with the scheduled property or any portion thereof either by way of sale, mortgage, charge, lease or otherwise without obtaining the previous consent in writing of the mortgagee permitting and authorising the mortgagor to do so and that the mortgagee shall have the right of pre-emption in respect of the scheduled property." The second deed of mortgage stated that all the terms and conditions of the first mortgage should, *mutatis mutandis*, be treated as applicable to the said deed. The plaintiff states that by reason of these two clauses he is entitled to a right of pre-emption in respect of the property, "that the plaintiff has recently come to know that on the 9th April, 1918 the 1st defendant sold to P. S. N. Muruganathan Chetti the property mentioned in the schedule hereto for a consideration of Rs. 3,025 in cash and the purchaser covenanted to pay to the plaintiff the amount due on the deeds of mortgage and the further charge above referred to and that the said P. S. N. Muruganathan Chetti by a deed of sale dated the 3rd July, 1919 sold the said house and ground together with another property to the 2nd and 3rd defendants herein. The 2nd and 3rd defendants sent a notice dated the 3rd May, 1920 through their Vakils, Messrs. Madhavan and Rangaiya, to the plaintiff in which they informed him of the fact of the purchase and offered to redeem the mortgage and the further charge. On the 5th July, 1920 the plaintiff through his vakils sent a reply to the said letter in which he *inter alia* pointed out to the 2nd and 3rd defendants that he had a right of pre-emption in respect of the said property, that the transfers of the said property by 1st defendant to P. S. N. Muruganathan Chetti and by the said Muruganathan Chetti in favour of 2nd and 3rd defendants had been effected without the plaintiff's knowledge or consent and that the plaintiff was entitled to enforce his right of pre-emption against 2nd and 3rd defendants. The plaintiff tendered with the said letter a sum of Rs. 3,025 and called upon the 2nd and 3rd defendants to execute a conveyance in favour of the plaintiff but 2nd and 3rd defendants refused to receive the said sum and failed and neglected to execute the conveyance." The plaintiff therefore prays that the defendants, or such of them as the Court may find liable, be directed to execute a conveyance in favour of the plaintiff of the property described in the schedule on payment of Rs. 3,025 or such other sum as the Court may find payable by the plaintiff.

The first defendant filed a written statement in which he pleads that the sale by him to Muruganathan Chett was subject to the covenants in the two deeds of mortgage and that the sale to the 2nd and 3rd dafendants by Muruganathan Chetti was a sham and colorable transaction. He says that there is no cause of action against him and that he necessary party to the suit.

The 2nd and 3rd defendants raise various pleas. They state that th agreement contained in the two deed of mortgage is void and unenforceabl as being a clog on the equty o redemption, that it is also no enforceable because of plaintiff' minority at the date of th mortgages and that opportunity was given by the 1st defendant to the plaintiff's guardian to purchase the property but that the offer was refused, that the claim is barred by limitation, that, in any event, the option to purchase not being exercised before the period for redemption expired, it ceased to have any legal effect and is not enforceable. He says he is willing to redeem the property and that the tender of Rs. 3025 was not a valid tender.

Suit No. 88 of 1921 is a cross suit to redeem the mortgages:

The following issues were settled:—

1. Is the plaintiff entitled to a right of pre-emption in respect of the suit property ?

2. Is the recital in cl. 16 of the mortgage deed dated the 25th April, 1914 a clog on the equity of redemption and is plaintiff in consequence deprived of his right of pre-emption?

3. Is the covenant as to the right of pre-emption void and unenforceable for the reasons set out in paragraphs 9 and 10 of the written statement of defendants 2 and 3 ?

4. Is the plaintiff precluded from asserting his right of pre-emption for the reasons set out in paragraph 10 of the written statement of defendants 2 and 3 ?

5. Is the plaintiff's claim barred by limitation ?

6. *(a)* Was it a condition precedent for the coming into operation of the sale dated 9—4—1918 to P. S. N. Muruganathan Chetti that he should be bound to sell and convey the equity of redemption to the plaintiff as stated in paragraph 4 of the 1st defendant's written statement ?

(b) If so, can the 2nd and 3rd defendants resist the claim of the plaintiff for pre-emption ?

7. Is the sale deed, dated the 3rd July, 1919 in favour of 2nd and 3rd defendants, a sham, nominal, fraudulent and colourable transaction and hence void and unenforceable in law as stated in paragraph 5 of the 1st defendant's written statement ?

8. Is the 1st defendant not a necessary party to the suit ?

9. Is the tender by the plaintiff a valid tender ?

10. To what relief is the plaintiff entitled ?

The deed of mortgage dated 25th April, 1914 is Ex. A. The material clause is cl. 16 and has been set out in page 2. The plaintiff was then a minor aged 12 years and the deed purports to have been executed in his favour and he was represented by his father and natural guardian Kumaraswami Chetti. The 2nd deed of mortgage is filed as Ex. B. and it incorporates the provisions of the first deed of mortgage as regards the clause in question. On the 4th April, 1918 the 1st defendant wrote a letter to Kumaraswami Chetti, the father of the plaintiff wherein he states that he represented to him some time ago that he wanted to dispose of the equity of redemption of the mortgaged property, as he was getting old and finding it difficult to make any arrangement for payment of interest and taxes and that he was told by the guardian that he might dispose of the same if he got a price more than Rs. 8,000. He proceeds as follows:—"I have been negotiating for the same ever since but I thought it desirable to give you another opportunity before I finish the sale elsewhere. I therefore requst you to reconsider and to inform me within one day after the receipt of this letter your last offer for the same, so as to enable me to finish the sale of the same elsewhere." To this letter a reply was sent on the 5th April, Ex. D, wherein the plaintiff's guardian denies the allegation in the letter under reply that he asked him to dispose of the property elsewhere if he got more than Rs. 8,000. He then proceeds as follows:—"Do you mean to say that I have forgotten the paragraph No. 16 of the mortgage deed executed by you. Kindly go through paragraph 16 of the firts mortgage deed in which it is clearly stated that you should not do anything with the said premises either by sale or by mortgage, lease or otherwise without my consent. Under the circumstances you have no voice to do anything in the matter until 1st May 1920 which please note." On the 9th April 1918, the 1st defendant sold the property to one Muruganathan Chetti under Ex. E. It recites that on the 9th February 1918, the 1st defendant agreed to sell to Muruganathan Chetty the property mortgaged to the plaintiff "subject to the conditions and limitations prescribed therein and now subsisting and capable of taking effect." On the 3rd July 1918 Muruganathan Chetty sold the property under Ex. F to the 2nd and 3rd defendants. On the 1st April, 1920 the 2nd and 3rd defendants gave notice to the plaintiff's father and guardian (Ex. G.) offering to redeem the property. To this a reply was sent Ex. K, on the 5th July, 1920, wherein they set up their claim under

cl. 16 of the mortgage deed for pre-emption.

I shall first deal with the question of limitation raised. It is clear from the correspondence which I have referred to that in 1918 the 1st defendant gave the plaintiff's father and guardian notice of his intention to sell the property and asked him what offer he had to make and that in 1918 the position taken up was that the 1st defendant had no power to sell and no offer was made by the plaintiff's father as to what price he was prepared to pay for the house. The case of pre-emption is governed by Art. 10 of the 2nd schedule to the Limitation Act which prescribes a period of one year in a suit to enforce a right of pre-emption, the period to run from the time when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the properties sold or, where the subject of the sale does not admit of physical possession, from the date on which an instrument of sale is registered. S. 8 of the Limitation Act states that nothing in Ss. 6 and 7 of the Limitation Act which gives an extended period in cases of minors or of persons under a disability applies to suits to enforce rights of pre-emption or shall be deemed to extend for more than three years from the cessation of the disability or the death of the person affected thereby the period within which any suit must be instituted or application made. In this case the minority of the plaintiff which would otherwise bring the case under S. 6 does not extend the period and similarly Cl. (3) of S. 17 which refers to the fact of death before the right to sue accrues says that nothing in subsections (1) and (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office. The minority of the plaintiff therefore is an element which cannot be taken into consideration in dealing with the question of limitation under Art. 10. In this case as the property was under mortgage to the plaintiff with possession and the plaintiff was in possession of the property, all that can be sold was the equity of redemption equity of redemption not being one of which physical possession could be given, the case falls under the latter part of Art. 10. Where the subject matter does not admit of physical possession, limitation runs from the date when the instrument of sale is registered. In *Shiamsunder* v. *Amanand Begum* (1) it was held that in cases where the sale was of the equity of redemption the property cannot be said to be capable of physical possession within the meaning of Art. 10 of Schedule II to the Limitation Act and limitation began to run from the date of the registration of the deed of sale. In *Intizar Hussain* v. *Jumma Prasad* (2) it was held that the property in that case which was the sale of an undivided share was not capable of physical possession and that limitation must be computed from the date of registration of the sale-deed. In *Umrao Beg* v. *Mukhtar Beg* (3) which was also a case of a fraction of a share of a Zamindari situated in several Khatas, it was held that limitation began from the date of registration. In *Nagina Singh* v. *Dhuni Chand* (4) a similar view was taken by the Punjab High Court. The property sold was a property which was in the possession of a mortgagee and it was held that it was incapable at the time of sale of physical possession being given over and limitation began to run under Art. 10 for one year from the date of registration. It was also held that it was immaterial whether registration was made with or without the consent of the vendor as in either registration was equally effective. In *Velayudham Pillai* v. *Tina Velayudham Pillai* (5) Justice Krishnan observes as follows:—"In cases where there is an outstanding interest in third parties in the property sold

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(1) [1887] 9 All. 234–(1887) A.W.N.24.
(2) [1904] 1 A. L. J. 247.
(3) [1919] 17 A. L. J. 269—50 I. C. 80.
(4) [1921] 62 I. C. 797.
(5) [1921] 40 M.L.J. 443, — 13 M. L. W. 268—(1921) M.W.N. 207—29 M.L.T. 251—62 I.C. 27.

which gives them a right to possession as in the case of leases and usufructuary mortgages, even if the sale purports to be of the land itself, the sale would pass only the lessor's or the mortgagor's estate; the subject of the sale in such cases may well be held to be only that estate and not the land ; and as physical possession of such an estate cannot be given and the vendor not being entitled to the possession of the land itself could not pass it on to the vendor; it may be that in such cases the second part of column 3 (of Art 10) will apply if there is a registered instrument." A similar view was taken by Justice Napier. The result is that in a case like the present limitation begins from the date of registration.

It has been argued that registration is not necessarily notice and that, secondly, it will be a hard case if the plaintiff's suit is barred by the defendant registering the document without his knowledge. It is no doubt true that the Privy Council has decided that registration is not notice but that was with reference not to Art. 10 of the Limitation Act but with reference to cases of priority of mortgages under the Transfer of Property Act. Where the Legislature expressly states that limitation begins from registration without any reference to whether the transaction was with or without notice it is difficult to see how the Court can go into any question of notice in dealing with the question. Reference has been made to S. 18 of the Limitation Act but it has no application as it refers to concealment or fraud or misrepresentation and it is not alleged here that there was any such fraud or concealment. On the contrary the 1st defendant gave notice that he wanted to sell the property to strangers and there was no attempt at concealment as regards the sale or registration of this document. I am therefore of opinion that so far as the plaintiff's claim is concerned it is barred by limitation.

It was further contended that, even if the plaintiff's suit is barred by limitation, he could resist a suit for redemption on the ground that his right is not extinguished and reference has been made to cases of *Kanharankutti* v. *Aliotti* (6), and *Krishnan Menon* v. *Kesaven* (7). This contention is with reference to C. S. No. 88 of 1921 brought by the 1st defendant against the plaintiff. It seems to me to be a peculiar position that where the plaintiffs' suit for specific performance is dismissed he can still hold on to the property. And the view taken in 13 and 20 Mad. has not been followed in *Ramaswami Pattar* v. *Chinniah Asari* (8) I entirely agree with the view taken in 24 Mad. where Sheppard and Bashyam Iyengar, JJ. state that, having regard to the provisions of the Transfer of Property Act as regards the right of redemption and of S. 54 as regards the effect of a contract for sale, it can be no defence to a suit for redemption to state that the defendant has got a right to purchase the property under a contract which right he is unable to enforce owing to the bar of limitation. The Full Bench decision in *Kurri Vera reddi* v. *Kurri Bapireddi*, (9) which has been considered and followed in *Ramanathan Chetti* v. *Ranganathan Chetti* (10) is to the effect that in suits for possession under title it is no defence to say that the defendant has got a right to enforce specific performance of a contract and the case *a fortiori* is barred by the statute of limitation. It seems to me that a suit under S. 60 of the Transfer of Property Act which the Privy Council in the recent case in *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (11) has construed to be absolute in its terms and

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(6) [1890] 13 Mad. 490.
(7) [1897] 20 Mad. 305.
(8) [1901] 24 Mad. 449.
(9) [1906] 29 Mad. 336—16 M. L. J. 395—1 M. L. T. 153 (**F. B.**)
(10) [1917] 40 Mad. 1134—33 M.L. J. 252—6 L. W. 300—22 M. L. T. 173—(1917) M. W. N. 757—43 I. C. 138.
(11) 1922 P. C. 17—44 All. 185—49 I. A. 60—9 O. L. J. 81—42 M. L. J. 584—25 O. C. 8—20 A. L. J. 476—35 C. L. J. 468—(1922) M. W. N. 378—24 B. L. R. 695—30 M. L. T. 220—66 I. C. 853 **(P.C.)**

applicable to all mortgages and which gives an absolute right to redeem cannot be met by an agreement of pre-emption which, under S. 54 of the Act, confers no right to immoveable property, especially, when a suit to enforce the right of pre-emption is barred under Art. 10 of the Limitation Act. I therefore hold that not only is the plaintiff's claim barred by limitation but that it would afford no defence to a suit for redemption.

The next question is as regards the minority of the plaintiff and the invalidity of a contract entered into by his guardian. It is admitted that at date of the mortgage the plaintiff was a minor. It has been held by the Privy Council in *Mir Sarwar Jan* v. *Fakiruddin Muhammad Chowdhury* (12) in a suit for specific performance by a minor of an agreement for the purchase and sale to him of immoveable property entered into by a manager that the contract was unenforceable as it was not within the competence of the manager of a minor's estate or his guardian to bind the minor or the estate by a contract for the purchase of immoveable property and that the minor was not bound by the contract, there being no mutuality and they were not going to give specific performance of the contract. It seems to me that in the present case this contract could not be enforced. It is argued that in cases of pre-emption there is, by its very essence, no mutuality and that, whereas the minor is not bound to buy, the defendant is bound to sell to nobody else and, the principle of mutuality not being necessary, the case does not fall within the ruling in *Mir Sarwar Jan* v. *Fakiruddin Muhammad Chowdhury* (12). But, as pointed out in *Ramaswami Pattar* v. *Chinniah Asari* (8) cited above, the moment the plaintiff elects to buy the property he affirms the contract and the same legal consequences follow as if there was a contract to buy and it is difficult to distinguish the case from the case of an ordinary contract to purchase. Although there is no mutuality in its inception, when the plaintiff elects to purchase the property and gives notice of his intention to buy, it becomes a contract like any other contract to purchase immoveable property and is governed by the same principles which govern other contracts. *Mir Sarwar Jan* v. *Fakiruddin Muhammad Chowdhury* (12) applies therefore to such cases.

As regards the notices which passed between the parties, I am of opinion that the two notices, Exs. C and D show that there was an offer by the 1st defendant which the plaintiff would not accept. It is not disputed before me that the clause against alienation without the consent of the mortgagee is a clog on the equity of redemption and it is not enforceable as such. The position that the plaintiff therefore took up when he was asked whether he was willing to buy the property was that, the sale itself being invalid under the mortgage document, no question would arise of any option to buy and he said the 1st defendant had no power to sell to anybody else at all. Even assuming that the representation of the 1st defendant that the plaintiff asked him to sell for not less then Rs. 8,000 is untrue, there is still the fact that the 1st defendant asked the plaintiff whether he was willing to buy and the plaintiff not only did not express his willingness but prohibited the alienation. Even assuming that there was a right of pre-emption, it was not exercised and the case falls within the decision in *Nanni Lal Singh* v. *Ram Ratan* (13) and *Ghulam Mohi-uddin Khan* v. *Hardeo Sahai* (14). This is a ground on which, I am of opinion, that, the plaintiff's suit fails and it is dismissed with costs. As regards the connected suit C S. No. 88 of 1921 which is a suit for redemption, it follows from

(12) [1912] 39 Cal 232—39 I. A. 1—16 C. W.N. 74—(1912) M. W. N. 22—9 A. L. J. 33—15 C. L. J. 69—14 B. L. R. 5—21 M. L. J. 1156—11 M.L.T. 8—13 I.C. 331 (P. C.)

(13) [1918] 39 All. 127—14 A. L. J. 1138—37 I. C. 511.

(14) [1920] 42 All. 402—18 A. L. J. 413—58 I. C. 93.

my judgment in the previous suit that the plaintiffs are entitled to redeem. As regards the amount payable by them an account will have to be taken of the amount due to the defendant under the mortgage and the usual preliminary redemption decree will be passed. The suit will be referred to the Official Referee to take an account of the amount due under the mortgage and a final decree will be passed on the amount being ascertained. Plaintiffs would be entitled to the costs of the suit.

Suit No. 20 *dismissed.*
Suit No. 88 *decreed.*

✱ 1924 MADRAS 63

SCHWABE, C. J. and COUTTS TROTTER, J.

The Secretary, Board of Revenue, Income Tax, Madras—Referring Officer—Petitioner.

v.

The Madras Export Company, Madras.—Assessee—Respondent.

Civ. Mis. Pet. No. 488 of 1923, D/19th March, 1923, against the judgment of the High Court, in Ref. Case No. 4 of 1922. D/ 30th October, 1922.

(a) *Intrepretation of Statutes—Extension of jurisdiction to new matters—Incidents of ordinary jurisdiction apply.*

Where the jurisdiction of a Court is extended by a statute to matters, which would not ordinarily come within its purview that extension of jurisdiction makes the new matters, subject to all the machinery provided by law, for the regulating of its ordinary jurisdiction, as a Court of record.

(b) *Income Tax Act (1898), 51—Appeal lies to Privy Council.*

Subject to the provisions of Ss. 109 and 110. Civil Procedure Code, There is a right of appeal to His Majesty in Council against the decision of the High Court, on a reference to it under S. 51 of the Indian Income Tax Act. 40 Cal. 21 Dist.

C. V. Ananthakrishna Aiyar—for Petitioner.

Nugent Grant, R. N. Aiyangar, O. T. Govindan Nambiar and Messrs King and Partidge—for Respondents.

Schwabe, C. J.—This is an application for leave to appeal to the Privy Council from a decision of this Court on a reference to it, under S. 51 of the Income Tax Act, VII of 1918. The question involved in this reference is a difficult and important point of law of very great and general importance. I am therefore prepared to certify that although the actual amount involved in this reference is only about Rs. 6,000, the case is a fit one for appeal to His Majesty in Council, provided that we have the power to certify, that is, provided an appeal lies. This depends on whether our decision in this case is a final judgment of the High Court either in its Ordinary Original Civil Jurisdiction, or extraordinary Original Civil Jurisdiction, or in its Appellate Jurisdiction, because under Cl. 39 of the Letters Patent it is only on these matters that an appeal lies. I agree that there is no inherent right of appeal and that unless such right is conferred by the Letters Patent or by statute there can be none. I have no doubt that our decision is a *judgment* and also that it is final. The power of determining income tax questions is conferred by the Income Tax Act, VII of 1918. By S. 51 the Chief Revenue Authority may, and in certain circumstances on the application of the assessee himself must, draw up a statement of the case and refer it with his own opinion to the High Court, and the High Court has to decide the question raised and deliver judgment, and that judgment is to be acted upon. Apart from this provision, the High Court by reason of S. 106 of the Government of India Act has no power to deal with Revenue matters. The section confers this jurisdiction on the Court and in my view these income tax cases are referred to the Court as a Court and it must follow that the ordinary rights of appeal from that Court are available. This principle is clearly enunciated in *National Telephone Co.* v. *Post Master General* (1). The Government in that case had taken over the assets of the National Telephone Company and by the Telegraph (Arbitration) Act, 1909, (9 Edw. VII, C. 20 S. 1), it was provided that any difference as to price and other matters, if the parties agreed, be referred

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(1) [1913] A. C. 546—82 L. J., K. B. 1197—109 L. T. 562—57 S. J. 661—15 Ry. & Con. Traff. Cas. 109—29 T. L. R. 637.

to the Railway and Canal Commission and that that commission should determine the same point. The Railway Canal Commission is a statutory body and there are certain rights of appeal from its decision. The matters in dispute between the National Telephone Company and the Government were by agreement referred to that Commission and a decision was given. Upon appeal it was argued that no appeal lay, no right to appeal having been conferred by the statute; but it was held that jurisdiction having been conferred on that tribunal, it followed that all the usual rights of appeal from that tribunal were also conferred. The point was shortly stated by Lord Parker at p. 562:

"Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters as a Court. Its jurisdiction is enlarged but all the incidents of such jurisdiction including the right of appeal from its decision remain the same."

The same principle has been applied here in cases under the Madras Forest Act V of 1892, which gives a right of appeal from a Forest Officer to the District Judge without providing for any appeal from the District Judge to the High Court. It was held by the High Court that when the District Court was reached, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees, the rules of the Civil Procedure Code are applicable and that therefore an appeal lay to the High Court: *Secretary of State* v. *Chellikani Rama Rao* (2).

It was argued that the decision of the Privy Council in *Rangoon Botatoung Company, Ltd* v. *The Collector, Rangoon*, (3) was against this view. Under the Land Acquisition Act, I of 1894 where lands are taken over for public purposes, the Collecter is appointed arbitrator between the Government and the parties. Under S. 18, he may be required to refer the matter for the determination of the Court, the Court for this purpose being a principal Civil Court of Original Jurisdiction. By S. 54, an appeal is given from what is termed an *award* of that Court to the High Court. Two judges of the Chief Court of Burma sat to hear the reference and it was held by the Privy Council that no appeal lay from their decision, applying the principle stated by Bramwell, L. J. in *Sandbak Charity Trustees* v. *North Staffordshire Railway Co.* (4).

"An appeal does not exist in the nature of things. A right to appeal from any decision of a tribunal must be given by express enactment."

So far as the actual decision is concerned, I think that the fact that the two Judges sat as arbitrators and not as a Court in the ordinary sense is established by the words of the Act itself, which calls the r decision an *award*, and not a *judgment*. It was, however, suggested that these judges were sitting not only on the reference to them by the Collector, but also as an appellate tribunal under S. 54. It is difficult to understand how these could be so, because it seems impossible that the two judges could be hearing a case as arbitrators and at the same time be hearing an appeal from their own decision, which had not yet been given. Lord Shaw in *Secretary of State* v. *Chellikani Rama Rao* (2), explains this judgment, by saying that the proceedings were from beginning to end ostensibly and actually arbitration proceedings'

(2) [1916] 39 Mad. 617—43 I.A. 192—14 A. L. J. 1114—31 M L. J. 324—20 C. W. N. 1311—(1916) 2 M. W. N. 224—20 M. L. T. 435—4 L. W. 486—18 Bom. L. R. 1007—25 C.L.J. 69—35 I.C. 902 (P.C.)

(3) [1912] 40 Cal. 21—39 I. A. 197—16 C. W. N. 961—12 M. L. T. 195—(1912) M. W. N. 781—16 C. L. J. 245—23 M. L.J. 276—14 Bom. L. R. 833—10 A. L. J. 271—5 Bur L. T. 205—6 L. B. R. 150—16 I. C. 188 (P. C.)

(4) [1877] 3 Q.B.D. 1.

and in *Ramachandra Rao* v. *Ramachandra Rao* (5), their Lordships of the Privy Council explained the decision in *Rangoon Batatoung Co.* v. *The Collector of Rangoon* (3), in the same way: see p. 329. I think it is clear on these authorities that the principles enunciated in the *National Telephone Company's Case* (1) are considered, as being of general application in this country and are in no way affected by the decision in *Rangoon Botatoung Co. Ltd.* v. *The Collector of Rangoon* (3). This Court does not sit in any other capacity than in the exercise of its Ordinary and Extraordinary Original Civil Jurisdiction and its Appellate Jurisdiction: See *Chappan* v. *Moidin Kutti* (6) and *In the mattar of Candas Narrondas Navivahu and C. A. Turner* (7). It does not sit in a further capacity, namely, to try matters referred to it by statute. It would be possible for the legislature to empower the judges to sit as arbitrators and without appeal, but it would require plain language to impose such duties and there is nothing in the Income Tax Act, to indicate any such intention. Whether in this case we are sitting in our Original Jurisdiction, or in our Appellate Jurisdiction as was held in *Birendra Kishore Manikya* v. *Secretary of State* (8), is immaterial, for, in either case, there is a right of appeal, or power to give leave to appeal, to the Privy Council. There is direct authority on the point in *Tata Iron and Steel Co.* v. *Chief Revenue Authority, Bombay* (9), with which for the reason stated above I agree.

Accordingly a certificate for leave to appeal to His Majesty in Council will be granted. Costs of this application will be costs in the cause.

Coutts Trotter, J.—This was a case referred to the High Court by the Chief Revenue Authority under the powers conferred upon it to that end, by S. 51 (1) (9) of the Income Tax Act, VII of 1918. The Revenue Authority being dissatisfied with the determination of the High Court, is desirous of obtaining leave to appeal to the Privy Council.

With the merits of the question, we are not concerned. The only point we have to determine is that raised by way of preliminary objection by the Assessee, *viz.*, that we have no power to grant leave to appeal in any event. There can be no question as to the fulfilment of the conditions requisite for an appeal being allowed, for though the value is only Rs. 6,000, the legal importance of the question raised by the reference is obviously great. But Mr. Grant has argued that the provisions of the Code of Civil Procedure do not apply, that there is a special machinery provided by the Income Tax Act beyond which you must not look, and that, unless there is an express provision in the Act, for an appeal to the Privy Council, there is no jurisdiction in this Court to grant leave. The chief authority which he cites for that position is *Rangoon Batatoung Co., Ltd.* v. *The Collector of Rangoon* (3), a decision of the Privy Council, on appeal from the Chief Court of Lower Burma, under the Land Acquisition Act, I of 1894, and it was there held that, as the Land Acquisition Act conferred no express right of appeal, none existed, following the observation of Lord Bramwell in *Sandband Charity Trustees* v. *North Staffordshire Railway Co.* (4).

"An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by an express enactment."

In that case an award of a Collector, as to valuation was referred to the Court of Lower Burma,

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(5) 1922 P.C. 80—45 Mad. 320—49 I.A. 129—20 A.L.J. 684—30 M.L.T. 154—35 C.L.J. 545—16 M.L.W. 1—(1922) M.W.N. 359—26 C.W.N. 713—24 Bom. L.R. 963—43 M.L.J. 78—67 I.C. 408 (P. C.)

(6) [1899] 22 Mad. 68—8 M.L.J. 231 (F. B.)

(7) [1889] 13 Bom. 520—16 I.A. 156—5 Sar. 440 (P. C.)

(8) [1921] 48 Cal. 766—25 C.W.N. 80—32 C.L.J. 438—61 I.C. 112.

(9) [1921] 23 Bom. L.R. 1102—64 I.C. 931.

under the provisions of the Act, and it was quite possible to take the view that, in effect, the judges forming the Court were to be regarded as arbitrators making an award, from which award no appeal would lie unless expressly conferred. But at p. 25 of the report, Lord Macnaughten, who delivered the judgment of the Board, makes the following observation:

"They (that is the representatives of the Chief Court) sat as "the Court" and also as the High Court to which an appeal is given by the Act from the award of 'the Court'."

This would seem to indicate that, in the opinion of the Board, the Chief Court of Lower Burma was in that case invested with the functions of a Court of law, as well as those of arbitrators. I do not profess to understand how any Court can be supposed to be combining, at one and the same sitting, the functions of arbitrators with those of an appellate tribunal, apparently a tribunal sitting in appeal from itself in its other contemporaneous exercise of its functions as arbitrators. But I think it is not going too far to say that that decision has been treated as being based on the view that the Land Acquisition Act made the Chief Court arbitrators, and no more. That view appears to have been adopted by Lord Macnaughten himself in *The Special Officer, Salsette Building Sites* v. *Dasabhai Bezanji Motiwala* (10), (see also the observations of Lord Shaw in *Secretary of State for India* v. *Chellikani Rama Rao* (2).

Mr. Grant's argument is as follows: By S. 106 of the Government of India Act, the Ordinary Courts of this country are debarred from inquiring into matters concerning the revenue. The Income Tax Act of 1918 gives power to the Board of Revenue and in a sense creates a right in the assessee to refer a formal special case for the opinion of the High Court. His contention is that the Act of 1918 is exhaustive, as to this subject, and that, when the High Court has given its opinion, the matter is ended, as the statute makes no provision for a further appeal to the Privy Council. If the matter were *res integra*, the inclination of my mind would be in accordance with this argument, but, I think, I am precluded by authorities of great weight from acceding to it. The principle that I conceive to be established by those authorities is this, that where you find the jurisdiction of a Court is extended by a statute to matters, which would not ordinarily come within its purview, that extension of jurisdiction makes the new matters subject to all the machinery provided by law, for the regulating of its ordinary jurisdiction, as a Court of record, the machinery in this instance being Code of Civil Procedure. That seems to me to be emphatically laid down by the House of Lords in *National Telephone Co. Ltd.* v. *Postmaster General* (1). There, by a special statute, it was enacted that, on the taking over of the company by Government, all matters in dispute should be determined by Railway and Canal Commission. The decision of the House of Lords was to the effect that the referring of of the matter to the arbitrament of the Railway and Canal Commission brought into operation all the machinery of appeal provided by the Railway and Canal Traffic Act, 1888 and allowed an appeal from it, notwithstanding the absence of any express provision in the special Act. I think that that position had been previously established for India in *In the matter of Candas Narrondas Navivalu and C. A. Turner* (7) by the Judicial Committee. This has been the consistent view of this Court, and it has been endorsed by the Privy Council in *Secretary of State* v. *Chellikani Rama Rao* (2). I am, therefore, constrained to hold that, when once this Court has its jurisdiction extended by a special Act, the case which is thus put under its jurisdiction becomes subject to the provisions of the Code of Civil

(10) [1913] 17 C.W.N. 421—20 I.C. 793 (P. C.)

Procedure, with all its incidents, including the duty to grant leave to appeal to the Privy Council, in cases which satisfy the conditions of the Code. As I have said, there is no question but that this case satisfies those conditions and I, therefore, am of opinion that leave to appeal must be granted. [cf. 1923 P.C. 138, and 1923 P. C. 148].

Leave granted.

✱ 1924 MADRAS 67

SCHWABE, C. J. AND WALLACE, J.

S. Parthasarathy Aiyar—Plaintiff—Appellant.

v.

M. Subbaraya Gramany and another—Defendants—Respondents.

F. A. No. 70 of 1921 Decided on 17th January 1923 from the Judgment of Kumaraswami Sastri, J. in C. S. No. 288 of 1919.

(a) *Benami transaction — Person with voidable title can give good title to the transferee—T. P. Act, S. 8.*

A person who has acquired property under a voidable title can himself give a good title to that property to a *bona fide* purchaser or mortgagee from him who deals for value and has no notice of the defects in the title. [P. 69 C. 1]

(b) *T. P. Act, S. 3—Person in possession of part of premises not enquired from—Constructive notice may not be imputed.*

Constsuctive notice of all rights of a person in possession of property sold or mortgaged is to be imputed to purchasers or mortgagees who made no enquiry of the persons in occupation. But that rule depends upon the principle that where another is in exclusive possession of the property and such possession would *prima facie* be inconsistent with the full rights of ownership of the vendor or mortgagor, and the purchaser does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked. It has, however, frequently been laid down that that doctrine has gone to its full length and must not be extended, and it has never been held that it is the duty of the proposed purchaser or mortgagee to enquire of every person who may be on the premises or any part of those premises. Nor has it been suggested that the unknown occupation of a part of the premises would put him on enquiry as to the possible rights of the occupier of that portion over the remainder of the premises. There is indeed strong authority to the contrary. (7 Ch. 75 and 1 Ch. 45 Ref.) To suggest that it is the duty of the proposed mortgagee or purchaser to attend on these premises and examine narrowly every one of those persons would be casting upon him an intolerable burden, and to hold that he was affected by constructive notice of all these persons possible equitable rights over any part of the premises would be an unjustifiable extension of the doctrine of constructive notice. [P. 69 C. 1, 2]

(c) *Succession Act, S. 15—Probate not taken—Will is valid.*

Schwabe, C. J.:—It is not right, as has was suggested in some cases, to treat a will of which probate has not been granted as non-existent and the property passing by intestacy. On the contrary the will is a perfectly valid document. The executor under it can deal with the property and give a perfectly good title though it may be that to complete that title it requires probate to be taken out at a later date. A person who in Court has to prove title and has to deduce that title from a will, whether that person is plaintiff or defendant cannot do sc without producing probate. 33 M. 99 Diss.

[P. 70 C. 1, 2]

Wallace, J.:—S. 187 is no bar to a transferee from an executrix, who has not taken out probate but who was in possession and who has given possessory title deed, suing on that title-deed to eject a trespasser. It cannot be said that the transferee in such a case has not a better title to possession than the trespasser and the lack of probate is insufficient, under the authorities quoted, to bar the ejectment of such a trespasser. [P. 71 C. 2]

T. R. Venkatarama Sastri—for Appellant.

T. Ethiraja Mudaliar—for Respondents.

Schwabe, C. J.—One Jambulinga owned two adjoining houses in Mylapore. He purported to mortgage them to one Subbusami who was a brother of the husband of Meenakshi, Jambulinga's daughter. He then died and left a will appointing his widow Mylathammal executrix and giving her power to sell his property for the purpose of paying debts and to enjoy what was left during her life and bequeathing after her death what was left to Meenakshi. Probate has never been taken out of the will. Some years later, the widow purported to sell the property to Rajagopaul, her brother for, Rs. 1,000. The documents of title were handed over to him, the sale deed was registered and in the presence of the Registrar a thousand rupees were handed over by Rajagopaul to the widow. Subbusami joined in that sale by acknowledging the discharge of his mortgage which was for a larger amount, the sale-deed providing that the sale was for the purpose of discharging that mortgage. Many years afterwards, Rajagopaul purported to sell the property to

Subbaraya Gramani for Rs. 4,000 and he, with the assistance of Rajagopaul, mortgaged the premises to the plaintiff for Rs. 2,000, it being stated that Rs. 2,000 was required for the purpose of providing part of the purchase money. This suit has been brought by this mortgagee to obtain possession of the premises. Meenakshi who has been for some time in occupation of part of one of the two houses resists the claim for ejectment alleging that the property is hers.

The learned Judge, who tried the case, has held that defendant Meenakshi has made out her case. He holds that all the transactions relating to this property from the time of the mortgage to Subbusami down to the sale to Subbaraya Gramani and including that sale, were *benami* transactions and mere shams. He holds too that the plaintiff is in no better position than Rajagopaul or Subbaraya Gramani, because he is not a *bona fide* mortgagee for value without notice.

I agree with the findings of fact of the learned Judge except on two material points. I agree that the original mortgage to Subbusami by Jambulinga himself was not a real transaction. I agree that the sale by Rajagopaul to Subbaraya Gramani was not a real transaction. I am prepared also to accept his view of the character and credibility of Rajagopaul that he was an impecunious and unscrupulous person. But I do not agree with the inference that he has drawn from the facts put before him in relation to the sale by Mylathammal, the widow. Nor do I agree that on the facts as found by him, the plaintiff is not a *bona fide* mortgagee for value. No rational explanation has been offered to the Court as to why Mylathammal should have gone through the form of selling the property to her brother Rajagopaul. It is suggested that she did so either, so that Rajagopaul might be trustee for Meenakshi, her daughter, and after her own death, protect the property for the benefit of the daughter against her husband, or as an alternative, that she went through a form of a real sale in order to frighten her son-in-law and make him more careful in the future in his conduct towards her and her daughter. The first of these alternatives seems to me to be incredible, for one cannot believe that the mother would hand over her property to her brother in trust after her death for her daughter in the form of an absolute conveyance without informing her daughter of the fact, and it is admitted that the daughter was never told anything about it. In doing so, she would leave her daughter at the mercy of her uncle and if the uncle died, she would leave her without evidence to attempt to recover her inheritance from the uncle's heirs. The other alternative seems to me to be equally incredible. Because, in order to have the desired salutary effect upon the conduct of the son-in-law, he would have to be told of the sale, that there was a real sale, and one would have thought that he would ascertain at once that it was not a real sale because his brother Subbusami who was a party to the transaction would tell him not to be alarmed, as the whole thing was *benami* and could be disregarded. And again, if he knew about it, how is it possible that his wife Meenakshi did not know about it? I cannot accept either alternative as a possible motive for this curious transaction. It is not the case of a person buying the property and putting it in the name of somebody else as *benami*. It is suggested to be the case of a person who has a life interest and whose daughter has a reversionary right to her property, voluntarily parting with the property in the sense of transferring it to somebody else. It is a much more likely view in my judgment that Rajagopaul, being of the character attributed to him, in some way defrauded or tricked his sister into selling the property to him at an undervalue and probably also knowing full well that under the terms of the will she was exceeding her authority in effecting the sale. because at that time there were no debts of the testator which required to be paid. I find on the facts that the sale to Rajagopaul was a real sale though induced by fraud and voidable therefore on discovery of fraud by Mylathammal and consequently also

by Meenakshi. But a person who has acquired property under a voidable title can himself give a good title to that property to a *bona fide* purchaser or mortgagee from him, who deals for value and has no notice of the defects in the title. In this case the plaintiff admittedly dealt for value. He had in fact no notice at all of anything being wrong from the beginning to the end of these transactions. He had before him the original mortgage, the will, title deeds to the property, the conveyance to Rajagopaul and the endorsement by the original mortgagee. He knew nothing of Meenakshi or that she had ever resided on the premises. But it is argued that he had constructive notice of all Meenakshi's claims by reason of the fact that, unknown to him, she was at the date of the sale in possession of a part of the premises. Now the doctrine of constructive notice is one that applies here as well as in England, and here the requisites for it are stated in S. 3 of the Transfer of Property Act which runs thus:—

"A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it."

In England as here it has been held that constructive notice of all the rights of a person in possession of property sold or mortgaged is to be imputed to purchasers or mortgagees who made no enquiry of the persons in occupation. But that rule depends upon the principle that where another is in exclusive possession of the property and such possession would *prima facie* be inconsistent with the full rights of ownership of the vendor or mortgagor, and the purchaser does not choose to ask what that possession is he must be taken to have got the information that he would have obtained if he had asked. It has, however, frequently been laid down that that doctrine has gone to its full length and must not be extended, and it has never been held that it is the duty of a proposed purchaser or mortgagee to enquire of every person who may be on the premises or any part of those premises. Nor has it been suggested that the unknown occupation of a part of the premises would put him on enquiry as to the possible rights of the occupier of that portion over the remainder of the premises. There is indeed strong authority to the contrary. That master of equity, Farwell, J., as he then was, in *Hunt* v. *Luck* (1), with whose judgment the Court of Appeal agree, said thus:

"If vendor or mortgagor offers property stated to be subject to tenancies, there is nothing in the fact that tenants are in occupation to give rise to any suspicion....."

In *Hunter* v. *Walters* (2), it was held that if further enquiry to title of a small part of the estate would have revealed a defect in title as to the whole estate, the purchaser was not to be held to have constructive notice of that defect. In *Manji Karimbhai* v. *Hoorbai* (3), it was held that the fact that a person was in occupation of a small part of a house did not put a purchaser on constructive notice of that person's rights as to the whole house. But apart from authority, one has to see here whether there has been wilful abstention from enquiry or gross negligence and I fail to see how there can be wilful abstention or gross negligence in a failure to enquire from everybody on the premises what their title might be. In the case of tenement houses, there may be on the premises the actual sub-tenants, their wives, families, friends, guests and so forth. To suggest that it is the duty of the proposed mortgagee or purchaser to attend on these premises and examine narrowly every one of those persons would be casting upon him an intolerable burden, and to hold that he was affected by constructive notice of all these persons' possible equitable rights over any part of

(1) [1901] 1 Ch. 428—71 L. J., Ch. 239—86 L.T. 68—50 W.R. 291—18 T.L.R. 265.
(2) [1871] 7 Ch. 75—41 L. J., Ch. 175—25 L. T. 765—20 W. R. 218.
(3) [1911] 35 Bom. 342—12 Bom. L.R. 1044—8 I. C. 752.

the premises would be an extension of the doctrine of constructive notice, which, as I have pointed out, has long been held, must be kept within the limits which have been fixed. I find nothing in this case to put the plaintiff upon any inquiry as to Meenakshi's rights and I hold that he is a mortgagee for value without notice

An attempt was made before us to contend that the defendant had a prescriptive title as against plaintiff, that she and her mother had been in adverse possession of this property for over 12 years. No such defence was set up in the Court below and no such issue was before that Court. In my judgment it is much too late to raise such a point now when it is obvious all the materials which would be required to decide that question properly are not before the Court.

On my findings that the plaintiff is a mortgagee for value, it follows that he is entitled to succeed in the action unless there is some infirmity in his own title and this brings me to a point which has been fully argued before us under S. 187 of the Succession Act which applies to the will of Jambulinga in this case. By that section, no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction shall have granted probate of the will under which the right is claimed or shall have granted letters of administration. Now the position in this case is rather curious. The defendant Meenakshi has no right to this property at all unless she takes under the will from Jambulinga. It is not right, as has been suggested in some cases, to treat a will of which probate has not been granted as non-existent and the property passing by intestacy. On the contrary, the will is a perfectly valid document. The executor under it can deal with the property and give a perfectly good title though it may be that to complete that title it requires probate to be taken out at a later date. The defendant then having no title under the will which she can prove, and seeing that her right as reversioner might be affected when probate has been granted, she says that she is prepared as far as this case is concerned to be treated as a mere trespasser in possession of the premises. She says: You the plaintiff cannot turn me out, because you cannot prove your title without proving that will, and you cannot prove that will without producing the probate of it." Now the law as stated in S. 187, in my judgment, is the same as the law of England on the subject. And I think that it is that a person, who in Court has to prove title and has to deduce that title from a will, whether that person is plaintiff or defendant, cannot do so without producing probate, and I do not agree with the cases which have suggested to the contrary, such as *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (4) which seems to have decided that the defendant can claim as a legatee under an unproved will. This would not prevent a defendant resisting a claim by an heir-at-law by producing and proving a will of which probate had not been granted. But the difficulty which would have been put in the plaintiff's way, if the view, which I have just expressed is correct, is in this case removed, because, Mylathammal who sold and conveyed to Rajagopaul, she being executrix of the will, was herself in possession of the property, and she had a right to that possession, and she could give that possessory right to Rajagopaul and that right to possession would be included in the conveyance by her of the property absolutely. The plaintiff in this case stands in the shoes of Rajagopaul as far as title is concerned. He too has that possessory title which can be used by him to eject a trespasser [see *Asher* v. *Withlock* (5) approved by the Privy Council in *Perry* v. *Clissold* (6).] If on the other hand the defendant Meenakshi was entitled to rely upon the will, it would follow that the plaintiff could equally rely upon it, and then he would be

(4) [1910] 33 Mad. 91—3 I.C. 473.
(5) [1865] 1 Q.B. 1—35 L.J., Q.B. 17—Jur. (N.S.) 925—13 L.T. 254—14 W.R. 26.
(6) [1907] A.C. 73—76 L.J., P.C. 19—95 L.T. 890—23 T.L.R. 232.

able to say that he innocently took the property from a purchaser from an executrix who had a right, given by the will, of selling the property, and that he is not concerned with the fact that the executrix exceeded the authority which she in fact had, and there would also arise in that eventuality an interesting question how far the daughter claiming as a legat e is estopped by reason of the acts of her mother, the executrix, as well as of her father, the testator.

For these reasons in my judgment, the plaintiff is entitled to succeed for his mortgage is a good mortgage as against the defendant Meenakshi. Her rights to redeem on payment of principal, interest and costs must depend on the terms of the mortgage which she no doubt can get Rajagopaul to enforce. The mortgage being a usufructuary mortgage, the plaintiff is entitled to possession. This appeal must be allowed with costs here and below. Judgment must be entered for the plaintiff for possession and for enquiry into mesne profits.

Wallace, J.—I agree.

The plaintiff is suing to eject the second defendant from certain property. He holds the title deeds for that as from the original owner Jambulinga, and is *prima facie* entitled to be put in possession under his usufructuary mortgage, and to eject second defendant on the strength of his documents, coupled with his payment of good consideration for his mortgage, until it is otherwise shown that he had not obtained a good title to eject.

As against plaintiff's case, the second defendant has put her case, as I take it, on four grounds: firstly, that Ex. D in particular, the really important document in this case, is *benami* secondly that if Ex, D is not *benami* she is entitled to ingore her father's will and remain on the property as the heir to the father, thirdly that if Ex. D is not *benami* and the will is accepted, she is entitled to remain on the property on the ground that her mother had no right to sell it and fourthly that assuming that Ex. D is not *benami* and she gets no title even under the will she can maintain her possession as a trespasser against the plaintiff unless he is able to prove a better title.

Grounds Nos. 2 and 4 may be shortly disposed of. It is quite clear that 2nd defendant cannot ignore the will. The property was the self-acquired property of her father and he left a will. There was no intestacy. The will Ex. M is registered, has been attested by witnesses on both sides in this case and although denied by the 2nd defendant. has been accepted as genuine by the trying Court and it does not matter whether before the suit the second defendant was aware of it or not. I should have been inclined to hold further that until the 2nd defendant had taken out probate she cannot plead in defence any right as legatee under the will had not a Bench of this Court apparently held in a case reported in *Caralapathi Chunna Cuniah* v. *Cota Nammalwariah* (4), in which however the facts are not very clear, that S. 187 of the Indian Succession Act did not preclude her from doing so. At any rate it is quite clear that the 2nd defendant cannot ignore the will since if she does so she has otherwise no right to the property. Therefore ground No. 2 fails.

As to ground No. 4, I agree with the learned Chief Justice that S. 187 is no bar to a transferee from an executrix, who has not taken out probate but who was in possession and who has given a possessory title deed, suing on that title deed to eject a trespasser. It cannot be said that the transferee in such a case has not a better title to possession than the trespasser and the lack of probate is insufficient, under the authorities quoted, to bar the ejectment of such a trespasser.

The next point is ground No. 1. It relates to the question whether Ex. D is a genuine sale. That Ex. D was a *benami* document under which no transfer of the property was at all intended, as the trying Court has held, I find very difficult to believe. There is really no evidence to prove it and the *onus* lies on those who assert it. The hearsay statement

of the widow reported by Vinayaka Mudali is not evidence that the statement was true and is partly countered by the fact that the sale-deed was handed over to the transferee. The only attestor examined, D. W. 2, who speaks to its *benami* nature, is, on the 2nd defendant's own admission, the real contesting defendant in this case. The reason alleged for a *benami* document, namely to frighten the 2nd defendant's husband, is unintelligible if it is true as contended that it was kept from his knowledge altogether. Further it seems incredible that the widow or Rajagopaul or D. W. 2 or 2nd defendant's husband if he knew of it would not at some time have told 2nd defendant, about the real nature of the transaction, which on the face of it robbed her of her rights, and made sure that the title deeds were handed to her. In my view, the 2nd defendant has no reasonable explanation why the documents Exs. M and D were not with her. I cannot believe that she did not know that they were in possession of Rajagopaul. No reason is suggested why Rajagopaul should have been left in possession of these title-deeds ever since 1906 or why it was necessary to keep up the *benami* farce after the death of 2nd defendant's husband in 1910. It is further difficult to believe that 2nd defendant would not have heard that Rajagopaul himself was mortgaging the property in 1908, her husband's brother having attested that mortgage. It is quite clear to me that she knew of Rajagopaul's title and for reasons known to herself, refrained from challenging it. Against these considerations are set the alleged low price and the fact that Ex. D was executed ostensibly to discharge Ex. E. I am not so clear as the trying Court that Ex. E was *benami* but accepting it to be so there is nothing to show that the widow knew it was so, and at this distance of time, I am not prepared to assume, in the absence of evidence, that she did know. If Rajagopaul was, as contended by 2nd defendant, villain enough to cheat her by Ex. D, he would not scruple by using Ex. E to cheat her mother also. The theory that the ostensible mortgagee Subbusami and Rajagopaul colluded to cheat the widow might easily account for the low figure in Ex. D. It is also not as clear as the trying Court found that Rajagopaul could not have raised Rs. 1,000 on loan then, as he was able to do in 1905 under Ex. Q. when, if he was an insolvent as suggested, it is unlikely that the widow would choose him as *benamidar*. Her refusal of Vinayaka Mudali's offer of Rs. 2,000 was not very reasonable as by selling to Rajagopaul she was at least keeping the property within the family, and probably securing herself in continued occupation thereof. As to the tenants paying rent to the widow such occupation with Rajagopaul's permission may be the very simple explanation for that, and there is no evidence free from grave suspicion, that for any length of time they paid rent to 2nd defendant or to anyone on her behalf and not on behalf of Rajagopaul. I find it difficult to believe that if Ayyathambi was collecting rent for second defendant he never informed her of the sale-deed (which he attested) by her mother to Rajagopaul. The fact, that she pleaded she did not know of the sale, is enough to dispose of the idea that the attestor to Ex. D was collecting rent for her. The execution of rental agreements by Rajagopaul and 1st defendant may be due merely to the fact that they had a suspicion that the tenants were then preparing to side with second defendant. There is thus no convincing evidence that Ex. D. must have been *benami* and I therefore agree with the learned Chief Justice that Ex. D must be held to have been a genuine sale transferring all the vendor's rights in the property to Rajagopaul. Therefore the 2nd defendant cannot resist the plaintiff's suit on the plea that Ex. D was *benami*.

Ground No. 3 remains. The question is whether or not 2nd defendant's mother had a right to sell under Ex. D so as to bind 2nd defendant by the sale. It seems unlikely that the mother would wish to defraud the daughter. No reason, why she should do so, is suggested. It therefore seem probable that she must have at least believed that the debt under Ex. E was a genuine debt. On this point

again I would call in aid the will. I have said that the 2nd defendant cannot reprobate it, and if she now approbates it is to claim rights to herself. She cannot be heard to reprobate it so as to destroy the mother's rights and authority under it. That is, she cannot be heard to deny that the mother had the authority of the testator to sell the property to discharge his debts and that she herself is entitled only to the residue of the property after such sales. As to whether there was necessity for the sale, *i.e.*, whether there was a genuine debt under Ex. E it is clear to me that Jambulinga when he died left Ex. E and his will among other documents to his widow, and thus in my view, represented to his widow, as to others, that the debt under Ex. E was genuine and one which fell to be discharged under the will ; and the widow, as I find, believed, that it was a genuine debt. Second defendant, who claims under the will of the testator, who was guilty of this representation which resulted in a genuine sale under Ex. D, cannot in my view be heard to say that this was not a *bona fide* sale by the widow, *i. e.*, *bona fide* so far as the widow was concerned and that it was not validated by the authority given under the will. For this conclusion a reference may be made to the Privy Council case in *Luchuman Chunder Geer Gossain* v. *Kelli Churn Singh* (7). It appears to me then that even if I accept the finding of the trying Court that Ex. E was benami there was a misrepresentation by the testator that it was a genuine debt, which misrepresentation binds the residuary legatee, who claims under the will, and the plea that there was no real debt, cannot be advanced by the 2nd defendant against one who was no party to the sale, Ex. D. For the purposes of this case it must be held that Ex. D was genuine sale for the discharge of a genuine debt and therefore valid and binding on the testator's legatees under the authority given by the will which the second defendant cannot reprobate.

I would hold therefore that second defendant can have no *locus standi* to challenge the title of Rajagopaul under Ex. D or his ability to hand on a good title to first defendant and through him to plaintiff. It is no part of second defendant's business to challenge the consideration paid by the 1st defendant to Rajagopaul or plaintiff' title as against Rajagopaul, since even if Ex. L was *benami*, plaintiff can, if it were necessary for him to do so, plead in this case that he was a *bona fide* purchaser without notice of the *benami* nature of Ex. L and hold up his mortgage against Rajagopaul.

In the view then that 2nd defendant has no real legal claim, which can be heard, to this property, the question of constructive notice to plaintiff of her claim, which has been argued at length before us, will not arise nor would it matter whether or not he knew the extent of her claim before his mortgage. It is only if her claim is a good one in law that it is worth-while contending that plaintiff, a mortgagee for value, was guilty of wilful abstention from enquiry or gross negligence, and consequently must be deemed to have had notice of her claim and his mortgagor's inability to convey to him a good title. That even so, there was any such wilful abstention or negligence, I find it difficult to deduce. I do not go further into this question as I agree with the learned Chief Justice for the reasons given by him that no wilful abstention or gross negligence on the part of plaintiff has been established.

Appeal allowed.

(7) 19 W.R. 292—4 Sar. 802 (P.C.).

1924 MADRAS 73

KRISHNAN, J.

Sambasadasiva Chinna Rayal Varu—Petitioner.

v.

Bannar Maddulappa and another—Respondents.

Civ. Rev. Pets. Nos. 273 and 274 of 1922 Decided on 27th March 1923 from the decrees of the Dt. Munsiff, Madanapalli in S. C. S. Nos. 377 and 758 of 1921

Limitation Act, Art, 110—Applies for recovering jodi by zamindar from service inamdar under him.

Article 110 applies to a suit to recover arrear of jodi and road cess claimed by the Zamindar

against the defendant who holds the suit land on service inam under him subject to payment of jodi as well. 21 M. 243 and 2 M. 11 Fol.
[P, 74 C, 1]

E. Krishnamoorthi—for Appellants.

V. Chandrasekara Aiyar—for Respondents.

Judgment.—The question raised in this case is one of limitation as to arrears of jodi and road cess claimed by the zamindar against the defendant who holds the suit land on service inam under him subject to payment of jodi as well. This Court has been taking the view that jodi is only favourable rent. See the observation in *Venkatagiri Rajah* v. *Venkat Rao* (1) and the case reported in *Gajpathi Rajah* v. *Suryanarayana* (2). In the latter case the question raised was one of limitation and only 3 years' arrears were decreed. Though there may be a good deal to be said if the matter were *res integra*, I think I must follow these rulings which have not been overruled or dissented from. Following them I must hold that Art. 110 applies and the suit is barred as held by the lower Court

The petition (C. R. P. No. 273 of 1922) is dismissed with costs.

C. R. P. No. 274 of 1922 follows and is dismissed; but there will be no costs as no one appears for the respondent.

Petition dismissed.

(1) [1899] 21 Mad. 243.
(2) [1899] 22 Mad. 11.

1924 MADRAS 74

KRISHNAN, J.

Mahomed Ghouse Sahib—Defendant-Petitioner.

v

Shaik Mohideen Sahib — Plaintiff-Respondent.

C. R. P. No. 158 of 1923, D/- 1st March, 1923 from the order of the Small Cause Court, Madras, D/- 11th January 1923.

Presidency Small Cause Courts Act, S. 48—Action under O. 21 R. 98, Civil P. C. can be taken by Small Cause Court.

S. 48 of the Small Cause Courts Act applies the provisions of the Code of Civil Procedure to proceedings under chapter VII and the language of it is wide enough to include a power to act under O. 21 R. 98, C. P. C. The Small Cause Court therefore has power to remove any improper obstruction to the carrying out of its own order. 7 M. L. T. 385 Foll.
[P 74 C 2]

Md. Ibrahim and *G. Ramakrishna Iyer*—for Petitioner.

K. Narasimha Aiyar, *A. Raghunatha Rao* and *P. V. Subramanian*—for Respondent.

Judgment.—It is argued that the Presidency Small Cause Courts had no jurisdiction to remove the obstruction by the petitioner. I am unable to accept this argument. It is clear S. 48 of the Small Cause Courts Act applies the provisions of the Code of Civil Procedure to proceedings under chapter VII and the language of it is wide enough to include a power to act under O. 21 R. 98 Civil Procedure Code. A similar view was taken in the case as reported in *Bagimall* v. *Appadurai Gramany* (1). To hold otherwise would lead to the extraordinary result that, though Small Cause Court can pass an order in ejectment against a tenant, its order could be defeated by the tenant giving over possession to a third party a day previous to the date fixed for ejectment. The Small Cause Court has power to remove any improper obstruction to the carrying out of its own order.

It was next contended that this was not a proper case to direct removal of obstruction as petitioner claims a title to the property. He has according to his own case no title at present but only a right to enforce specific performance of a contract which, it may be mentioned, the respondent denies and he has taken possession from Karim, the respondent's tenant, against whom the order in ejectment was made. The order of the lower Court removing obstruction was clearly right in the circumstances.

The Civil Revision Petition is dismissed with costs.

Petition Dismissed.

(1) [1910] 7 M. L. T. 385—6 I.C. 720.

✱ 1924 MADRAS 75

OLDFIELD AND VENKATASUBBA RAO, JJ.

Ammani Ammal and others—Appellants.

v.

Periasami Udayan and others - Respondents.

S. A. No. 205 of 1922 Decided on 6th February 1923 against the order of the Dt. Court, Coimbatore, in App. No. 266 of 1921, D/ 25th March 1922.

Hindu Law—Succession—Daughters succeeding—Partition—Alienation by one of her share—Suit for possession by reversioners is not maintainable in the life of the surviving daughters.

Two daughters succeeded to the estate of their deceased father. They partitioned the property by a deed agreeing to enjoy severally, for ever and absolutely, the properties comprising their respective shares. After the partition one of them sold absolutely some of the items alloted to her and died leaving the other sister surviving her. A suit was brought by the sons of the surviving daughter for declaration of the invalidity of the alienation by the deceased daughter and for possession of the properties.

Held: the suit for possession was not maintainable till the death of the surviving daughter but that the suit for the declaration of the invalidity of the alienation was maintainable. [P 75 C 1; P 76 C 2; P 77 C 1]

T. M. Krishnaswami Aiyar—for Appellants.

P. R. Ganapathi Aiyar and *N. A. Krishna Aiyar*—for Respondents.

Oldfield, J.—The four items of suit property and others fell to two sisters, Vedambal and 6th defendant, in succession to their father; but Vedambal was in separate possession of the suit items under Ex. A, by which they, to the extent open to them, divided the estate. Vedambal died after alienating item 3 and a portion of item 4, to which this second appeal relates, to 3rd, 4th and 5th defendants. The plaintiffs, the sons of 6th defendant, have sued for a declaration of the invalidity of those alienations and for possession of those items. The question is whether they are entitled to sue, the lower appellate Court having held that they are entitled to sue, and remanded the suit for trial on the merits.

In the plaint the title relied on is that the plaintiffs are the heirs of Veerabhadra, the father of Vedambal and 6th defendant; that is, reversioners of his estate. It is therefore impossible to proceed on the alternative ground, on which it was proposed to support the lower appellate Court's decision, that they could sue as heirs of Vedambal. Moreover, even if that ground were not excluded by the pleading, further reference to it would serve no purpose. For, whatever the extent of Vedambal's interest, it does not appear on principle or authority how her heirs can have had any vested or other right in the property during her life time, which could debar her from alienating it to their prejudice or which they can rely on against 3rd, 4th and 5th defendants, her alienees.

The plaintiffs' claim as reversioners of Veerabhadra's estate would ordinarily be negatived by the fact that the interest of the 6th defendant, his surviving female heir, is still outstanding; and they accordingly contend that the agreement between her and Vedambal, Ex. A. effected a separation between the two shares into which the estate under it was divided, so absolute as to constitute each share a distinct estate, in respect of which the reversioner's succession would open separately on the death of the sharer concerned. Ex. A. no doubt is expressed in unqualified language, the parties to it agreeing to "enjoy severally for ever absolutely the properties which have fallen to their respective selves" and reciting that "neither should hereafter have a right over the properties set apart for the other," and, if it was open to them to relinquish their whole actual and future interests, each in the other's share, it must be held that they did so. It is urged that, whilst they could do so with the effect of depriving the survivor of the succession to the share of the one first deceased, the latter's share would pass, not to her own heirs, until the life estate might be determined on the survivor's death, but at once to the reversioners.

In favour of this contention there is only one authority. *Rindamma* v. *Venkataramappa* (1); but the passage relied on in it is, as a later case points out, only a non-committal reference to a possible conclusion on facts other than those actually before the Court. In *Subbammal* v. *Lakshmana Iyer* (2), on which the decision of the lower appellate Court is based, the dispute was between the surviving female life-tenant and her deceased co-tenant's heir. But it turned to some extent on the wording of the document under construction and there was nothing in the judgment directly in favour of the last male owner's reversioner, there being nothing to show that the deceased's heir was regarded as possessing that character. And in fact the lower appellate Court would seem to have erred, because it paid no attention to this aspect of the case. In *Ramakkal* v. *Ramaswami Naicken* (3) and *Kanni Ammal* v. *Ammakannu Ammal* (4) the parties were the surviving life tenant and an alienee from the deceased life-tenant, the decision in each cese being in favour of the latter. The inference from these two authorities is that, as the interest of the deceased was alienable, so it would, in the absence of an alienation, have passed to her heirs in the ordinary course of inheritance, although in them again the reversioner was not before the Court and his right was not pleaded; and there is nothing inconsistent with that inference in *Sudalai Ammal* v. *Gomathi Ammal* (5), although there the claim of the deceased's heir rested on a provision in the document of partition, or in *Papammal* v. *Venkatasami Naicken* (6), in which the learned Judges followed the clear current of authority although they doubted its correctness, Those decisions also do not deal with the claim of reversioners. But they are important, because they are consistent with the view, expressed in *Subbammal* v. *Lakshmana Aiyar* (2) that the agreement for division must be regarded, as in view of its wide language we must regard Ex. A., as a transfer by way of relinquishment by each party to it in case she should survive, of her right to the other's share and that such a transfer does not offend against S. 6 of the Transfer of Property Act and must receive effect. The relinquishment is and legally can be, when that is entailed by the language used, not only of the life estate, so far as it can be enjoyed simultaneously by the sharers, but of that estate, as they take it, limited only by the life time of the survivor; and the uncertainty as to which of the transferors will survive to benefit does not make the transfer one of a *spes successionis*.

That is material, when (as here) the claim is by reversioners. For there can be no reason why the effect of such a transfer should be less as against them. And two cases, *Kailash Chandra* v. *Kashi Chandra* (7) and *Muthiyala Chegappa* v. *Buradagunta* (8) support this. In the former the reversioners' claim was expressly dismissed as premature during the life time of the surviving female life tenant, the application of Dayabhaga Law not affecting this part of the decision. In the latter the grounds of decision were that a reversioner's right could not be accelerated by an agreement, to which he was not a party, and that no acceleration could result from a relinquishment, not to a reversioner, but to a co-life-tenant, the fact that there the relinquishment was not, as it is in the case before us, mutual, but of the right to a share in exchange for a money payment, not impairing the validity of these considerations.

The conclusion then must be that plaintiffs cannot, as reversioners, claim possession until the death of

(1) 1866) 3 M. H. C. 268.
(2) [1914] 26 M. L. J. 479—22 I. C. 399.
(3) [1899] 22 Mad. 522—9 M. L. J. 101.
(4) [1899] 23 Mad. 504—10 M. L. J. 253.
(5) [1912] 23 M. L. J. 355—(1912) M. W. N. 908—12 M. L. T. 288—16 I. C. 428.
(6) S. A. No. 356 of 1918 (Mad.)
(7) [1897] 24 Cal. 339.
(8) [1920] 43 Mad. 855—39 M.L.J. 567—28 M.L.T. 272—12 L.W. 656.

the surviving life tenant, 6th defendant; and that, as already pointed out, they cannot claim it by right of heirship to Vedambal, because against that right (if they have it) her alienation must prevail. So far the appeal must succeed and the suit, so far as it is for possession, must be dismissed. The plaintiffs however asked also for a declaration of the invalidity of Vedambal's alienations. They may subject to the law of limitation and other objections be entitled to such a declaration as reversioners; and it is not clear that they asked for this relief only as ancillary to their prayer for possession. The lower appellate Court's decision must therefore be modified in this sense, the remand to the District Munsif being allowed only for the consideration of the prayer for a declaration and of issues (ii), (iii) and (iv) as framed by him.

In view of the course of pleading, the District Munsif should, before proceeding with the trial, give defendants an opportunity to file additional written statements and should frame any further issues, which may be necessary with reference to them. Costs in this and the lower appellate Court to date will be costs in the case and will be provided for in the decree to be passed.

Venkatasubba Rao, J.—I entirely agree. This is an appeal by the defendants 3 to 5 against the order of the District Judge setting aside the dismissal of the suit by the District Munsif and remanding it for fresh disposal. Vedambal and Mahalakshmi Ammal, daughters of Veerabhadra Udayan who inherited their father's property, partitioned it by Ex. A. and certain items of property fell to the share of Vedambal and certain other items to the share of her sister Mahalakshmi. The deed contains the following clause.

"We have each of us taken delivery of the properties as have been set apart for our respective shares. We shall in future ourselves severally enjoy for ever absolutely the properties as have fallen to our respective selves, from progeny to progeny and fit for sale, gift, exchange, etc. We shall severally pay the Government tax for the lands as have been respectively set apart for us. Neither of us have a right over the properties set apart for the other."

The plaint contains an allegation that Vedambal Ammal executed a sale deed in respect of certain properties set forth in paragraph 6 thereof and that the defendants 3 to 5 claim a title under the sale deed. The plaintiffs are the sons of Mahalakshmi who was impleaded as the 6th defendant in the suit.

The District Munsif holding that the plaintiffs have no cause of action during the life time of Mahalakshmi dismissed the suit, and the District Judge as observed above reversed the decision of the District Munsif. The argument before us ranged over a wide ground. But the point that presents itself for decision is extremely simple.

According to the Mitakshara School two or more daughters succeeding as heirs to their father take as joint tenants with rights of survivorship. It is well settled that they may effect a partition, each daughter giving up her right of enjoyment over the properties allotted to the other daughter during the life time of the latter. The question then arises:—Can an arrangement be entered into by which each daughter may give up her interest not merely during the life time of the other daughter but during the whole of her own life time? It is difficult to see why such an agreement cannot be entered into. A and B inheriting their father's estate partition the property, B agreeing that in regard to the property that falls to A she gives up not only her interest for the life time of A, but also for her own life-time in the event of B surviving A. Why should such an agreement not be valid? If the arrangement amounted to a mere partition, the result is that B would give up her right in the property that fell to the share of A only for the life time of A and B's right to take by survivorship the share that fell to A would be unimpaired. But, if to an arrangement amounting to a partition was super-added the surrender

by B of her right to take by survivorship, the effect would be to dispose of the entire interest of B in favour of A. For convenience I have, in the illustration, referred to B's disposal of her interest. It makes no difference whether we consider the case from the standpoint of A or B. The act of the nature referred to above on the part of either of the co-sharers amounts to an alienation of her interest in the property falling to the share of the other. Such an alienation is, both on principle and authority, perfectly valid and binding.

As was pointed out in *Sudalai Ammal* v. *Gomathi Ammal* (5) if it is not denied that one of the joint tenants may part with her own life interest in favour of a stranger, it becomes difficult to imagine why she may not part with it in favour of the other joint tenant In the above case the question in regard to two co-widows was under consideration. But on this point there is no difference between the case of widows and daughters and the principle is equally applicable to the case on hand.

What Mahalakshmi gave under the deed was her interest in the property that fell to the share of Vedambal. That interest, as observed above, no doubt consists of two portions, (1) the interest which she would possess for the life time of Vedambal, (2) the interest which she would possess beyond the life time of Vedambal in the event of her surviving Vedambal. Does it therefore follow that in regard to the second portion she was dealing with *spes successionis* and therefore that her alienation of that portion contravenes S. 6 of the Transfer of Property Act? The argument seems to me grotesque, and I have no hesitation in rejecting it as was done in *Subbammal* v. *Krishna Aiyar* (2). The fact is, that what she surrendered, was her entire interest and it is not permissible to divide it into two interests for the purpose of making S. 6 applicable.

Ramakkal v. *Ramaswami Naicken* (3) is a very useful authority in this connection. A Hindu died leaving two widows who divided his property by a partition deed under which each took possession of her share with powers of alienation over the property comprised in it. Certain alienations were made by one widow who subsequently died. On the surviving widow claiming the whole of her husband's property including the portion she alienated, it was held that a widow could alienate for her life any estate which came to her as such and that she could therefore enter into such a deed as would preclude her from recovering during her life, property which she had alienated to the full extent of such alienation, provided it did not extend beyond her life interest.

The right to the property after Vedambal's death would under the Hindu Law, vest in Mahalakshmi for her life. The latter disposed of that interest in favour of Vedambal. If Mahalakshmi is bound by the alienation, I fail to see how it can be questioned by any other. But then, it is argued that the effect of Mahalakshmi's act was to accelerate the interest of the reversioners. The identical argument was advanced in *Muthiyala Chegappa* v. *Buralagunta* alias *Akula Venkataswami* (8) and was overruled, Sadasiva Aiyar, J., observing: "That a male reversioner's right should be accelerated by agreements to which he is not a party is, to me, a very startling proposition," and I entirely concur in this view.

It is necessary to notice another argument put forward on behalf of the respondents. It is said that even assuming that the interest transferred to Vedambal was to enure for the life time of Mahalakshmi, still that interest would pass to Vedambal's heirs and that the plaintiffs as her heirs are entitled to maintain the action. The reference to heirs succeeding, seems to me quite beside the point. Such interest as Vedambal acquired was alienated in favour of the appellants before us and the question of inheritance therefore does not arise. In this view it is needless to enquire whether the plaintiffs are the streedhanam heirs of Vedambal.

Appeal allowed.

✱ 1924 MADRAS 79

AYLING AND ODGERS, JJ.

Dharma Raja—Appellant.

v.

K. M. Pethur Raja and others—Respondents.

S. A. Nos. 553 and 554 of 1921, Decided on 16th March, 1923, against the decree of Addl. Sub. J., Ramnad in A. S. Nos. 28 and 29 of 1919.

Civil P. C., O. 23, R. 1 — Withdrawal by plaintiff respondent, of his suit against the appealing defendant at the appellate stage, was not allowed.

Plaintiff got a decree against the defendants one of whom only appealed, the other remaining silent. Plaintiff respondent then offered to withdraw his suit as against the appealing defendant and to be content with the decree as against the other defendants.

Held: that O. 33, R 1 provides for the withdrawal of a suit by a plaintiff and abandonment of part of his claim, as a matter of right and a similar privilege is inherent in an appellant as regards his appeal: but there is no provision of law which would extend this privilege to a plaintiff-respondent, nor is there reason why, when the litigation has reached the stage of an appeal, the respondent should be allowed the right to defeat the appeal and prevent its being heard by the simple process of withdrawing his suit as against the appellant.

[P. 79 C. 2]

T. S. Venkatarama Sastri and *A. Swaminatha Iyer*—for Appellant.

The Government Pleader and *A. S. Visvanatha Aiyar*—for Respondents.

Ayling, J.— The dispute which has given rise to the present litigation is in connection with a channel, which is claimed by the appellants to be a poromboke channel feeding the Karisalkulam tank which irrigates their lands, but which the respondents, who were plaintiffs in the first Court, claim to be a portion of their patta lands and to have no connection at all with Karisalkulam tank The suits were brought to establish the rights of the plaintiffs in the channel and to prevent interference by Government, who are impleaded under the designation of the Secretary of State as the first defendant, as well as by the other defendants, who are pattadars holding lands irrigated by the Karisalkulam Tank. In the first Court, the plaintiffs were successful and were granted the reliefs prayed for by them. Government did not appeal, holding, as is now explained by the learned Government Pleader, that their interests were not sufficiently involved in the matter to make it worth their while to contest the decrees of the first Court in appeals. The defendants, however, did appeal. When the appeals came on for hearing, the plaintiffs-respondents claimed that they were entitled as of right to withdraw their suit as against the present defendants appellants, and to content themselves with the decrees against Government who have not appealed. The learned Subordinate Judge accepted this plea and allowed the suits to be withdrawn and dismissed as against the present defendants-appellants, and the decrees against the Secretary of State were confirmed.

It is now contended on behalf of the appellants that the Subordinate Judge was wrong and that the plaintiffs could not claim as of right to be allowed to withdraw their suit at the stage which the litigation had reached, that they were prejudiced by the decrees of the first Court, even supposing the latter to be confined to a decree against Government, and that their appeals should have been heard and decided on their merits. We think these contentions are justified. The provision of law relied on by the plaintiffs-respondents is O 23, R. 1 of the Code of Civil Procedure, which provides for the withdrawal of a suit by a plaintiff and abandonment of part of his claim. This the rule gives as a matter of right and it is not disputed that a similar privilege is inherent in an appellant as regards his appeal: but we have not been referred to any ruling or provision of law which would extend this privilege to a plaintiff-respondent, nor can we see any reason why, when the litigation has reached the stage of an appeal, the respondent should be allowed the right to defeat the appeal and prevent its being heard by the simple process of withdrawing his suit as against the appellant. It may of course be argued that, although this is not a right of the appellant, nevertheless it is in the discretion of the Court to allow him

to do so but that will depend on considerations which, we think, have not been appreciated by the lower appellate Court. The lower appellate Court has held that the appellants in these cases have no right of appeal because they are not prejudicially affected by the decrees in so far as they are decrees against Government. We do not think this is so. The defendants represented themselves as holders of lands as depending on the supply of water allowed to them by Government. The effect of the decrees is to declare that a certain channel claimed by them as a supply channel to the Government tank is not such a supply channel and to prevent Government from using it as such and exercising its paramount right of distributing the water supply therefrom. We think that they clearly are materially prejudiced by the decrees against Government and that they should have a right of appeal against them. This is in accordance with the decision in *Sivasailam Iyer* v. *Ramakrishna Iyer* (1). It has been argued on behalf of the respondents that this is not so, because the appellant's rights have been negatived by the decision of this Court in another litigation terminating in S. A. No. 1198 of 1913. To what extent the decision in that appeal is conclusive of the rights of the parties in the present cases is a matter for argument; but, it is a question which must be decided in the course of the hearing of these appeals. We are most anxious to express no opinion on a point which would have to be determined by the lower appellate Court, but it is argued on behalf of the appellants that the points for decision in that case are not identical with those which may arise for consideration in these cases and in effect that the rights claimed by the plaintiffs in that case were more extensive than those which are prejudicially affected by the decrees in these cases. This is a point which we must leave to the lower appellate Court to determine.

The decrees of the lower appellate Court must therefore be set aside and the appeals remanded to the lower appellate Court for re-hearing and disposal on their merits. The plaintiffs respondents will pay the defendants-appellants their costs in this Court. The costs of Government in this Court will be provided for in the final decrees. The Court fee paid on the present appeals will be refunded to the appellants.

Appeals remanded.

(1) [1914] M. W. N. 788—26 I. C. 18.

1924 MADRAS 80

KRISHNAN, J.

Polimati Mungadu and others—Petitioners.

v.

Nalla Bapadu and others—Respondents.

Civ. Rev. Pet. No. 128 of 1922 D/- 28th February 1923 to revise the Order of Principal Dt. Munsif. Rajahmundry, D/- 1st September 1921.

Civil P. C., O. 33 R. 5 (d)—Court cannot go into merits.

Where plaint discloses a cause of action, it is not competent for a Court to go beyond the plaint and find that the plaintiff is not likely to succeed on the alleged cause of action. 41 Mad. 620 Foll. [P 80 C 2]

T. Ramachandra Rao — for Petitioners.

T. S. Raghunatha Rao—for Respondents.

Judgment.—The order of the District Munsif is clearly opposed to the ruling in *Govindasamy Pillai* v. *Municipal Council, Kumbakonam* (1). The learned Munsif has found that the petitioners are paupers, but has travelled beyond the four corners of the plaint and relied on evidence to hold that the petitioners have "no cause of action". The plaint certainly discloses a cause of action; and it was not open to the Court to go beyond it and come to a finding which, in reality, is a finding that the petitioners are not likely to succeed on the cause of action alleged. The Civil Revision Petition is allowed and the order of the Lower Court is set aside; and the petitioners are given leave to sue in *forma pauperis*. Costs will abide and follow the result of the suit.

Petition allowed.

(1) [1918] 41 Mad. 620–34 M.L.J. 399 45 I.C. 95.

** 1924 MADRAS 81

PHILLIPS AND VENKATASUBBA RAO, JJ.

Ramasvami Aiyar and others—Defendants—Appellants.

v.

A. S. Venkatarama Aiyar—Plaintiff—Respondent.

Appeal. No. 14 of 1922, Decided on 21st March 1923 against the decree of the Addl. Sub. J., Tanjore, in O. S. No 11 of 1920.

(a) *Hindu Law— Alienation by Manager— Alienee's right to claim partition in a suit to set aside the sale.*

In a suit by a co-parcener for recovery of the property or for partition, the alienee is entitled to claim partition, if it can conveniently be done. 40 Cal. 916 Foll. [P. 83 C. 3]

(b) *Mesne profits—Suit to set aside sale by Manager.*

In a suit to set aside a sale by a manager of the family which is not *prima facie* void but only voidable at the instance of other members of the family, the plaintiff is not entitled to any mesne profits, until the date of the plaint. 19 Cal. 123 and 5 Mad. 449, Ref. [P. 83 C. 2]

A. Krishnaswami Aiyar—for Appellants.

K. Bashyam Aiyangar and *V. C. Veeraraghavachariar*—for Respondent.

Phillips, J.—In this case the plaintiff is the son of one Sambasiva Aiyar, the adopted son of Sivarama Aiyar; and he sues to recover possession of certain properties sold by his grandfather Sivarama Aiyar, on the 29th of June 1901 to the 1st defendant, who is the father of defendants 2 to 4, on the ground that the sale was not effected for any necessity and is not binding on him. The plaintiff's father and grandfather are now both dead; and, therefore, the plaintiff claims to recover the whole of the suit properties.

The Subordinate Judge has found that there was no necessity for the sale and that it is, therefore, not binding on the plaintiff's share, and he has given a decree to the plaintiff for a division of the property into two parts and that for recovery of possession by the plaintiff of one-half with mesne profits, from the date of sale. The defendants now appeal and state that the decree is wrong and that the plaintiff's suit should have been dismissed on the ground that the 1st defendant acquired a right by the sale in his alienors's share and that he is also entitled to ask for partition of the family property, and to have the specific item assigned to his alienor's share, if that is consistent with the rights of other co-parceners.

It is not disputed that an alienee from an undivided co-parcener has a right to sue for a partition of the family property and to recover his alienor's share, in the case of a sale of an undivided share that share itself and in the case of sale of a specific item of property an equitable right to have that property assigned, if possible to his alienor's share. This principle was laid down in *Ayyagari Venkataramayya* v. *Ayyagari Ramayya* (1), and was followed in *Chinnu Pillai* v. *Kalimuthu Chetti* (2), when it was further held that the share of the alienor which passes to the alienee is the share to which the former was entitled at the date of alienation. This latter ruling disposes of the respondent's contention that the 1st defendant has lost all right to the property on the death of Sivarama Aiyar. It is thus quite clear on all the authorities that the 1st defendant is entitled to partition of the family property and to have the plaint property assigned to Sivarama Aiyar's share, if that can equitably be done, and can bring a suit for that purpose.

It is then argued for the respondent that relief cannot be given to the defendants in this suit and that they must be left to work out their rights in a subsequent suit, and reliance is placed on several cases cited, beginning with *Deenuyal Lal* v. *Jugdeep Narain Singh* (3). In that case it was held by the Privy

(1) [1902] 25 Mad. 690 (F. B.)
(2) [1911] 35 Mad. 47—21 M.L.J. 246—19 I. C. 1. M W. N. 238—9 M. L. T. 389—9 I.C. 596 (F. B.)
(3) [1877] 3 Cal. 198—4 I. A. 247—1 C. L. R. 149—3 Sar. 730—3 Suther. 468 (P. C.)

1924 MADRAS 84

VENKATASUBBA RAO, J.

Venkatachalam Pillai—Defendant—Petitioner.

v

P. V. Srinivasa Iyer—Plaintiff—Respondent.

Civ. Rev. Pet. No. 722 of 1922, Decided on 10th April, 1923, from the order of the Court of the Dt. Munsif, Valan_iman. in O. S. No. 233, of 1922 D/- 4th September, 1922.

Court Fees Act Sch. II, Art. 17 Cl. 4—S. 7 Cl. 4 (c) - Suit to set aside award—Actual and not arbitrary value will be accepted.

In a suit to set aside an award the plaintiff cannot place arbitrarily his own valuation on the relief and it need not be accepted as conclusive for purposes of jurisdiction, (*case law discussed*) [P 85 C 1]

A. Krishnaswami Iyar, S. Satyamurthi and *K. Narasimha Aiyangar*—for Petitioner.

A. Ramchandra Aiyar—for Respondent.

Judgment.—The question to be determined in this Civil Revision Petition is whether the District Munsif's Court had jurisdiction to decide the suit. The 1st defendant pleaded that the Court had no jurisdiction. The District Munsif overruled the plea.

The suit was instituted for the setting aside of an award passed by the defendants 2 to 6 to whom the plaintiff and the 1st defendant referred certain matters in dispute between them. By the award the plaintiff was directed to pay to the 1st defendant the sum of Rs. 11,070, with interest thereon. The contention of the 1st defendant is that the value of the subject matter of the suit is the amount mentioned in the award and that the District Munsif had consequently no jurisdiction to try the suit.

For the purposes of the Court fee payable, it is conceded by the plaintiff that the suit is governed by the Court Fees Act, Sch. II, Art. 17, Cl, (4). Under that provision, a fixed fee of Rs. 15 is payable on a plaint in a suit to set aside an award. As was pointed out in *Phul Kumari v. Ghanshyam Misra* (1), the award to be set aside "may be of the value of Rs. 10, or of the value of Rs. 1,00,000 and yet no distinction is made. In short, the Statute, for good reasons or bad, has dealt with certain actions irrespective of value." But it is equally clear that it is only for purposes of court fees, there is to be no reference to value. It is to an altogether different enactment that we must turn to find out, if the suit falls within the jurisdiction of the District Munsif's Court. S. 12 of the Madras Civil Courts Act, III of 1873, provides that the jurisdiction of a District Munsif extends to all original suits and proceedings of a Civil nature, of which the amount or value of the subject matter does not exceed Rs. 2,500. The short question to be decided is, does the subject matter of the suit exceed in value Rs. 2,500? In my opinion the question does not admit of any doubt, and the answer is clear that the value of the subject matter is the amount awarded by the arbitrators to the 1st defendant. The plaintiff seeks to set aside an award which directs payment by him of a sum over Rs. 11,000. He is affected by the award to that extent, and similarly if the award sub-sists, the 1st defendant will be entitled to that sum. If the award is set aside, that sum represents the measure of the 1st defendant's interest affected. The expression "the amount or the value of the subject-matter in S. 12 must receive its ordinary significance, and I fail to see how in a suit to set aside an award the value of the subject matter can be fixed with reference to any other consideration.

The learned Vakil for the plaintiff has not argued that the suit falls within S. 7, Cl. 4 (c) of the Court Fees Act, which relates to suits to obtain declaratory decrees, where consequential relief is asked for. No doubt, if the suit for the purposes of court fees, is governed by that section the plaintiff may value the relief at his pleasure, and the court fee payable is

(1) [1908] 35 Cal. 202—35 I. A. 22—7 C. L. J. 36—12 C. W. N. 169—10 Bom. L. R. 1—5 A. L. J. 10—17 M. L. J. 618—2 M.L.T. 506. (P.C.)

ad valorem, computed with reference to that valuation. S. 8 of the Suits Valuation Act will in that case apply, and the value as determinable for the computation of court fees and the value for purposes of jurisdiction will, in that event, be the same. As already observed, Sch. II, Art. 17, Cl (4), being in terms applicable to the suit in question, there is no necessity to resort to S. 7, Cl. 4 (c). This being the case, there is no occasion to impute to the relief claimed an imaginary or a notional value, as distinct from the real value. The plaintiff valued the relief at Rs. 2,500, to enable the suit to be filed in the District Munsif's Court. It is not disputed that this sum has no relation to the amount actually involved in the suit. The argument on behalf of the plaintiff, therefore, amounts to this, that in a suit to set aside an award the plaintiff may place arbitrarily his own valuation on the relief and that it must be accepted as conclusive for purposes of jurisdiction. I do not think there is any warrant for this position in any of the three Acts mentioned above, the Court Fees Act, the Suits Valuation Act and the Madras Civil Courts Act.

The view contended for, on behalf of the plaintiff leads to the anomaly, *viz.*, that a suit to set aside an award affecting rights to property valued at Rs. 1,00,000 may be filed in a Court of the lowest grade, and. unless there is very strong authority in favour of that proposition, I should not be prepared to accept it. On the contrary, the cases by which I am bound tend strongly to support the view which I am disposed to think is correct. In *Keshava* v *Lakshmi Narayana* (2), it was held that in a suit by a reversioner for a declaration. that, in fact, there was no adoption or in the alternative. if the adoption was made, it was invalid, the value of the suit for purposes of jurisdiction was the value of the estate in question or, in the words of the learned Judge :—

"The value of the interest that would be lost to the alleged adopted minor if the adoption be declared invalid"

(2) [1883] 6 Mad. 192.

This case was dissented from in *Sheo Deni Ram* v. *Tulshiram* (3) and the Bombay High Court in *Bai Rewa* v. *Keshavaram* (4) followed the Allahabad case last cited and in *Bai Machhbai* v. *Bai Hirabai* (5) followed again its earlier dicision. In *Prahlad Chandra Das* v. *Dwarka Nath Ghose* (6), the learned Judges observed that in a suit to set aside an adoption the practice was that the plaintiff could be permitted to value the relief and the valuation given by him was taken to determine the forum. I may observe in passing that the Allahabad, Bombay and Calcutta High Courts have treated the question as one relating to the practice prevalent in those provinces and that there is no discussion of the principle in any of the cases referred to above. These then are the authorities bearing on the valuation for purposes of jurisdiction of a suit to set aside an adoption.

Turning to suits for mere declaratory decrees, it has been held in *Ganapati* v. *Chathu* (7) that the value of a suit of that description must be taken for purposes of jurisdiction to be "what it would be, if the suit were one of possession of the property regarding which the plaintiff seeks to have his title declared." This case was followed and the law was stated in the same terms by the Patna High Court in *Mohini Mahan Misser* v. *Gour Chandra Rao* (8), the ground for the decision being stated thus:—

"It is difficult to see how the value of the declaration can be other than the value of the property in respect of which the declaration was asked for."

I have referred to the authorities dealing with suits to set aside an adoption and suits to obtain mere declaratory decrees, because for

(3) [1893] 15 All. 378—(1893) A.W.N. 147.
(4) [1894-96] P. J. 334.
(5) [1911] 35 Bom 264 — 13 Bom. L. R. 251—10 I. C. 816.
(6) [1910] 37 Cal. 860-14 C.W.N. 929-6 I. C. 636
(7) [1889] 12 Mad. 223.
(8) [1921] 1 Pat. L. T. 390—5 Pat. L. J. 397—56 I. C. 762.

purposes of court fees, Sch. II, S. 17 of the Court Fees Act treats them as standing precisely on the same footing as suits to set aside an award. If in the two classes of suits mentioned first, the actual value of the subject matter determines the forum. it seems to me indeed difficult to apply a different rule to suits of the third description, namely, suits to set aside an award.

Considerable light is thown on this question by the observations of the Judicial Committee in *Rachappa Subrao* v. *Shivappa Venkatrao* (9). The suit was instituted in the Court of the 1st class Subordinate Judge to establish the plaintiff's claim to the property of a deceased person on the ground that the plaintiff was his adopted son. The suit could be heard by the Judge in the exercise of his Special Original Jurisdiction, if the amount or the value of the subject matter exceeded Rs. 5,000. As already seen, by Sch. II to the Court Fees Act, a fixed fee is prescribed for a plaint in a suit to obtain a declaratory decree, where no consequential relief is asked for. The fixed fee was Rs. 10 and the prayer for declaration was valued in the suit at Rs. 130 in accordance with a practice not uncommon in Bombay of valuing a prayer for a declaratory decree at Rs. 130, as being the amount on which the fee nearest to Rs 10 would be leviable. The value of the property however exceeded Rs. 60,000. Their Lordships say that it is contrary to the scheme of the Act that there should be any valuation of a prayer for declaration and that when a fixed fee under Sch. II of the Court Fees Act is payable, regard should be had to the real value of the property for the purposes of jurisdiction. Their Lordships, however, very clearly, and emphatically point out that there is no warrant in law, in such cases, for what is described as notional value of the property. Of course, the case before the Judicial Committee was one falling within S. 17 (3), whereas the present case falls within S. 17 (4). But as I stated above, the principle to be applied is identical and the observations quoted from the judgment of the Privy Counci have a very direct and material bearing on the question before me.

I have no hesitation in holding that the District Munsif is wrong and I reverse his dicision and allow the Civil Revision Petition with costs throughout.

In the view I have taken, the learned vakils on both sides agree that the order I am to make is to direct the District Munsif to return the plaint for presentation to the proper Court.

I order accordingly.

Petition allowed.

(9) [1919] 43 Bom. 507—46 I. A. 24—17 A. L J 418—25 M. L. T. 298—36 M. L. J. 437—29 C. L. J. 452—21 Bom. L. R. 489—10 L. W. 274—24 C. W. N. 33—50 I. C. 280 (P.C.)

1924 MADRAS 86

SPENCER, J.

Arumugam Pillai, In re.

Civ. Rev. Pet. No. 351 of 1922 Decided on 4th Dec. 1922 to revise the order of Dt. Munsif, Karur, in O. P. No. 6 of 1922 D/- 14th November 1921.

Criminal P. C., S. 4 (m)—Retrial of suit after decree ex-parte is set aside is continatin of the origi al suit.

The trial of a suit after an *ex parte* decree against the defendant is set aside may be regarded as a continuation of the trial of the same suit which first ended in a decree. The definition of "judicial proceeding" in S. 4 (m) Criminal Procedure Code is not opposed to this view. 32 M. 49 and 42 M. 422 F. B. Dist. [P. 86 C. 1]

K. P. Mahadeva Aiyar for *V. C. Seshachariar and K. Narayana Aiyangar*—for Petitioner.

J. C. Adam—for the Crown.

Judgment.—The trial of O. S No. 88 of 1920 after the *ex-parte* decree against the defendant was set aside may be regarded as a continuation of the trial of the same suit which first ended in a decree for the plaintiff.

The definition of "judicial proceeding" in S. 4 (m) Criminal Procedure Code is not opposed to this view.

At the time of dismissing the suit, the District Munsif commenced to take action under S 476, Criminal Procedure Code, by issuing notice to

the petitioner to show cause against an order being passed under that section. Therefore the decisions in *Aiyakannu Pillai* v. *Emperor* (1), and *In re Padmanabha Hebbara* (2) are not applicable to the facts of this case. Whether the petitioner's acts amount to offences under Ss. 209 and 210, Indian Penal Code, is not of consequence in these proceedings. It is sufficient that as a witness he is liable to be tried for offences under Ss. 193 and 196 of the Indian Penal Code, for which sanction has been accorded. The petition is dismissed.

Petition dismissed.

(1) [1904] 32 Mad. 49—19 M.L.J. 42—9 Cr.L.J. 41—4 M.L.T. 404—1 I.C. 597.
(2) [1919] 42 Mad., 422—9 L.W. 315—36 M.L.J. 352—(1919) M.W.N. 223—25 M.L.T. 296—20 Cr.L.J. 309—50 I.C. 385 (F.B.)

1924 MADRAS 87

SPENCER AND KRISHNAN, JJ.

K. P. M. Neelakandhan Nambudiri, Urlan of Thirunarayanapuram Devaswom—Appellant.

v.

Vasudevan Nambudiri, Karnavan and Manager and another—Respondents.

A. A. A. O. No. 37 of 1921, Decided on 9th February, 1923, against the order of the Court of the Sub. J., Ottapalam, in A. S. Nos. 52 and 56 of 1920, D/- 28th September, 1920.

Civil P. C., S. 144—Interest is a good substitute for profits—Malabar redemption suit—No right of defendant in possession on increase of compensation for improvements.

Interest at a sufficient rate may be substituted for the profits, which the person in possession under a mortgage decree which was subsequently varied, enjoyed during the period between his execution of the first Court's decree and his giving notice that he had deposited the additional amount. The defendants in a redemption suit are not entitled to recover possession, merely because the amount of compensation for improvements is increased in appeal. But under S. 144 of the Code of Civil Procedure, they are entitled to interest or other compensation consequential on the variation of the First Court's decree.

[P. 87, C. 2]

K. P. Ramakrishna Aiyar—for Appellant.

C. Madhavan Nair—for Respondents.

Judgment.—Following the Observations of the Privy Council in the case quoted by the lower appellate Court, *Lala Kalyan Das* v. *Sheikh Mafbul Ahmad* (1) interest at a sufficient rate may be substituted for the profits, which the person in possession under a mortgage decree which was subsequently varied, enjoyed during the period between his execution of the First Court's decree and his giving notice that he had deposited the additional amount.

It was unnecessary to remand this case for ascertainment of the mesne profits. The defendants were not entitled to recover possession, merely because the amount of compensation for improvements was increased; *vide Subramanian Pattar* v. *Kuthiravattath Nayar* (2) and *Sankaran Nambu ripad* v. *Sankaran Nair* (3) but under S. 144 of the Code of Civil Procedure, they were entitled to interest or other compensation consequential on the variation of the First Court's decree.

We set aside the Subordinate Judge's order of remand and direct that the petitioners do recover interest on the additional compensation amount awarded at 12 per cent from 4th April, 1919, when plaintiff took delivery till 1st March, 1920, when the defendants became aware that the amount had been deposited. Each party will bear his own costs in these restitution proceedings in the lower Courts. In this Court appellant will get his costs

Appeal allowed.

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(1) [1918] 40 All. 497—8 L.W. 179—22 C.W.N. 866—35 M.L.J. 169—20 Bom. L.R. 864—16 A.L.J. 693—5 P.L.W. 159—28 C.L.J. 181—(1918) M.W.N. 535—24 M.L.T. 110—46 I.C. 548 (P.C.)
(2) [1921] 41 M.L.J. 15—13 L.W. 449—62 I.C. 724.
(3) 1922 Mad. 347—44 Mad. 960—(1921) M.W.N. 470—66 I.C. 129.

** 1921 MADRAS 88

AYLING AND ODGERS, JJ.

Chenraya Goundan and others—Plaintiffs—Appellants.

v.

Athappa Goundan and others—Defendants—Respondents.

S. A. No. 99 of 1921, Decided on 22nd March 1923 against the decree of the Sub. J., Salem, in A. S. No. 42 of 1919.

(a) *Civil P. C., S. 11—Expl. 6—Leave under O. 1 R. 8 not obtained—Explanation applies.*

Explanation 6 to S. 11 is not confined only to cases where leave of the Court has been granted under O. 1, R. 8. 43 M. 467 and 31 M. L. J. 36 Ref. [P. 88, C. 2 & P. 89, C. 1.]

(b) *Civil P. C., S. 11—Compromise decree constitutes* res judicata.

A judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment, which results from the decision of the Court, after the matter has been fought out to the end, unless the compromise can be attacked in some effective manner. (1895) 1 Ch. 37, 35 M. 75 and 41 M. 191 Ref. [P. 89 C. 2, P. 90 C. 1.]

T. L. Venkatrama Aiyar and *P. Sankarnarayana*—for Appellants.

S. Swaminathan—for Respondents.

Odgers, J. This suit was brought by the four plaintiffs for the recovery of certain land alleged to belong to the Mariamman Temple of Chettipatti under O. 1, R. 8, of the Code of the Civil Procedure and for a declaration that the decree in O. S. No. 934 of 1911 is not binding on the plaintiffs. The District Munsif found that the plaint property belonged to the Temple, that the Temple had possession of the plaint property within twelve years of the suit, and that there was no *res judicata* by reason of O. S. No. 934 of 1911, and gave the plaintiffs a decree.

On appeal the Subordinate Judge found that there was *res judicata* and that a certain compromise (to be referred to later) was not fraudulent or *ultra vires* and reversed the Munsif's decree. The question in second appeal is whether the Subordinate Judge was right on both these points.

In the previous suit, which was brought by the present defendants 1 to 3 and two others, they sued as the Periadhanakars of the Chettipatti village to recover the same land as in the present case. The former suit was compromised by two of the plaintiffs and the suit was dismissed as against two others.

The former suit was not brought under O. 1, R. 8, but the plaintiffs there (1 to 4) were Periadhanakars of the Padayachies of the Chettipatti village. In their plaint paragraph 4 (page 14 of the papers in Second Appeal No. 786 of 1914) they stated:

"The suit *inam* land has been in possession of the Periadhanakars, plaintiffs 1 to 4, since the time of their forefathers. Since the time of the plaintiff's forefathers, the puja, festivals, affairs of the Mariamman Temple in the said Chettipatti village have, for many a year, been conducted with the funds made up of the income derived from the suit *inam* land and of the collection of tax, Vattam etc. from among the Padayachi ryots alone, who are of the same caste as the plaintiffs."

The plaintiffs therein contended that the suit land belonged to the Mariamman Temple at Chettipatti, while the defendants therein contended that it belonged to a similar Temple at Uppupalayam—another hamlet in the same village. In my opinion, it must be taken that the plaintiffs in their former suit were suing as trustees on behalf of themselves and the whole body of persons, worshipping or interested in the temple at Chettipatti.

The first point taken for the appellants is that if the prior suit was to recover a right held in common with others, it was incompetent as it was not brought under O. 1, R. 8. Expl. 6 to S. 11 of the Code of the Civil Procedure says that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such a right shall, for the purpose of the section, be deemed to claim under the person so litigating. In *Gopalacharyulu* v. *Subbamma* (1), it was held that this explanation is not confined only to

(1) [1920] 43 Mad. 487—38 M.L.J. 493—(1920) M.W.N. 435—55 I.C. 984.

cases where leave of the Court has been granted under O. 1, R. 8. In that case a suit by some of the Agraharamdars of a village against the Zamindar and the other Agraharamdars was held *res judicata* against the representative of one of the latter, who was a defendant who died pending the appeal and whose legal representative had not been brought on the record. Wallis, C. J., held in that case that though:

"he would hesitate to hold that any litigation had been *bona fide*, within the meaning of that explanation, in which there had been a substantial departure from the accepted rules as to the joinder of parties, as for instance by suing without the leave of the Court in a case properly falling under O. 1, R. 8,.....", there was a case of *res judicata* established.

The decision follows that in *Rangamma* v. *Narasimhacharyulu* (2), where the contention for the appellants was that Expl. 6 of S. 11 makes the decision in the first suit *res judicata*, only if the first suit was a representative one under O. 1, R. 8. It was held that the explanation does not become inapplicable, because the suit was for the establishment of the plaintiffs' individual rights in addition to the right claimed by him in common to himself and others, in so far as his claim in respect of the latter right was concerned. It appears to me that the prior suit, though not brought under O. 1, R. 8, was brought in respect of a right claimed by the plaintiffs as trustees of the Temple in common with themselves and others. If this is correct, it would, on the authority of the two cases quoted above appear to make no difference whether it was in fact brought under O. 1, R 8 and that the observation of Wallis, C. J., referred to above would be inapplicable to a case where, as here, the trustees represented the whole body of the worshippers of this particular Temple in the suit. It was further argued that a decree by way of compromise can never constitute a *res judicata* by reason of the fact that the mind of the Court had not been brought to bear upon it, and reliance was placed on *Jenkins* v. *Robertson* (3). This case is however explained by Vaughan Williams, J., in *In re South American and Mexican Company, Ex parte Bank of England* (4) where he holds that *Jenkins* v. *Robertson* (2), is no decision on the general law:

"All that the House of Lords decided was that such a result (*i.e.*,) binding the public at large under the Scotch law would not bind the public at large, unless it was a result arrived at, after judicial consideration, and that it would not bind the public, if it was a result arrived at, by consent and *a fortiori* if such consent was a purchased consent."

Again:

"It has always been the law that a judgment by consent, or by default raises an estoppel, just in the same way as a judgment after the Court has exercised a judicial discretion in the matter."

This decision was approved by the Court of Appeal where Lord Herschall, L. C. said:

"the truth is a judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment, which results from the decision of the Court, after the matter has been fought out to the end."

In *Kumara Venkata Perumal* v. *Thatha Ramasamy Chetty* (5), it was held that the test for *res judicata* arising from a compromise is to be found in the construction of the decree in each case and that whatever is necessarily involved in the decree cannot be reopened by either party.

Muthavan v. *Keshavan* (6), was a suit by one trustee out of five to recover property alleged to have been illegally alienated by three of the others to a stranger. This suit was dismissed and was held to be a bar to a suit by the fifth trustee, as he must be held to have claimed under the plaintiff in the former suit.

(2) [1916] 31 M L J 26—(1916) 2 M.W.N. 258—35 I.C. 116.

(3) L. R Sc. App. 117.

(4) [1895] 1 Ch. 37—12 R. 1—71 L. T. 594—43 W.R 131.

(5) [1911] 35 Mad 75—(1911) 1 M. W. N. 290—9 M L T. 487—21 M. L. J. 709—9 I. C. 875.

(6) [1888] 11 Mad. 191.

I am therefore of opinion, on the authority of the above cases, that the compromise decree, as to two of the defendants, in the former suit, and the dismissal of the suit as against two of the others (the fifth was only a tenant) constitute a *res judicata* under S. 11, Expl, 6 and I therefore agree with the Subordinate Judge that the present suit cannot be maintained, unless the compromise can be attacked in some effective manner. The only point urged before us, on this part of the case is that the compromise was effected by only two of the trustees and it is said that there was no evidence of authority to bind the others. The latter, however, allowed the suit to be dismissed against them and in fact did not appear when judgment was pronounced. The Subordinate Judge sent the case down to the District Munsif for a finding, as to the *bona fides* of this compromise, whether defendants 1 to 3 in the former suit acted within the ambit of their powers as trustees of the Temple, or whether they acted fraudulently with the other defendants. The Munsif found that the trustees acted *bona fide*, in the interests of the institution and within the ambit of their powers and that there was no fraud or collusion with the other defendants. This appears to me to be a question of fact on which both the Munsif and the Subordinate Judge (see paragraph 9 of the latter's judgment) are agreed. I see no reason to interfere with these findings. In my opinion the Second Appeal therefore fails on both the grounds urged by the appellants and must be dismissed with costs.

Ayling, J.—I agree.

Appeal dismissed.

1924 MADRAS 90

SCHWABE, C. J. AND RAMESAM, J.

Krishna Reddy and others—Plaintiffs—Appellants.

v.

Thanikachala Mudali and another—Defendants—Respondents.

L. P. A. No. 3 of 1923, Decided on 7th March 1923 against the order passed by Kumaraswami Sastry, J. in O. S. No. 29 of 1922 D/-18th December 1922.

Letters Patent (Mad), Cl. 15—Order transferring a suit from Dt. Court to High Court is a judgment

An appeal lies from an order of the Judge sitting on the Original Side transferring a suit from the District Court to the High Court under Cl. 13 of the Letters Patent, the order being a judgment within the meaning of cl. 15 of the Letters Patent. 35 M. 1 (F. B.) Foll. 47 C. 1101 Not foll. [P 91 C 1]

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar*—for Appellants.

V. Visvanatha Sastri—for Respondents.

Schwabe, C. J.—This is an appeal from an order of the Judge sitting on the Original Side transferring a suit from the District Court of Chingleput to the High Court under Cl. 13 of the Letters Patent. As a preliminary point it is argued that no such appeal lies on the ground that the order is not a judgment within the meaning of cl. 15 of the Letters Patent. In the recent case of *Kanayalal Bhoya* v. *Paramasuk Doss* (1), I stated that "I do not propose to attempt to add a further definition to those which have already been given in other cases." Definition after definition has been attempted of that word. A very narrow meaning was given to it by Sir Richard Couch in *Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (2). A much wider definition was given by a Full Bench of this Court in *Tuljaram Rao* v. *Alagappa Chetiar* (3), and it is enough for me to say that, in these matters, this Court is bound by the opinion of its own Full Bench in that case. An attempt was made to give rules in that case which should be exhaustive of any matters that can come before this Court, and, in my judgment, all we have to do now is to say whether the matter in question before us is excluded from or included in the class of judgments referred to there. I find that it was there held that the case of *De Souza* v. *Coles* (4) in which it was held that the granting or refusing of

(1) 1923 Mad. 44—43 M.L.J. 480—31 M.L.T. 284—16 M.L.W. 608—68 I.C. 921
(2) 8 B.L.R. 433—17 W.R. 364.
(3) [1910] 35 Mad. 1—21 M.L.J. 1—(1910) M.W.N. 697—8 M.L.T. 453—8 I.C. 310 (F.B.)
(4) 3 M.H.C. 384.

leave to sue in this Court under Cl. 12 of the Letters Patent was a judgment in respect of which an appeal lay under cl. 15 was rightly decided. This has also been held in *Vaghoji* v. *Comaji* (5). I can see no difference in principle between such an order and the order in this case. The learned Judge in this case by his order puts an end to the case as it now stands in Chingleput and confers a jurisdiction on this Court in respect of that particular case. In my judgment, we are bound by the decision of the Full Bench of this Court referred to above and we hold that this is a matter which is appealable. The contrary view has been taken in *Khatizun* v. *Sonairam Daulatram* (6) where, on this precise point, a Bench of the Calcutta High Court has held that no appeal lies, but that Bench has applied the reasoning of Sir Richard Couch in his judgment in *Justice of the Peace for Calcutta* v. *The Oriental Gas Company* (2) and the passage which they followed in that case is the passage which was expressly dissented from by the Full Bench of this Court in *Tujaram Rao* v. *Alagappa Chettiar* (3). The Calcutta High Court followed the earlier Calcutta decisions on this point but this Court must follow its own Full Bench decision. It may be that some day this point may somehow get to the Privy Council and then perhaps we shall know whether Madras or Calcutta is right. But, for the present, all we can do is to hold that this appeal lies. The preliminary point therefore fails.

Both parties state that, by consent, this appeal has been settled on the terms that it should be dismissed without costs, the respondent undertaking to pay Rs. 100 to the appellants in respect of costs already incurred and also undertaking, if further court fee has to be paid by reason of the case having been transferred from Chingleput to Madras, to provide what may be necessary up to Rs. 100. C. M. P. No. 681 of 1923 for stay will also be dismissed.

Ramesam, J.—I agree.

Appeal dismissed.

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(5) [1905] 29 Bom. 249—6 Bom. L. R. 958.
(6) [1920] 47 Cal. 1104—60 I.C. 963.

1924 MADRAS 91

VENKATASUBBA RAO, J.

Kaliyaperumal Naidu—Petitioner,

v

Bavaji Shaib — Accused — Respondent.

Criminal Rev. No. 374 of 1922, Decided on 31st January 1923. to revise the Order of the Addl. Dt Mag. Tanjore, in Cr. R. C No. 28 of 1921, D/- 11th January 1922.

Criminal P. C., S. 250—Information given to Village Magistrate is information given to Police.

A man who complains to a Village Magistrate of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the Police, gives information to the police just as effectively as if he went in person to the police Station. 39 M. 1006; 5 L. W. 210 and 4 L. W. 73 Foll. [P. 92 C. 1]

S. Sraminathan—for Petitioner.

V. L. Ethiraj—for Respondent.

Order.—The 2nd Class Magistrate of Tanjore directed P.W. 4 to pay to the accused a sum of Rs. 35 as compensation under S. 250 of the Criminal Procedure Code, and the District Magistrate confirmed the order.

The facts are these, P. W. 1 lost a bull, P. W. 1 and P. W. 4 who were residents of a village called Rainsapatti thereupon went to Ammapet, the village where the accused was living and P. W. 4 gave information to P. W. 2, the Village Magistrate of Ammapet, to the effect that a bull of P. W 1 was stolen and that the accused was the thief. Before taking any action, P. W. 2 desired to have a report from the Village Magistrate of Rainsapatti, who accordingly forwarded to him Ex. A which confirmed the information given by P. W. 4. On the receipt of this report P. W. 2 communicated with the police who, charged the accused with theft, or in the alternative receiving stolen property. It must be added that the police subsequent to the receipt of the communication from the village Magistrate of Ammapet, but before charging the accused with the offences mentioned above, received from P. W. 1, the owner of the bull, information under S 154 Criminal Procedure Code. The lower Courts found that the accused was not guilty

and directed P. W. 4 to pay compensation to the accused.

On behalf of P W. 4, it is contended that the order directing him to pay compensation, is, in the circumstances illegal.

The first contention is that a Village Magistrate is not a Police Officer, or a Magistrate under S 250 and that as P. W. 4 gave information only to a Village Magistrate, an order could not be made directing him to pay compensation. Reliance is placed on *King Emperor* v. *Thammana Reddi* (1) and *in re Aru'anandadham* (2) and these cases no doubt support the contention aforesaid. But a different view was taken in three later cases. *Nachimuthu Chettti* v. *Muthusami Chetty* (3), *Gadilla Nadiabba* v. *Maryasa Raya Chetty* (4) *Thonikadavath Awl a* v. *Ammian Mannil Kuttiati* (5). The principle underlying these decisions tersely stated in the following passage in the judgment of Ayling, J., in *Nachimuthu Chetty* v. *Muthusami Chetti* (3) :—

> "In other words, a man who complains to a Village Magistrate of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the Police, gives information to the police just as effectively as if he went in person to the Police Station."

My own view coincides with that taken in the aforesaid three cases and I therefore hold that the information though given to a Village Magistrate comes within the terms of S. 250

Dr. Swaminadhan has also argued that P. W. 2, before acting on the information of P. W. 4. obtained information from the Village Magistrate of Rainsapatti and that this fact distinguishes the present case from the cases referred to above. I fail to see how P. W. 4's responsibility is in any manner affected by reason of the fact that P. W. 2 was cautious enough to obtain a report from a responsible person, who might be supposed to give, as far as possible, a correct account of the occurrence.

It is next contended that as P.W. 1, the owner of the bull, gave information under S. 154, the order in question directing P. W. 4 to pay compensation, is illegal. This argument is again untenable. The first information to the authorities was that given by P. W. 4 and it led to the initiation of the proceedings. The subsequent information given by P. W. 1 is of no significance in deciding the question under consideration.

It is unnecessary to consider whether on the facts an order could also have been made against P. W. 1; but so far as P. W. 4 is concerned, he is liable and I see no reason to interfere with the order passed.

As the accused is unrepresented in this Court, Mr. V. L. Ethiraj has at my instance argued the case on his behalf and brought to my notice the decisions referred to above and I desire to express my indebtedness to the learned counsel.

Petition dismissed.

(1) [1902] 25 Mad 667.
(2) [1912] 22 M. L. J. 138—(1911) 2 M.W.N. 558—10 M L. T. 500—13 Cr.L.J 29—13 I C. 221
(3) [1914] 39 Mad. 1036—(1914) M. W.N. 804—27 M L.J. 37—15 Cr. L.J. 431—24 I C 167.
(4) [1917] 5 L.W. 290—32 M.L J. 78—(1917) M.W N. 86—18 Cr.L J. 11—38 I.C. 843.
(5) [1917] 4 L.W. 73—(1917) M.W.N. 155—17 Cr. L.J. 503—36 I.C. 471.

1921 MADRAS 92

KRISHNAN, J.

Secretary of State for India—Petitioner.

v.

P. Appurao and another—Respondent.

Civil Rev. Pet. No. 428 of 1922 Decided on 7th March 1923 from the order of the Dt. Court Chittoor, in O. P. No. 54 of 1921 D/- 30th January 1922.

Ultra vires—Rule—Power to make rules—Test—There must be no power at all under any law.

Before a rule framed by a rule making authority is declared *ultra vires* the Court must be satisfied not only that it had no power to act under the power under which it purported to act, but also that it had no power at all under

any law to so act. If power can be found elsewhere than the section quoted, the rule will be referred to that power and held not to be *ultra vires*. [P. 93 C. 1]

Government Pleader—for the Crown.

Judgment.—Respondents have not appeared before me in person or by counsel and I have not had the advantage of hearing the argument on their side.

The Judgment of the lower Court treating the rules framed by the Governor in Council and published as notification No 1134 as *ultra vires* so far as they relate to the election of Chairmen and Vice Chairmen of District Municipalities on the ground that they purported to have been made under S. 303 (2) (b) of the Act clearly cannot be supported. Before a rule framed by a rule-making authority is declared *ultra vires* the Court must be satisfied not only that it had no power to act under the power under which it purported to act, but also that it had no power at all under any law to so act. If power can be found elsewhere than the section quoted, the rules will be referred to that power and held not to be *ultra vires*. This principle is recognised in *Rajam Chetty* v. *Seshayya* (1), where the Full Bench of this Court in considering whether a rule framed for the guidance of the Presidency Small Cause Court by this Court was *ultra vires* or not did not confine themselves to the section which was cited in the rule as authorising it but went beyond to consider whether there was any power under any other provision that would justify it and it was only after holding that there was no such power that they declared the rule *ultra vires*. A similar view was taken in *Queen-Empress* v. *Ganga Ram* (2). In the present case as the District Judge himself remarks there was ample power to frame the rules objected to under S. 303 (2) (c) and it is only an obvious mistake that clause (c) was not also added. Such an omission does not affect the validity of the rule. See also Halsbury, Vol 27 p. 146.

As to the jurisdiction of the District Judge to hear election petitions, the District Judge is right in holding that he has jurisdiction as the rules expressly give it to him.

The order of the lower Court is set aside and that Court is directed to take the petition on to its file and dispose it of according to law.

There will be no costs for this petition.

Application allowed.

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(1) [1894] 18 Mad. 246—5 M.L.J. 14 (F. B.)

(2) [1894] 16 All. 136—(1894) A.W.N. 39 (F. B.)

1924 MADRAS 93

PHILLIPS AND DEVADOSS, JJ.

Venkatarangayya Apparao Bahadur—Plaintiff—Appellant.

v.

Morampudi Bajiraju and others—Defendants—Respondents.

F. A. No. 136 of 1916. Decided on 15th January, 1923, against the decree of the Sub J., Masulipatam, in O. S. No. 77 of 1913.

Grant—Presumption—Grant of both varams.

There is no presumption that an inam grant by a zamindar is a grant of the melvaram only or of both varams. 41 M. 1133 and 43 M. 166 1932 P. C. 232 Ref. [P. 94 C. 1]

Y. Suryanarayana—for Appellant.

K. Kamanna—for Respondents.

Judgment.—This appeal relates to the resumption of service inams, which were resumed in Fasli 1301 by Government (1st defendant), but this resumption was cancelled and 1st defendant exonerated from the suit. The Zamindar's claim in his plaint was to eject the other defendants, the inamdars, but the learned Subordinate Judge has dismissed the suit on the ground that plaintiff had failed to prove that the inam granted consisted of both kudivaram and melvaram. In coming to this conclusion he has relied on a presumption that an inam grant by a zamindar is a grant of the melvaram only. It has now been decided by the Privy Council in *Suryanarayana* v. *Patanna*

(1) and *Venkata Sastrulu* v. *Seetharamulu* (2) that no such presumption exists, but the decision may be supported on other grounds.

Before dealing with the evidence in the case it was argued that inasmuch as a zamindar can be the owner of both varams, and as a landlord must be deemed to lease the whole of his interest in his land, therefore the lease or grant in this case must have included both varams. This is tantamount to arguing that there is a presumption that inam grants by a zamindar are grants of both varams, but the argument was not framed in this way, as such a presumption has been expressly negatived by the Privy Council in *Sivaprakasa Pandara Sannathi* v. *Veerama Reddy* (3). We must therefore determine the nature of the grant from the evidence. Inasmuch as plaintiff sues in ejectment he is bound to prove that he has a right to eject and he can do that only by proving that he granted the land itself and is now entitled to resume it.

The original grant, having been made nearly 200 years ago, is not available, and the only evidence adduced by plaintiff is the fact that a similar inam was resumed in 1869-70, and was subsequently treated as his own private land. The fact that no one disputed the Zamindar's claim then, cannot be evidence against defendants. On the other hand there is evidence that the Zamindar was unable effectively to resume a similar inam at a later date. Defendants have also filed documents from 1833 onwards showing that they dealt with the land as their own. We must therefore hold that plaintiff has failed to prove his right to eject and consequently the lower Court's decree is right.

The lower Court has found, and in our opinion rightly found that plaintiff is entitled to resume these inams, and it is now contended that the decree should have contained a declaration to that effect. There was no such prayer in the plaint, but as an issue had been framed on the point we allow plaintiff's request and modify the decree by inserting such a declaration. In other respects the appeal is dismissed.

A number of defendants have compromised this appeal and decree will be passed accordingly and sanction to compromise on behalf of minors is also asked for. In view of our finding, such sanction cannot be given,

Appeal dismissed.

(1) [1918] 41 Mad. 701—45 I.A. 209—25 M. L. T. 30—(1918) M. W. N. 859—23 C. W. N. 273—9 L. W. 126—29 C. L. J. 153—36 M. L J. 535—21 Bom L. R. 547—(1919) M.W N. 463—48 I. C 639 (P. C.)

(2) [1919] 43 Mad. 165—46 I.A. 1 3—17 A.L.J. 725—37 M.L.J. 42—21 Bom. L. R. 925—26 M.L T. 175—30 C.L.J. 441—10 L. W. 633—24 C.W.N. 129—51 I.C. 304 (P. C.)

(3) 1922 P. C. 292—45 Mad. 536—49 I. A. 286—43 M L.J. 640—16 M.L.W. 103—31 M.L.T. 54—37 C.L J. 199—27 C. W.N. 245—68 I. C. 538 (P. C.)

✱ 1924 MADRAS 94

SCHWABE, C. J. AND COLERIDGE, J.

B. Chandramma — Plaintiff—Appellant.

v.

C. Naganna and another—Defendants—Respondents.

S. A. No. 30 of 1921, Decided on 19th April, 1923, against the decree of the Sub. J., Vizagapatam, in A. S. No. 225 of 917.

Hindu Law—Succession—Dancing girls—sons & daughters get equal shares.

Amongst the dancing girl's caste, the sons and daughters inherit equally, contrary to ordinary Hindu usage. [P. 95 C. 1]

K. Sundara Rao—for Appellant.

Y. Suryanarayana-for Respondents.

Coleridge, J.—The suit is in ejectment. The plaintiff was a purchaser in Court-auction in O. S. No. 627 of 1911 of the suit property and he got possession; but the defendants, who were tenants, refused to execute a lease and claimed occupancy rights from seven persons who, they said, were the Inamdars. The suit lands were nautch Inam lands, and the Inam was enfranchised in the name of Maddila Gangayya and Maddila

Basayya by Ex. C in 1851. Aleyya and Chelliya were two members of the families of these two original Inamdars, and they mortgaged the property as theirs and the decree under which the sale took place was against them.

The lower Courts have found that these two were members of a dancing girl family of which there were nine members living and the District Munsif, on remand for a finding, held that Aleyya and Chelliya were entitled only to 5/9ths, that this was all they had power to mortgage and that this was all the plaintiff could recover. The lower appellate Court accepted the finding that the mortgage would only bind the share of these two, but disagreed with the lower Court that there was no custom amongst the dancing girls caste for females to share with the males; and holding that the custom had been established that females share equally with the males, he decreed only 2/9ths to the plaintiff.

Both the Courts held against an alleged partition and we are bound by that finding.

The only grounds of appeal here are (1) that the custom set up is not sufficiently established by the evidence and (2) that the plaintiff's predecessors-in title had adverse possession. As regards the latter point, it is clearly not so, for the property was held as tenants-in-common by the members of the family. Also as to this point there was no plea, no issue and no evidence. As regards the former, it is true that only one old man speaks to the custom; but he proves two partition deeds of the caste in which the females shared with the males. It is not as if this was some strange new custom; it is a well-recognised one which we find in Thurston's Castes and Tribes of Southern India dealing with Deva Dasis at page 127, Vol. II, where he mentions as a recognised custom that the sons and daughters inherit equally, contrary to ordinary Hindu usage. We are therefore, satisfied that the lower appellate Court was justified in finding the custom proved.

The appeal, therefore, fails and is dismissed with costs.

Schwabe, C. J.—I agree and only wish to add this that, in addition to one witness aged 70, the 1st witness for the defendant, a young man it is true, stated "Among dancing girls' caste the males and females share equally." Although the evidence of custom is not as definite or clear as it ought to be, and I have no doubt in this case it could have been, I think there is sufficient to justify the finding of the Subordinate Judge that the custom was proved.

Appeal dismissed.

1924 MADRAS 95

OLDFIELD AND DEVADOSS, JJ.

Balusami Iyer —Plaintiff — Appellant.

v

Venkataswami Naicken and *T. S. Ringaswami Iyengar, Official Receiver, Madura* —Petitioner—Respondent.

A. A. O. No. 151 of 1922, Decided on 6th March 1923 against the order of the Addl. Sub. J., Ramnad, in E. A. No. 24 of 1922.

(a) *Civil P. C., O. 45 R. 15—Separate transmission is not necessary.*

It would be inconvenient, if not impossible, to hold that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted. [P. 96 C. 1]

(b) *Decree—Execution—Any party can apply for execution.*

There is no foundation for the principle that only the successful appellant can execute the order, unless such restriction can be inferred from the actual language of the decree or order itself. 17 M. 83; 25 M. 426 Dist. [P. 96 C. 1]

A. Krishnaswami Ayyar with *M. Subbaraya Ayyar* —for Appellant.

C. V. Anantakrishna Ayyar and *S. R. Muthuswami Ayyar*—for Respondent.

Oldfield, J.—The lower Court's order is objected to first on the ground that the respondents before us, petitioners before it, were not entitled to apply for restitution, when they had not, under O. 45 R. 15, obtained transmission of the order

of His Majesty in Council to the lower Court, that order being the basis of their claim. O. 45 R. 15 no doubt does make it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission. But in the present case transmission has already been obtained by the 27th defendant, the successful appellant in the Privy Council. It would be inconvenient, if not impossible, to hold that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted. This ground of appeal is not sustainable.

The next ground on which the appeal is argued, is that the petitioners are not entitled to apply for execution of the order by way of restitution or otherwise, because they were not parties to the Privy Council Appeal. It is true that they were not impleaded as parties, the 27th defendant, the successor in interest of the 26th defendant, having been the appellant; and it is true that they claim as lessees from the deceased 26th defendant. But we cannot accept either generally or with reference to the particular circumstances of this case, the principle that only the successful appellant can execute the order. That principle has been supported by reference to *Kassim Saib* v. *Louis* (1) and *Natesa Ayyar* v. *Annusami Ayyar* (2). But those decisions turned on the special circumstances in each case, and on reference to the record in the second we find that the decree under execution did contain an explicit limitation sufficient to justify the conclusion reached. We have not been shown how it is consistent with any general principle that any limitation should be applied to the execution of the decree resulting from the order, unless such restrictions can be founded by the actual language of the decree or order itself.

Turning to the decree and order in this case in order to see whether the contention before us is sustainable with reference to the particular circumstances, we find that the order is without qualification and the Subordinate Judge also in the decree, which it restored, without qualification refused the relief which the plaintiff asked against the defendants 1 and 2, except in respect of a small sum claimed for quit-rent, cocoanuts etc., with which we are not concerned. In view of the unqualified language used, we cannot read into either order or decree any intention to exclude from the relief granted to the present respondents. It is said that the case as between them and the plaintiffs was not on the same footing as the case between the successful appellant, 27th defendant, and the plaintiffs, because in their case a plea of estoppel might have prevailed against them. We do not feel called upon to enter into that when, (as we have stated) the result of the Privy Council appeal is clear and amounted to an adjudication that the plaintiff was not entitled to retain against them the land or the profits, or the sum of money representing the profits, which the lower Court awarded to them in restitution.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1892] 17 Mad. 82.
(2) [1901] 25 Mad. 426.

1921 MADRAS 96

WALLACE, J.

Mahalakshmi—Plaintiff—Petitioner.

v

V. Venkam Setti and others—Defendants—Respondents.

C. R. P. No. 537 of 1921, Decided on 7th December 1922.

Limitation Act, S. 20—Payment by son—Debt by father for his own purposes—No acknowledgment.

Where a promote *prima facie* a for 1st defendant's necessity only and not for family necessity the mere fact that 2nd defendant is his

undivided son will not suffice to make a payment by him tantamount to an acknowledgment in law on behalf of his father, for the father's private debt, or suffice to raise any presumption that 2nd defendant acted as his father's agent in making such a payment.

[P 97, C 1]

V. Ramadas—for Petitioner.

Ch. Raghava Rao—for Respondent.

Judgment.—Plaintiff argues that the endorsement by the 2nd defendant binds 1st defendant the manager of the joint family because the pronote was executed by 1st defendant for joint family trading purposes. The pronote states that the 1st defendant himself borrowed the money "for my necessity" and says nothing about family necessity or family trade. There is no allegation in the Civil Revision Petition that plaintiff was not allowed to adduce evidence; so I must take it that the whole case is before me. Hence, as I have said, the pronote *prima facie* is for 1st defendant's necessity only and the mere fact that 2nd defendant is his undivided son will not suffice to make a payment by him tantamount to an acknowledgment in law on behalf of his father, for the father's private debt, or suffice to raise any presumption that 2nd defendant acted as his father's agent in making such a payment.

Now can there be any decree against 2nd defendant as he is not a promisor under Ex. A. and is not liable in 1st defendant's life-time for such a pronote debt?

I therefore dismiss the petition with costs.

Petition dismissed.

✱ 1924 MADRAS 97

OLDFIELD AND VENKATASUBBA RAO, JJ.

A. R. A. R. S.' M. Somasundaram Chettiar by agent Venkatachalam Chettiar—Appellant.

v

Sundaresa Rao Scindia Saheb and others—Respondents.

A. A. O. Nos. 180 and 181 of 1920 & C. R. P. Nos. 495 and 496 of 1920, Decided on 14th February 1922 against the orders of Dt. Court, Tanjore, in Ex. P. N. 11 of 1920 and Ex. A. No. 48 of 1920 D/-3rd February 1920.

1924 M—13 & 14

Civil P. C., S. 73 (2)—Aggrieved, decree holder—Remedy is by suit.

Even though the person aggrieved is the decree-holder, the remedy is by way of suit and not one under S. 47 C. P. C, or by revision.

[P 98, C 1]

C. S. Venkatachariar—for Appellant.

K. V. Krishnaswami Ayyar—for Respondents.

Judgment.—These appeals arise from certain proceedings in execution. There is first an appeal against order No. 180 of 1920, the order in question being one dismissing the appellant's petition for a share in rateable distribution of an amount of Rs. 23,000 in deposit in the lower Court to the credit of the judgment-debtor; and there is next an appeal against No. 181 of 1920, the decision in which, it is admitted, will follow that in appeal No. 180.

Separate arguments have been relied on in reference to Rs. 20,000 out of the Rs. 23000 and the remaining Rs. 3,000. As regards the claim to the rateable distribution of Rs. 20,000 which is opposed by the respondents who are other creditors, the facts are that the appellant originally made his application in a manner which the lower Court regarded as invalid. The Rs. 23,000 had been deposited by a receiver in the Court to the credit of the judgment-debtor; and rightly or wrongly, the Court held that the appellant's petition was incompetent, in the absence of any sanction for it by the Court. The petition for want of such a sanction was returned to the appellant; while it was in his possession and before he could amend and present it again, Rs. 20.000 out of the Rs. 23,000 was paid out to the present respondents. Subsequently when the appellant's petition came before the Court for disposal, it was dismissed by the order under appeal in respect of the Rs, 20,000 on the ground that no valid petition had been presented by the appellant before the money was paid out.

Mr. Venkatachari has argued that notwithstanding the terms of S. 73 (2) C. P. C. we can interfere with such an order either by way of appeal mainly, if we understand him aright, on the ground that it must be

regarded primarily as an order between the judgment-debtor and the present appellant his decree-holder, and is therefore appealable under S. 47 C. P. C. That might be arguable, if the issue decided was whether the decree-holder could execute the decree or whether the fund in Court was liable at all to satisfy it. But we see no reason for, and in fact no meaning in, so regarding it, since we can give no such relief as the appellant requires against the judgment-debtor alone or without impleading the other respondents creditors. We may add that when the Code statedly contemplates that persons, aggrieved in such circumstances as the appellant has alleged, shall have their remedy by suit, there can be no foundation for the use of our discretionary powers in revision. S. 73 (2) in our opinion clearly covers such a case as tho present and applying it, we must hold that the appellant is entitled only to sue the respondents and that his appeal so far as it relates to Rs. 20,000, received by them must fail.

The claim as regards the remaining Rs. 3000 stands on a different footing, In order to dispose of it, we think it necessary to have before us the full record in execution petitions Nos. 58 and 86 of 1919 and therefore adjourn the hearing in order that the full record may be obtained from the lower Court.

The record which has now been obtained from the lower Court shows that the remainder of the fund in dispute has been paid out to the two creditors-petitioners. In these circumstances it is impossib'e to distinguish between the considerations applicable to that remainder and those, which we have already applied to the bulk of the fund.

As regards that remainder, therefore, the appeals must fail ; and they are accordingly dismissed *in toto* with costs

For the reasons already given the Revision Petitions also are dismissed, but without costs.

Petitions and Appeals dismissed.

✱ 1924 MADRAS 98

PHILLIPS AND VENKATASUBBA RAO, JJ.

M. Murari Rao and others — Defendants Nos. 1 to 3—Appellants.

v.

Balavanth Dikshit and another—Plaintiffs—Respondents.

S. A. No. 294 of 1920, Decided on 5th July 1923, against the revised decree of the Dt. Court, Bellary, D/- 31-3-1920, in O. S. No. 33 of 1917.

(*a*) *Hindu Law—Mitakshara—Succession—Agnates are preferred to sister's sons.*

Under Mitakshara law as applied in Madras, the agnates are to be preferred to the sister's sons. 38 M. 45 Ref. [P. 99, C. 1]

(*b*) *Civil P. C., O. 47, R. 1—Error includes error of law.*

The word 'error' need not necessarily be limited to errors of fact, but there are cases in which an error of law can also come within the meaning of the rule *e. g.* where the error of law is such that it is clearly apparent on a perusal of the record. 44 I.C. 161 ; and 1 Cal. 184, Diss. [P. 98, C. 2]

B. Satyanarayana—for Appellants.

V. S. Narasimhachar—for Respondents.

Judgment.—This suit is a dispute regarding the properties of one Gundu Bhat, who died leaving a minor daughter who survived him only a few days. Plaintiffs claim to be the nearest agnates of Gundu Bhat, while defendants are admittedly his sister's sons. The District Judge found plaintiffs' case to be true, but held that the sister's sons were the preferential heirs. Plaintiff applied for review of judgment on the ground that it has been held in *Kamala Bai* v. *Bhagirathi Bai* (1), that the agnates are to be preferred to the sister's sons. This ruling had not been brought to the Judge's notice at the original trial and he accordingly revised his original order and gave a decree to plaintiffs. Defendants, appeal both on the merits, and on the ground that it was incompetent for the District Judge te grant a review as none of the grounds mentioned in O. 47, R. 1, C. P. C. is present in this case.

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(1) [1912] 38 Mad. 45—23 M.L.J.518—12 M.L.T. 499—(1912) M.W.N. 1166—16 I.C. 939.

On the merits we entirely agree with the District Judge's conclusion that plaintiffs have satisfactorily proved their relationship. Pedigrees filed by Gundu Bhat's father, Giri Bhat, (Exs. L and V) in 1860 at the time of the inam enquiry show that plaintiffs' grand-father and Giri Bhat were descended from a common ancestor, Venkana Bhat. There are one or two discrepancies in the intervening links of the genealogical trees, but they clearly show the relationship between the families, and there is a remark in Ex. L 1, showing that plaintiff's grand-father held an inam in Dombala (Bombay Presidency). This explains their house name of Dombala, the house name of the other branch being Ittigi. There is also the oral evidence of three witnesses (P. Ws. 2, 3 and 9) who are the executors of Gundu Bhat's will, that Gundu Bhat admitted the relationship and even entertained the idea of adopting one of the plaintiffs. These three men were persons enjoying Gundu Bhat's confidence and no reason has been shown for disbelieving their evidence.

Defendants content themselves with a denial of the relationship, but have no particular case of their own, nor can they point to any specific defect in plaintiffs' claim to relationship. We find that plaintiffs are Gundu Bhat's agnates and are entitled to succeed in preference to defendants.

It next remains to consider the validity of the District Judge's order granting a review. Appellants rely on *Chhajju Ram* v. *Neki* (2). The actual facts of that case are not too clear, but it is evident from the judgment that the case is not one in which the first two grounds for review mentioned in O. 47, R. 1 were considered at all, the decision being that unless a review is granted for "any other sufficient reason" that reason must be analogous to the preceding reasons contained in that rule. In the present case the District Judge was guilty of an error of law, but an error so patent that we think it can be said to be "apparent on the face of the record." It has undoubtedly been held in many cases such as *Hazra Sardar* v. *Kunja Behari Nag Chowdhury* (3) and *Ellen* v. *Basheer* (4), that a mistake in law is not sufficient ground for granting a review, but there are other cases in which a different view is taken. We are of opinion that each case must be judged by itself and that where the error of law is such that it is clearly apparent on a perusal of the record, there is ground for granting a review. To hold otherwise would be to multiply litigation, for naturally the aggrieved party would appeal and the error would have to be corrected by the appellate Court rather than in the Court of First Instance. Here the question of law involved is the question af priority of heirs under the Mitakshara Law applicable to this Presidency, and it is a question which can admit of no doubt, when it has been definitely laid down by this Court as the law of the land. In the present case therefore we think that the error was one apparent on the face of the record and that therefore the District Judge had power to grant a review under the provisions of O. 47. We are not prepared to accept appellant's contention that the word 'error' must necessarily be limited to errors of fact, but consider that there are cases in which an error of law can also come within the meaning of the rule.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

(2) 1922 P.C. 112—3 Lah 127—49 I. A. 144—30 M.L.T. 295—16 L. W. 37—26 C.W.N. 697—3 Pat. L.T. 435—17 P.W.R. 1922—24 Bom. L.R. 1238—36 C.L.J. 459—43 M.L.J. 332—(1922) M.W.N. 435—72 I.C. 566. (P.C.)

(3) [1917] 44 I.C. 161.

(4) [1876] 1 Cal. 184—24 W.R. 382.

1924 MADRAS 100

OLDFIELD AND DEVADOSS, JJ.

R. Mamillayya and others—Decree holder and purchaser—Appellants.

v.

A. Venkataratnam—Judgment-debtor Respondent.

S. A. No. 76 of 1921 and Cr. P No 610 of of 1921, Decided on the 21st March 1923, to revise the order of Sub. J., Kistna. in A. S. No. 393 of 1920.

Civil P. C. S., 151—Inherent power can be used to set aside order of lower Court resulting in an abuse of the process of his Court.

During the progress of Court sale sons of the judgment-debtor filed a suit for partition of the property and obtained an *interim* injunction staying the sale. The judgment-debtor applied for the adjournment of the sale on the ground that "the bidders had come and gone away thinking that the auction would not take place." He did not rely on the injunction directly in the first instance, but simply preferred the application for adjournment. The said injunction had been passed only half an hour ago by the same Court, who, however, refused to grant adjournment.

Held, that the District Munsif's conduct in the present case was not in contravention of any definite provision of law. But his action resulted in the words of S. 151, as an abuse of the process of his Court, and therefore under the inherent power recognised in that section his order must be set aside. [P. 101 C. 2]

S. Varadachariar—for Appellants.

C. Rama Rao, Y. Suryanarayana and *S. Venkataratnam*—for Respondents.

Judgment.—This appeal and the revision petition are against an order of the lower appellate Court setting aside a Court-sale. We shall confirm that order with reference to our powers under S. 151, Civil Procedure Code; and it is therefore necessary to state fully the facts which justify our taking that exceptional course.

During the progress of the Court sale in question the sons of the judgment-debtor, here respondent, filed a suit for partition of the property and obtained an *interim* injunction staying the sale. That injunction is not before us; but it is not alleged that it was not in the ordinary form. After the injunction had been granted, an attempt seems to have been made to serve it on the decree-holder; but he had left the Court, although (as appears) his Vakil was still there and took part in the proceedings next to be referred to.

Those proceedings consisted in an appplication by the judgment-debtor for the adjournment of the sale on the ground that "the bidders had come and gone away thinking that the auction would not take place." The application was heard at once in the presence of the decree holder's Vakil. The judgment-debtor, who was not the party who had obtained the injunction, did not rely on it directly in the first instance, but simply preferred this application for adjournment, and the rejection of it is the irregularity or, as the lower appellate Court has held, the illegality relied on as a ground for setting aside the sale, which was later in the day completed.

The District Munsif first rejected the allegation that the bidders had gone away, thinking that the auction would not take place, on the rather unconvincing ground that, although some of the bidders might have gone, there were still three persons who were willing to bid; and it may be observed that two of those persons are said to have been gumasthas of the two decree-holders, who had obtained rateable distribution of the sale proceeds and eventually purchased the property. But there follows the remarkable portion of the District Munsif's order which we extract *verbatim*. "The petitioner says that some injunction has been said to have been passed and that most of the other bidders have consequently gone away. A copy of the injunction has not been served admittedly on the decree-holder and it is said that the said injunction has been passed only half to one hour ago and no authority is shown as to how the executing Court can take any notice of

an alleged injunction said to have been passed in an injunction suit a short while ago." It is clear from this that the existence of an *interim* injunction was relied on by the judgment-debtor although it is not explicitly referred to in his application. It is further, it must be at once observed, not suggested that the injunction having been passed was ever withdrawn. It is possible that, as the District Munsif who in the first instance dealt with the present petition has held, the injunction was granted on insufficient grouuds and the partition suit was simply a device to frustrate recovery by the decree-holders, who were supporting the sale. But that was immaterial. When the District Munsif had granted the injunction and so long as it stood he had no duty but to give effect to it. The reason stated in the halting words we have quoted from his order for not doing so was that he did not know of its existence; and it is, we recognise, easily possible for a Court to forget the details of orders, passed however recently, in the press of business. But we can see no reason, and none is suggested, why a Court cannot and should not verify an allegation, such as was in question in this case, by reference, which could easily have been made, to papers, which had been disposed of in the words of the order before us "only half to one hour ago." We can only conclude that the District Munsif deliberately shut his eyes to or at least perversely refused to ascertain what he had done.

This having been the District Munsif's disposal of the application for adjournment, we have to decide whether there was any contravention of the law, constituting an illegality, on which the sale can be set aside. There is no doubt that, as the authorities relied on before us show, a legal act done in breach of an injunction will not ordinarily be invalidated on that account and that the only consequence of contempt of an injunction is the penalty which the Court is competent to impose. But it is not suggested that any of those authorities relates to the case of proceedings actually being prosecuted in the Court, the prosecution of which under the Court's authority actually deprives its injunction of effect. Such a result we cannot acquiesce in and we do not think that the law compels us to do so. It is no doubt true that the District Munsif's conduct in the present case was not, so far as we have been shown, in contravention of any definite provision of law. On the other hand there is the fact that his action resulted in what must be described, in the words of S. 151, as an abuse of the process of his Court; and we therefore hold that we are entitled to use, as the lower appellate Court was entitled to use the inherent power recognised in that section to prevent the consequences.

It remains only to refer to the excuse, which the lower appellate Court has charitably suggested for the District Munsif's act That excuse is that the *interim* injunction was obtained without bringing to the notice of the Court full details regarding the sale and that, when the application was made for adjournment, the District Munsif was "naturally put out seeing that the petitioner himself set up his own sons to get the order passed without bringing all the facts to his notice." First, that is not the reason, which the District Munsif himself has given; and secondly, even if it had been the reason, it was useless, since, so long as the injunction stood, it was not open to the District Munsif to deprive it of effect, whatever his second thoughts as to the propriety of its issue.

Taking this view we confirm the lower appellate Court's order and dismiss the appeal with costs. C. R. P. is dismissed.

Appeal and Revision dismissed.

✱ 1924 MADRAS 102

SPENCER AND DEVADOSS, JJ.

Ambi alias Subramanian Pattar—Appellant.

v.

P. K. V. Sridevi styled *Vala Thamburatti*—Respondent.

S. A. No. 114 of 1921, Decided on 26th July 1923, against the order of the Sub. J., South Malabar, in A. S. No. 152 of 1920.

(a) *Civil P C., O. 21, R. 1 (2) —Does not apply to mortgage decrees.*

O. 21, R. 1 Clause 2, is not applicable to cases of mortgage decrees which are governed by O. 34. R. 8 which governs decrees in redemption suits does not specifically require any notice to be given to a defendant after the decree has been passed before the plaintiff obtains possession, [P. 102, C. 2]

(b) *Malabar Law—Redemption Kanomdar is not entitled to stay delivery pending reva uation.*

Kanomdar is not entitled to have delivery stayed pending a revaluation of improvements. 44, Mad. 960. Foll. [P. 102, C. 2]

(c) *Civil P. C. S., 34. (2)—Non-mention by appellate Court as to interest granted by lower Court amounts to refusal.*

Where as regards interest on costs, the first Court in its judgment awarded to the defendants their costs with interest at the usual rate and the appellate Court reduced the amount of costs to be paid to defendant and increased the amount due to the plff. it is reasonable to suppose that the appellate Court considered it unnecessary to award interest on costs, although it did not expressly say so. Under S. 34 (2) where a decree is silent with respect to nterest, the Court shall be deemed to have refused such interest. [P. 103, C. 1]

The Govt. Pleader (*C. V. Anantha Krishna Iyer*,—for Appellant.

K. P. Ramakrishna Aiyar—for Respondent.

Judgment.—The respondent in this case obtained a decree for redemption of a kanom after the expiry of the kanom period. There was an appeal and the appellate Court modified the District Munsif's decree on certain points. It confirmed it as regards the main right of the plaintiff to redeem the suit property. In the second appeal two points have been pressed. First it is argued that before the decree-holder obtained possession, notice ought to have been given to the 1st defendant, and that the failure to give notice prejudiced this defendant in respect of his right to remove the improvements made by him if it appeared to him advantageous to him that he should do so and in respect of his right to demand increased compensation for the period during which he had been in possession after the passing of the decree. The second point argued is that the decrees which have heen executed have been misconstrued as regards the interest awarded by the first Court on costs. In support of the first point Mr. Ananthakrishna Iyer has referred us to O. 21 rule 1 clause 2 of the Code of Civil Procedure which requires that notice should be given of any payment made into Court under a decree. This order and rule evidently refer to a money decree. The rule says that notice of such payment should be given to the decree-holder. In a redemption decree it is the decree-holder who makes the payment and the defendant who is to receive it. This rule is evidently not applicable to cases of mortgage decrees which are governed by O. 24, Rule 8 whioh governs decrees in redemption suits does not specifically require any notice to be given to a defendant after the decree has been passed before the plaintiff obtains possession. Moreover the Kanomdar was not prejudiced by the want of notice seeing that he was not entitled to have delivery stayed pending a revaluation of improvements. This has been established by *Sankaran Nambudripad* v. *Sankaran Nair* (1). As regards interest on costs, the first Court in its judgment awarded to the defendants their costs with interest at the usual rate. This was taken to be 6 per cent, when the decree was drawn up. Then plaintiff and the 1st defendant appealed and the appellate Court directed the plaintiff to pay the 1st defendant Rs. 203-8-0 as costs instead of Rs. 343 8-0 and the 1st defendant to pay the plaintiff Rs. 146-8-0 as costs and directed that in other respects the decree of the lower Court should be confirmed. As the lower appellate

(1) 1922 Mad. 347—44 Mad. 960—(1921) M.W.N. 470—66 I.C. 129.

Court reduced the amount of costs to be paid to the 1st defendant and increased the amount due to the plaintiff, it is reasonable to suppose that the appellate Court considered it unnecessary to award interest on costs, althought it did not expressly say so. If it had thought it necessary to award interest to the 1st defendant, it might have also awarded interest to the plaintiff on his costs. While leaving the order awarding interest on the costs of the defendant untouched in the judgment the lower appellate Court simply directed that the decree of the District Munsif should be modified in accordance with the findings recorded. The words "the decree of the lower Court is in other respects confirmed" appears in the decree only. The difficulty that has arisen in the present case is only as to the interpretation of the appellate Court's decree. Under S. 34 (2) of the Code of Civil Procedure where a decree is silent with respect to interest, the Court shall be deemed to have refused such interest. The lower Court therfore appears to be right in holding that the result of the appellate Court's decree was to abrogate the order of the first Court as regards interest on costs and therefore the amount paid into Court must be treated as the correct amount, and the appellant is not entitled to have it increased or to have the property redelivered to him.

The Second Appeal fails and is dismissed with costs.

Appeal dismissed.

✱✱ 1924 MADRAS 103

KRISHNAN AND VENKATASUBBA RAO, JJ.

G. P. Thiruvadi Ayyangar and another—Defendants 2 and 5—Appellants.

v.

P. Janaki and others—Plaintiff and Defendants. 1, 4 and 3.–Respondents.

S. A. No. 130 of 1921, Decided on 19th April 1923, against the decree of the Sub. J., of Tuticorin, A. S. No. 12 of 1920.

(a) *T. P. Act, S. 101*—Per Krishnan, J.—*Mortgagee purchasing mortgaged property for price of equity of redemption and amount of mortgage does not necessarily intend to destroy mortgage*—Per. Venkatasubba Rao, J. *But where purchaser agrees to pay off puisne mortgagee, his mortgage must be deemed to be not kept alive.*

If a person buys property over which he has a mortgage himself and the mortgage in consequence becomes discharged by merger, or by the terms of the sale deed, he can nevertheless use that mortgage as a shield against any puisne incumbrancer, who attempts to enforce his claim against the property, unless his intention to extinguish the mortgage is clear otherwise; Whether the purchase is statedly of the whole property, for a price made up of the price of the quity of redemption and of the mortgage amount, or whether it is, statedly, of the equity of redemption only, the transaction is substantially the same. One cannot necessarily assume the existence of an intention on his part to extinguish it, even in the former case. 12. L.W. 393. Foll.

[P 103, C 2 & P 104, C 1]

(b) *Contract—Stranger can enforce*

Per Krishnan, J.—Stranger can enforce contract if parties to contract are parties to suit and stranger is supported by the interested. party 34. A. 3. (P. C.) Dist. 34. Mad. 119, Parly foll.

[P 104, C 1]

C. A. Seshagiri Sastri for *M. Patanjali Sastri*—for Appellants.

K. R. Rangaswami Aiyangar—for Respondents.

Krishnan, J.—My learned brother has set out the facts of the case in his judgment which he is about to deliver and they need not therefore be repeated. I agree with him that the second appeal fails but for reasons somewhat different from his.

2. It seems to me clear that if a person buys property over which he has a mortgage himself and the mortgage in consequence becomes discharged by merger, or by the terms of the sale deed, he can nevertheless use that mortgage as a shield against any puisne incumbrancer, who attempts to enforce his claim against the property, unless his intention to extinguish the mortgage is clear otherwise. That is the principle of Section 101 of the Transfer of Property Act. The buyer cannot be credited with the intention of altogether extinguishing his mortgage for all purposes, when it is found to be to his benefit to keep it alive, merely because, in the deed of purchase, a part of the purchase money is treated as going in discharge of his mortgage. Whether the

purchase is statedly of the whole property, for a price made up of the price of the equity of redemption and of the mortgage amount, or whether it is, statedly, of the equity of redemption only, the transaction is substantially the same and as it is for his benefit to keep the 1st mortgage alive, we cannot necessarily assume the existence of an intention on his part to extinguish it, even in the former case. See the decision in *Chidambara Naadn* v. *Muni Nagendrayan* (1). The puisne mortgagee loses nothing, by the 1st mortgage being used as a shield, as he bargained only for a right subject to the 1st mortgage and there is no reason why his right should be enlarged, because the prior mortgagee purchases the property. In the present case, therefore, I should have been prepared to hold that defendants 2 and 3 had not lost their right to plead their 1st mortgage under Ex. I, as against the plaintiff but for the covenant in their deed of purchase, Ex. III, whereby they expressly undertook to pay off the whole of the plaintiff's mortgage amount. That I think makes the difference in this case.

3. Having covenanted to pay the plaintiff's mortgage amount themselves, it is not open to them to deny their liabilities. It was contended that plaintiff cannot take advantage of the covenant in Ex. III, as she was not party to it and reference was made to *Jamna Das* v. *Ram Autar Pande* (2), a decision of the Privy Council. This might be so; but the 1st defendant with whom the covenant was made and who is entitled to enforce it, is a party to this suit and has asked the Court to enforce it by making defendants 2 and 3 pay the plaintiff's mortgage amount themselves by sale of item No. 1, free of encumbrances. I do not see why that claim should not be enforced in this suit. Defendants 2 and 3 have no answer to that claim. It was argued that 1st defendant should be left to sue for damages for breach of covenant, if he suffers any injury, by reason of defendants 2 and 3 not paying off the plaintiff's mortgage. He will no doubt have a right to sue for damages; but this is not a reason why in this suit itself, when the parties are all before us, their rights should not be adjusted. There is no necessity to drive the 1st defendant to a separate suit for damages. I would, therefore, in enforcement of the covenant between the 1st defendant and defendants 2 and 3 direct that item 1 be sold free of any claims by the latter under their mortgage; and for that reason, I would support the decree of the Lower Appellate Court.

4. A somewhat similar case arose in *Govindasami Tevan* v. *Dorasami Pillai* (3), where a person purchased property subject to 2 mortgages and covenanted with the vendor that he would pay off both mortgages. He paid off the 1st mortgage but not the 2nd. In a suit by the 2nd mortgagee he pleaded the 1st mortgage he had paid off, as a shield against the plaintiff; but his plea was disallowed. The learned Judges have based their judgment on the view that as the 1st mortgagee had been paid off, in pursuance of a covenant to discharge it, it could not be treated as alive for any purpose, or used as a shield. Whether this is the right view to take or not, I am inclined to think that the decision is clearly right, though I should be inclined to put it, on the ground above stated, that the covenant by the vendee with the mortgagor vendor to pay off the 2nd mortgage could be enforced in the 2nd mortgagee's suit, where all the parties are before the Court; and consequently, the 1st mortgagee cannot be allowed to plead his mortgage as a shield.

For the above reasons, I agree that the second appeal should be dismissed with costs of the plaintiff.

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(1) [1920] 12 L.W. 393—(1920) M.W.N. 534—28 M.L.T. 300—39 M.L.J. 445—58 I.C. 813.

(2) [1912] 34 All. 63—39 I.A. 7—16 C.W.N. 97—11 M.L.T. 6—9 A.L.J. 37—(1912) M.W.N. 32—15 C.L.J. 68—14 Bom.L.R. 1—21 M.L.J. 1158—13 I.C. 304 (P.C.)

(3) [1910] 34 Mad. 119—20 M.L.J. 380—8 M.L.T. 132—(1910) M.W.N. 390—6 I.C. 781.

Venkatasubba Rao, J.—I shall state very briefly the facts material for the decision of the question involved in this second appeal. The plaintiff was originally the owner of the suit item with which we are concerned. She executed a mortgage in favour of defendants 2 and 3, and it is evidenced by Ex. I, dated 10th July, 1904. The plaintiff then sold the property to the 1st defendant by Ex. II, dated 8th August, 1906, subject to the mortgage in favour of defendants 2 and 3. The effect of these two transactions may be shortly stated to be that the second and third defendants acquired a mortgage right, in respect of a property, of which the owner was the first defendant; and for the purpose of deciding the question at issue, we must have regard to this result, and a separate consideration of each of these two transactions, as distinct from and unconnected with the other is not called for. Then we come to the third transaction, namely, the creation of a mortgage in favour of the plaintiff, by the first defendant, Ex. C, dated 16th August, 1906. The suit, out of which the second appeal has arisen, was based upon this mortgage. Fourthly, the 1st defendant sold the property to the second defendant, for the benefit of defendants 2 and 3, subject to the mortgage in favour of the plaintiff. This sale is evidenced by Ex. III, dated 23rd February, 1914.

What is the net result of these transactions? We may start with the first defendant as the owner of the property. There is a first mortgage in favour of defendants 2 and 3. The 1st defendant then executed a 2nd mortgage in favour of the plaintiff. Finally, the 1st defendant sold the property to defendants 2 and 3 (I already stated that the sale in favour of the 2nd defendant was for the benefit of defendants 2 and 3), subject to the mortgage in the plaintiff's favour.

The plaintiff instituted this suit on her mortgage. The 2nd and 3rd defendants pleaded, in respect of their own mortgage, priority over the mortgage of the plaintiff. The question to be decided is, have they such priority?

S. 101 of the Transfer of Property Act runs as follows:—

"Where the owner of a charge or other encumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or encumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit".

According to this section, as the continuance of the encumbrance would be for the benefit of defendants 2 and 3, the mortgage in their favour would continue to subsist, unless there is evidence of an intention to extinguish such mortgage. We must turn to Ex. III, the deed of sale, dated 23rd February, 1914, to find out what the intention of the parties was. It recites that the consideration for the sale is Rs. 3,400 and that it is made up in the following manner:

(1) Rs. 1,500 retained with the purchaser (the 2nd defendant or practically defendants 2 and 3) being the amount due to the plaintiff, under the hypothecation bond, dated 16th August, 1906, (Ex. C); (2) Rs. 800, the amount received in cash by the 1st defendant the seller; and (3) Rs. 1,100 the amount agreed by this deed to be the equivalent of the mortgage dated 10th July, 1904 (Ex I), in favour of defendants 2 and 3.

In the first place it is to be observed that defendants 2 and 3 have undertaken by this document to pay the plaintiff Rs. 1,500, due in respect of her mortgage. Is this undertaking consistent with an intention to keep alive their own mortgage, in the sense that it is to prevail over the mortgage of the plaintiff? I have no doubt that they are not entitled to enforce the mortgage in their favour as against the plaintiff. Let me take a very simple example A property is mortgaged in favour of A to secure a sum of Rs. 100. B takes a second mortgage over the same property for the sum of Rs. 200. A finally purchases the property subject to the two mortgages for Rs. 50. If B sues for the recovery of Rs. 200 and the property is found worth Rs. 300 or more, no question of priority arises,

as the property is sufficient to discharge both the mortgages. But if the property realises less than Rs.300, the question becomes material. Is the mortgage in favour of A subsisting, or is it extinguished ? Ordinaril he will be entitled to say the mortgage in his favour is subsisting: (S. 101 of the Transfer of Property Act). If the property, for instance, realises only Rs. 100, A will be entitled to claim that sum, in discharge of his own prior encumbrance. But, supposing that the sale deed in favour of A contains a covenant by A to pay B the full amount of Rs. 200, how can then A say that he is still entitled to priority ? It is that very right to priority that is destroyed by the covenant. It has been suggested that all that A undertakes is that he renders himself liable to pay B Rs. 200, in the event of the security being found sufficient to pay both the mortgages. To me this argument seems absolutely untenable. As I already observed, if the security realises a sum sufficient to pay both the mortgages, B will be paid his Rs. 200, as a matter of course. Then, where is the need for a special covenant ? The covenant becomes relevant only when the security is found insufficient.

The second and third defendants have undertaken to pay the plaintiff Rs. 1,500. The undertaking is absolute. They have not said that they will be liable to pay Rs. 1,500 only in the event of the security being found sufficient to pay off both the mortgages. The competition is only between the plaintiff on the one hand and the second and third defendants on the otber. The 2nd and 3rd defendants entered into the covenant, that, notwithstanding that the law favours the in this competition, they will allow the plaintiff to take precedence of them. There is no third party involved. The contest is merely between the plaintiff on the one hand and the defendants 2 and 3 on the other. If the plaintiff is to have her entire Rs. 1,500, no question of priority can possibly arise. Defendants 2 and 3 having agreed to pay her that sum, they must be deemed to have clearly intended that the mortgage in their favour should be extinguished. Of the cases cited, the only case that has a bearing upon this question is *Govindsami Tevan* v. *Doraisami Pillai* (3) and the view that I have taken is consistent with the principle underlying this decision.

Apart from this, I am prepared to hold, on a construction of Ex. III, that the prior mortgage in favour of defendants 2 and 3, Ex I, was agreed to be treated as discharged. If the prior mortgage is discharged by payment in full, no further question can arise. What difference does it make that the creditor has waived a portion of the amount due to him and has agreed to treat the mortgage in his favour as completely discharged ? I am prepared to go even further. Suppose the purchaser, the prior mortgagee, agrees with the seller the mortgagor, to forego the entire amount and treat the mortgage as discharged, what difference does it make ? Whether the mortgage is discharged by payment in full, or by an agreement between the parties, the result is the same and the mortgage becomes extinguished. When the mortgage is discharged or is extinguished, no further question of subrogation can arise. In the course of the argument, it was suggested by Mr. Seshagiri Sastri, the learned vakil for defendants 2 and 3, that the agreement to discharge may be effective as between the mortgagor and the mortgagee; but it can have no force as against the puisne encumbrancer. I fail to see how a mortgage deed in fact can be used as a shield against the subsequent encumbrancer. All that S. 101 enacts is that a mortgage, which in fact exists, must not in law be deemed to be extinguished, by reason of the merger in the same individual of the two interests, the interest of the mortgagee and the interest of the owner of the equity of redemption. To say that a mortgage which has become extinguished springs into exstence to be enforced against the puisne encumbrancer is opposed to principle and there is nothing in the section, which lends support to such a view.

I find in the terms of the deed, Ex. III, sufficient indication of a discharge of the prior mortgage in favour of defendants 2 and 3. The Rs. 1,100, the third item of the consideration, is described in the deed to be "the equivalent of" the mortgage dated 10th July, 1904. If this rendering is correct, there is a complete discharge. But, a rival construction was suggested, namely, that the Tamil words only mean "on account of" and not "as an equivalent of." Even if this meaning be adopted, I am still of the opinion that the mortgage was treated as completely discharged. It is extremely improbable that, if the purchaser intended that his prior encumbrance should be kept alive to any extent, he would pay to the seller in cash Rs. 800. Any balance payable to the seller would have been set off against the amount due, on the footing of the mortgage. As a matter of fact, there is no dispute that to the extent of Rs. 1,100 at any rate, there was no actual payment but there was merely an adjustment. Then again, it must be remembered that the sum of Rs. 1,100 represents the principal and the interest upon it at 27½ per cent. The rate of interest provided for in Ex. I is 75 per cent. There is nothing unlikely in the second and third defendants having agreed to forego a portion of this exorbitant interest. The amount actually received by them included interest calculated, as pointed, at 27 ½ per cent., a rate quite high. In the circumstances, I also hold, on a construction of Ex. III, that the second and third defendants agreed to treat the mortgage Ex. I, in their favour as completely discharged.

The result is that the second appeal fails, and is dismissed with costs.

Appeal dismissed.

✱ 1924 MADRAS 107

OLDFIELD AND DEVADOSS, JJ.

B. Levai Sahib and others—Appellants.

v.

Ammeenammal and others—Respondents.

A. A. O. No. 154 of 1921, Decided on 16th March 1923, against the order of the Sub. J., Madura D/- 9th December 1920, in A. S. No. 34 of 1917.

Civil P. C., O. 9, R. 13—Right to challenge decree exists, where no application to set aside is filed — Untenable application before decree, though to set aside decree, is no bar to the right.

The right of a person who has been placed *ex parte* to impugn the decree ultimately passed is recognised subject to the qualification that he has not moved the Court of first instance to set aside the *ex parte* decree under O. 9 R. 13, 30 Mad. 54, and 39 M. L. J. 697 Foll.

An application before decree is passed to set it aside on the wrong belief that a decree is passed, though rejected on merits, is not bar to the right. [P. 108, C. 1

S. Srinivasa Aiyangar and *K. S. Ganapathi*—for Appellants.

A. Krishnaswami Aiyar and *P. S. Chandrasekhara Aiyar*—for Respondents.

Oldfield, J.—This appeal is against the final decree passed in a partnership suit. The course of the proceedings before the District Munsif was that, after the preliminary decree had been passed, the scope of the enquiry was defined in an order D/- 25-9-1916 and the suit was then posted for evidence. On the date, to which it was adjourned, the 1st defendant did not appear to adduce his evidence; and the Distrct Munsif declared him *ex parte*. A decree was afterwards given on the basis of the evidence adduced by the other parties to the proceedings; and against that decree there was an appeal to the Lower Appellate Court, by the 1st Plaintiff. There was also a memorandum of objections by the 1st defendant, in which he complained *inter alia* of his having been debarred from producing evidence. The lower appellate Court held that his absence on the date of hearing was sufficiently explained and the District Munsif's order placing him

ex parte and excluding his evidence was not justified. It therefore remanded the suit directing that his evidence should be taken, and we first deal with the appeal so far as it is against that direction.

It is urged that the 1st defendant was not entitled to bring his objection to the enquiry, based on his having been placed *ex parte* before the appellate Court in a memorandum of objections, unless in the words of O. 41, rule 22 (1), C. P. C., he could have taken his point by way of appeal. The right of a person who has been placed *ex parte* to impugn the decree ultimately passed on that was recognised in *Krishna Aiyar* v. *Kuppan Ayangar* (1) subject to the qualification, which is emphasized in *Badvel Chinna Asethu* v. *Vattipalli Kesavayya* (2) that he has not moved the Court of first instance to set aside the *ex parte* decree under O. 9 rule 13 of the Code of Civil Procedure. It is urged however that in effect the 1st defendant had so moved the Court, because before the decree was passed, but under the incorrect impression that it had been passed, he presented a petition asking the District Munsif to allow him to make a defence and produce his evidence and the District Munsif disposed of that petition on its merits. Such a petition is not a remedy recognised by the Code; and we do not see how the fact that it was intended to be and believed to be a petition recognised by the Code can alter its real nature or give it and the order passed on it a legal effect, to which they would not in fact be entitled. Taking this view, we regard the case in *Krishna Aiyar* v. *Kuppan Aiyangar* (1) as in point, and hold that the 1st defendant is entitled to object to the order placing him *ex parte* in his memorandum of objections. Nothing has been said here against the lower appellate Court's conclusion that he was wrongly placed *ex parte*, and its decree so far as it directs the District Munsif to hear his defence and to take his evidence must therefore stand.

The lower appellate Court's decree however went further than that, because it set aside the decree of the District Munsif *in toto* and remanded the suit for disposal according to law with a direction that further evidence might be adduced by all the parties with reference to the order dated 25—9—1916 already referred to as defining the scope of the enquiry. That order was objected to on its merits, not only by the 1st defendant in his memorandum already referred to, but also by the 1st plaintiff in his grounds of appeal and by two other plaintiffs in their memorandum of objections. Unfortunately all this seems to have been lost sight of by the lower appellate Court. For it has made no reference at all in its order of remand to the merits of those objections. We consider that it would be futile, so long as those objections are outstanding and undisposed of, to have further enquiry or further evidence taken on the lines, to which the majority of those concerned object. We must therefore set aside the lower appellate Court's order except in so far as it recognises the right of the 1st defendant to take part and adduce evidence in the future proceedings and direct it to consider the remaining grounds set out in the appeal and memoranda of objections by him and the other parties. When it has dealt with those objections on their merits, it will again remand the case. Costs here and in the lower appellate Court will be costs in the cause and be provided for in the order to be passed. Stamp value will be refunded on application.

Appeal allowed.

(1) [1907] 30 Mad. 54—16 M.L.J. 479—1 M.L.T. 268.
(2) [1920] 39 M.L.J. 697—12 L.W. 507—(1920) M.W.N. 780—29 M.L.T. 63—60 I.C. 215.

✱✱ 1924 MADRAS 108

DEVADOSS AND COLERIDGE, JJ.

M. Gangulu and another — Defendants 1 & 2—Appellants.

v

T. Jagannatham and others — Plaintiffs and defendants 3 to 5—Respondents.

S. A. No. 208 of 1921, Decided on 11th April 1923, against the decree of Sub. J., Kistna, in A. S. No. 68 of 1919.

Easements Act, S. 13—Necessity in (a) (c) (e) is absolute necessity, in (b) it is qualified necessity—Openings or vents used, though often shut out for convenience, prove continuous apparent and necessary easement.

An easement of necessity, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property, but an easement apparent and continuous and necessary for enjoying the portions severed from the unity of ownership will pass to the transferee unless a contrary intention is expressed or implied in the instruments of transfer (1902) 2 Ch. 557 at 572 and 3 Bom. L. R. 601 Foll. [P. 110, C. 1 & 2]

Where the plaintiffs' plots were all along watered through the openings or vents,

Held, the existence of these vents is sufficient evidence of an apparent, continuous and necessary easement. The vents might be closed for the sake of convenience after irrigating the plaintiffs' fields as a temporary measure, just as a drain may be closed for clearing silt or for repairs, but this act being done for the proper enjoyment of the easement or in the course of the enjoyment of an easement which is continuous would not make the easement a non-continuous one. [P. 111, C. 1]

B. Satyanarayana—for Appellants.

V. Suryanarayana—for Respondents.

Devadoss, J.—The question in this second appeal is, is the plaintiff entitlde to irrigate his fields A, B and C with water from the 1st defendant's field marked F and G in the plan through silts or openings at points H and J.

It is contended before us that this is not a case of easement of necessity and the plaintiffs cannot claim the right to irrigate their fields with water from the 1st defendant's fields. The plots A, B, C, F and G which are Zemindari zeroyoti wet lands belonged to one Gurappiah who made a gift of plots, A, B and C to his step mother Veeramma for her maintenance. The plaintiffs claim under Veeramma. 1st defendant is the son of Gurappiah and the 2nd defendant is his lessee. It is proved that during the life time of Gurappiah and for at least 15 years from the date of the gift to Veeramma, the plots A, D and C were irrigated with water from F and G. The plaintiffs claim the right to irrigate their fields as was done till the defendants 1 and 2 obstructed them from irrigating their fields, and the defendants deny that the plaintiffs fields were ever irrigated as alleged. The District Munsif found that water was taken for irrigating the plots A, B and C over the plots marked F, and G and through the openings marked H and J till the date of obstruction and that it could not be that A, B and C were all along irrigated with water taken direct from the irrigation Channel D; this finding was affirmed by the Lower Appellate Court. It is urged that the plaintiffs cannot claim a right to irrigate their lands with water from the plots F and G as an easement of necessity, that there is an irrigation channel marked D in the plan adjoining plot A from which the plaintiffs could water their fields and that in order to claim an easement of necessity it must be shown that it is absolutely necessary to have the easement for enjoyment of the land and if it is a question of convenience or better enjoyment of the dominant heritage, such an easement cannot be claimed.

Mr. Satyanarayana for the appellants relies strongly on *Krishnama Raju* v. *Marraju* (1) and *Union Lighterage Company* v. *London Graving Dock Company* (2). In *Krishnama Raju* v. *Marraju* (1) the learned Chief Justice and Davies, J., held that the word 'necessary' in Cl. (*e*) of S. 13 of the Easements Act must be construed in its ordinary sense. They observe at page 497. "In this case we are of opinion that Cl. (*e*) of S. 13 of the Indian Easements Act, 1882, does not admit of the construction which has been placed upon it by the lower Courts. We think the word 'necessary' must be construed in its ordinary sense. If A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. The law of England as to the cases in which a person can claim an easement of necessity so as to give him a right of way over another man's land is now well settled, and there is nothing to indicate that the Indian Legislature intended to adopt a different principle." * * * * * *

(1) [1905] 28 Mad. 495—15 M. L.J 255.

(2) [1902] 2 Ch. 557—71 L.J.,Ch. 791—87 L. T. 381—18 T. L. R. 754.

* * * * It is admitted that the Respondent has a means of access to his property without going over the appellant's land, and we must accordingly hold that he has no easement of necessity. He is not entitled to an easement under Cl. (*f*) of the section since the easement which he claims is not apparent and continuous." In *Union Lighterage Co.* v. *London Graving Dock Company* (2) Stirling, L. J., observes at page 73: "In my opinion an easement of necessity, such as is referred to means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property." In the present case there is no finding that the plaintiff's land could not be at all irrigated except through the vents H and J. The plaintiffs attempted to irrigate their fields A, B and C from the channel D directly, but were obstructed by the defendants 3. 4 and 5, and the District Munsif dismissed the suit against them on the ground of misjoinder of the parties and causes of action. Oldfield and Spencer, JJ., before whom the second appeal came on for hearing on 3—4—1922 directed the appellants to make the defendants 3, 4 and 5 parties to the appeal which has been done, but they have not chosen to appear though they have been served with notice of appeal. It is not necessary in the view we take of this case, to decide whether the plaintiff can claim to irrigate their fields with water from the defendant's lands as an easement of necessity. We think the plaintiffs case falls within Cl. (*b*) of S. 13 of the Easements Act which is in the following terms: "If such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is exressed or necessarily implied, be entitled to such easement." The last but one paragraph of S. 13 puts it beyond doubt that only cases covered by Cls. (*a*), (*c*) and (*e*) are called easements of necessity. Even if it be held that absolute necessity should be shown for claiming a right under Cls. (*a*), (*c*) and (*e*) we do not think such necessity should be made out to bring the plaintiffs' case within Cl. (*b*). An easement apparent and continuous and necessary for enjoying the portions severed from the unity of ownership will pass to the transferee unless a contrary intention is expressed or implied in the instrument of transfer. In *Watts* v. *Kelson* (3) Sir George Mellish, L. J., in delivering the judgment of the Court observes: "It was objected before us on the part of the defendant that on the severance of two tenements no easement will pass by an implied grant except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the water course was necessary for the use of the tenement conveyed. It was, at the time of the convevance, the existing mode by which the premises conveyed were suppli d with water; and we think it is no answer that if this supply was cut off possibly some other supply might have been obtained. We think it is proved on the evidence that no other supply of water equally pure could have been obtained. We are also of opinion, having regard to the general words in the conveyance that the language of the conveyance was sufficient to pass the right to the water-course even if it was not necessary but only convenient for the use of the premises." The observations of Stirling, L. J., in *Union Lighterage Co.* v. *London Graving Dock Company* (2) are important in this connection "on this point the governing authority is *Wheellon* v. *Burrowes* (4) decided by James. Baggally and Thesiaer, L. Js, by the last of whom the judgment of the Court was delivered. In it two rules are laid down in the following terms. The first of these rules is that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which of course I mean *quasi* easements), or in other words

(3) 40 L.J., Ch. 126—L.R 6 Ch. 166—24 L. T. 209—19 W.R. 833.
(4) [1879] 12 Ch. D 31—48 L. J., Ch 853—41 L.T. 327—28 W.R. 196.

all those easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second is that if the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant." The distinction between Cls. (1), (*c*) and (*l*) of S. 13 and Cl. (*b*) is clearly brought out in the judgment of Jenkins, C. J., and Chandavarker, J., in *Chhotalal* v. *Devshanker* (5). They observe at page 602: "It is true that the lower appellate Court has found that there was no necessity, but it is clear that the Judge in so deciding had in mind an absolute necessity such as is indicated in S. 13 (1) (*c*) and (*l*), and not a qualified necessity such as is contemplated in S. 13 (*b*) This distinction is obvious; thus, the right of way may not be absolutely necessary and yet necessary for the purpose of enjoying the property as it was enjoyed when a transfer of it took place. The existence of this last necessity has to be determined by reference to the prior user. Besides the condition of this qualified necessity, an easement must, for the purpose of coming within S. 13 (*b*) possess the qualities of being apparent and continuous" There is a concurrent finding of the lower Courts in this case that the plaintiffs' plots were all along watered through the openings or vents at H and J, and the existence of these vents is sufficient evidence of an apparent, continuous and necessary easement.

It is contended that the existence of the vents would not imply that the easement was a continuous one. S. 5 is referred to in this connection. The vents might be closed for the sake of convenience after irrigating the plaintiffs fields as a temporary measure, just as a drain may be closed for clearing silt or for repairs. An act done for the proper enjoyment of the easement or in the course of the enjoyment of an easement which is continuous would not make the easement a non-continuous one. The existence of the vents is for enjoyment of the easement, and that being found as a matter of fact it is unnecessary to pursue this discussion further. We have no hesitation in holding that the plaintiffs have established the right to irrigate their fields A, B and C with water from the 1st defendant's plots F and G and through the vents at H and J.

The second appeal fails and is dismissed with costs.

Appeal dismissed.

(5) [1901] 3 Bom. L. R. 601.

1924 MADRAS 111

ODGERS AND HUGHES, JJ.

Aisamma—2nd Defendant—Appellant.

v.

Moidin Kunhi Beari and another—Plaintiff-1st Defendant-Respondents.

S. A. No. 267 of 1921, Decided on 18th July 1923, against the decree of Dt. Court, South Kanara, in A. S. No. 14 81920.

(*a*) *Civil P. C,. O. 21, R. 63—Claim petition dismissed without investigation but without prejudice to right—Order is conclusive.*

Where a claim petition was dismissed without investigation on the ground of delay and the order of dismissal added that the sale would not affect the rights, if any, of the petitioner and the petitioner did not file a suit to assert the right within a year of the date of the Order.

Held, that the order was one negativing the right and that it was conclusive. 41 Mad, 992. F. B. Applied [P 112, C 2]

(*b*) *Civil P. C., O. 21, R. 63—Adverse possession on date of adverse order cannot be pleaded if order not set aside.*

The rejection of a claim, if not contested by suit, will estop the claimant from pleading adverse possession at the date of the order in a suit brought to eject him. [P 112, C 2]

B. Sitarama Rao—for Appellant.

K. Y. Adiga—for Respondents.

Hughes, J.—The point to be decided now is whether the question of 2nd defendant's title has been concluded against her by reason of the order passed in R. E. A. No. 243 of 1910 in R. E. P. No. 375 of 1910.

The suit property was attached in R. E. P. No. 375 of 1910 and the 2nd defendant filed a claim petition (R. E. A. No. 243 of 1910) claiming right to

the property. The order passed on that petition is Ex. E. and runs as follows:—"There is no time to investigate into this claim. This petition is dismissed without investigation on the ground of delay. I may add that the sale, will not affect the rights, if any, of this petitioner." The plaintiff's contention is that as the 2nd defendant did not file a suit within a year from the date of this order her rights to the property is barred.

Now if the order had been merely, "this petition is dismissed without investigation on the ground of delay, the matter would have been quite simple. It would be covered exactly by the Full Bench case *Venkataratnam* v. *Ranganayakamma* (1) wherein it was held that such an order was an order rejecting the claim, to which the provisions of O, 21, R, 63 will not apply. The question is what is the effect of the added sentence "the sale will not affect the rights, if any, of this petitioner"? Can it be said that when the order expressly declared that the sale would not affect the right of the petitioner, the order was one passed against the party? The answer to this is, I think to be found in the Full Bench case referred to. In that case the order that was under consideration was as follows:—

"As this petition was filed late this claim is ordered to be notified to the intending bidders." It was held that the order amounted to a rejection of the claim on the ground that it was filed too late. It was pointed out in the judgment of Seshagri Aiyar J. that "when a claim is preferred the usual prayer is that the attachment should be raised as the property does not belong to the Judgment debtor but belongs to the claimant. On the presentation of such a petition if the order is not that the property be released from attachment, it must be taken to be an order against the claimant," and further "his right to raise the attachment must be deemed to have been negatived, when the property was ordered to be sold, without releasing it from attachment. Therefore an order on a claim petition which expresses no final Judgment upon the right put forward but simply directs the sale after notifying the claim, is an order against claimant." In the present case the fact that the order wrongly stated that the petitioner's right would not be affected does not help her. She asked for a release of the property from attachment and she sought to establish her right. She did not succeed. I think therefore following the judgment of the full Bench case as quoted *supra* it must be held that the order was against her and it was her duty to proceed to assert her title by suit within one year.

The case of *Laksmi Amma* v. *Kadiresan Chettiyar* (2) has been referred to but that is not in point because in that case the attachment had terminated and the District Munsif had no authority to dispose of the petition of claim.

One other case has been quoted, the case of *Saharabi* v. *K.P.P.M. Chekkutti* (3) but in that case the claimant's petition had not been dismissed and his claim to an undefined share in the property attached had not been negatived. In the present case the petition was dismissed and though it may be argued that the rider attached to the dismissal, to the effect that the order would not affect the claimant's right, means that that was not negatived, it is plain the right was not established and in the light of the observations in the full Bench case the order was one against the party. I think therefore the District Judge was right in the view taken by him of the effect of the order on the claim petition. It has then been urged that the 2nd defendant can still rely upon adverse possession but the case of *Velayudhan* v. *Lakshmana* (4) is an authority for the position that the rejection of a claim, if not contested by suit, will estop the claimant from

(1) [1918] 41 Mad. 985—24 M.L.T. 197—(1918) M.W.N. 599—8 L.W. 292—35 M.L.J. 335—48 I.C. 270 (F. B.)

(2) [1921] 41 M.L.J. 198—(1921) M. W.N. 495—14 L.W. 12—63 I.C. 431.

(3) 1923 Mad. 295—44 M.L.J. 141—17 M.L.W. 182—72 I.C. 856.

(4) [1885] 8 Mad. 506

pleading adverse possession at the date of the order in a suit brought to eject him. Since the date of the order the possession has been insufficient to establish a title.

The decision of the District Judge is right and the appeal must be dismissed with costs.

Odgers J.—I agree.

Appeal dismissed.

✱ 1924 MADRAS 113

AYLING AND ODGERS, JJ.

Rajagopala Aiyangar—Plaintiff — Appellant.

v

Soundararaja Aiyangar and another—Defendants—Respondents.

S. A. No. 285 of 1921 Decided on 6th April 1923, against the decree of the second Add. S. J. Tanjore.

Adverse possession — Coparceners — Adverse possession by one coparcener after partition, of land omitted at partition does not arise until intention to hold so is proved or is inferable from exclusive possession.

Where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him however in possession of certain properties not divided between them, his possession will still continue to be the possession of other members of the family though they may have been divided, till some event happens which renders his possession exclusive or hostile to others. The fact of adverse holding must be brought home to the co-owner, either by information to that effect given by the tenant-in-common asserting the adverse right or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and disseisin are intended to be asserted. 32 M. 191 and 35 C. 961 Foll.

[P. 114 C. 1]

N. R. K. Tathachariar and *N. R. Govindachariar*—for Appellant.

T. Narasimha Aiyangar—for Respondents.

Judgment.—The plaintiff and the first defendant in this case are the surviving members of a joint family which became divided in 1904. The suit is for partition and delivery to the plaintiff of a half share in a plot of nanja land which, according to the plaintiff, was kept undivided at the time of the partition. The defendants denied that the suit property was family property at all, but this plea has been decided against them by both the lower Courts. The defendants, other plea was that they had acquired a prescriptive title to the plaint property by exclusive and hostile enjoyment since the time of the partition. On this point also the District Munsif was against them and gave a decree for the plaintiff. The Subordinate Judge on appeal has decided that the first defendant was in open adverse enjoyment of the suit land for over twelve years and the plaintiff's claim was therefore barred.

The learned Vakil for the appellants has argued that there is no evidence on record which could possibly support this finding, and after a careful consideration of the record of the suit we think this plea must be allowed. The partition deed Ex. A gives a list of the properties to be divided in which the plaint property is not included. There is no specific mention of the plaint property in Ex. A, but there is a clause which says "if any lands are omitted such lands shall be divided by the holders of A and B schedules in due proportion." We certainly think that no inference in favour of the defendants can possibly be drawn from the contents of Ex. A. The other evidence adduced in defendant's favour is the oral evidence of four witnesses, D. Ws. 1 to 4 The first and the second of these witnesses are the two defendants in the suit, the second defendant being the purchaser of the plaint land from the first defendant. But quite apart from this, the evidence of all the witnesses amounts simply to this; that the land was cultivated by tenants under the first defendant. There is nothing to indicate that the possession of the first defendant was in any way hostile or openly adverse to that of the plaintiff.

The law regarding acquisition of a prescriptive title in respect of joint property by one co-parcencer against another has been clearly laid down in two cases quoted on the appellants' behalf. In *Vaidyanatha Aiyar* v. *Aiyaswami Aiyar* (1) the learned

(1) [1908] 32 Mad. 191–19 M.L.J. 94—5 M.L.T. 49—1 I.C. 408.

Judges say, "where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him however in possession of certain properties not divided between them, his possession will still continue to be the possession of the other members of the family though they may have been divided, till some event happens which renders his possession exclusive or hostile to the others Neither in the record of this case nor in the judgment of the Subordinate Judge is there anything that could possibly be construed into such an event. The other case is *Jogendra Nath Rai* v. *Balaleo Das* (2), in which the question was discussed at much greater length and the learned Judges say, "The fundamental rule is that the entry and possession of land under the common title of one co-owner will not be presumed to be adverse to others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is, in itself, rightful, and does not imply hostility as would the possession of a mere stranger." Further on, " much stronger evidence, however, is required to show an adverse possession held by a tenant-in-common than by a stranger; a co-tenant will not be permitted to claim the protection of the statute of limitation, unless it clearly appears that he has repudiated the title of his co-tenant and his holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner, either by information to that effect given by the tenant-in-common asserting the adverse right or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and disseisin are intended to be asserted. These words of course apply with equal force to the case of a co-parcenary. If this test be applied to the present case there is absolutely nothing on the record from which an inference in the first defendant's favour could be drawn.

(2) [1907] 35 C. 961—12 C.W.N. 121—6 C.L.J. 735.

We must set aside the decree of the lower appellate Court and restore the decree of the District Munsif with costs throughout.

Decree set aside.

✱ ✱ 1924 MADRAS 114

SCHWABE, C. J. AND WALLER, J.

R. C. Krishnaswami Naidu and others—Appellants.

v.

R. Chengalroya Naidu and others—Respondents.

A. A. O. No. 443 of 1921, Decided on 5th October 1923, against the order of S. J. Chittore D/-23-9-21.

(a) Civil P. C., O. 41 R. 17 and 19—S. 151 cannot be invoked where Rr. 17 and 19 apply.

O. 41 Rr. 17 and 19 are exhaustive in respect of cases where an appellant has made default in appearance in an appeal, and the Court has no inherent power under S. 151, C. P. C., or otherwise, to restore an appeal dismissed for default. 35 All. 301 Dist. 45 B. 648 Diss. [P. 116 C. 1]

(b) Civil P. C. S. 151—Section not to be applied where specific provision exists but is not availed of.

Where a Code declares the law on any matter specifically dealt with, the law must be ascertained by an interpretation of the language used by the legislature, for, the essence of a Code is to be exhaustive on such matters. 43 M. 94 Foll. 45 B. 648 dissent. [P. 115 C. 2]

M. S. Vaidyanatha Aiyar—for Appellants.

O. P. Srinivasan—for Respondent.

Judgment.—This is an appeal from an order of the Subordinate Judge of Chittore, dated 23rd September, 1921 refusing to set aside an order dismissing an appeal dated 4th March 1921.

The facts are that the petitioner being the appellant in the appeal before that Court instructed a Vakil to appear and conduct his appeal. We will assume on the evidence before the Court that this Vakil did not appear on 4th March, 1921 to conduct the appeal in pursuance of his instructions by reason of the Vakil having taken up the attitude of non-co-operation with the Courts

and we will also assume that the appellant did not come to know of the order of the Court dismissing his appeal until sometime after it was dismissed and that he took immediate steps on making the discovery to bring the matter before the Court. Assuming these facts to be correct, the appellant has suffered grave injustice for his appeal, for no fault of his own, has never been heard although it may be that he has a remedy against his Vakil for negligence. Under O. 41, R. 17 of the Civil Procedure Code, "if on the day fixed the appellant does not appear when the appeal in called on for hearing, the Court may make an order that the appeal be dismissed," and under R. 19 where the appeal is so dismissed, "the appellant may apply to the appellate Court for the readmission of the appeal; and where it is proved that he was prevented by a sufficient cause from appearing when the appeal was called on for hearing the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit." These rules provide a remedy in a case like the present for having the appeal re-admitted. But by Art. 168 of the Limitation Act, IX of 1908, an application for the re-admission of an appeal dismissed for want of prosecution must be brought within 30 days from the date of the dismissal. It, therefore, follows that, if the Court is confined to acting under O. 41, R. 19, this application is 'statute barred'

It is, however, contended that the Court has an inherent power under S. 151, C. P. C, or otherwise, to reinstate an appeal under such circumstances. There are two authorities quoted in support of that proposition: *Debi Baksh Singh* v. *Habib Shah* (1) and *Sonu Bai* v. *Shiwaji Rao* (2). In the former the Privy Council acted under S. 151, C. P. C., in a case where a suit was dismissed for non-appearance, the plaintiff being dead and the Court being unaware of that fact, and their lordships say, 'The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default but the punishment of the dead or the ranking of death under the category of default does not seem to be very stateable." Their Lordships in effect, held that the Court had made a mistake in thinking that the plaintiff was alive that the plaintiff or appellant could not be said to have not appeared or to have defaulted in appearing when he was no longer alive. that, therefore, that was a case to which the rules did not apply and that the Court, to do justice, could fall back on its inherent powers.

In *Sonu Bai* v *Shivaji Rao* (2) the facts were that a pleader employed to conduct an appeal died and his death was communicated to the guardian *ad litem* of the minor and such guardian at the time being insane took no steps and the appeal was dismissed for want of appearance. The Court held that it had an inherent power under S. 151, C. P. C. to reinstate the appeal thinking that the death of the pleader unknown, in fact, to the appellant was equivalent to the death of the plaintiff himself. If this case is rightly decided, we think that the assumed facts before us are as strong for the non-appearance of the Vakil due to his political attitude could not reasonably be imputed to his client. But the question as to when this Court can act under S. 151 or otherwise under its inherent powers is a matter which had been fully considered in *Neelaveni* v *Narayana Reddi* (3), and can be stated thus:—Where a Code declares the law on any matter specifically dealt with, the law must be ascertained by an interpretation of the language used by the legislature, for the

(1) [1913] 35 All. 331—40 I.A. 150—16 O. C. 194—17 C. W. N. 829—11 A. L. J. 625—18 C. L. J 9—15 Bom.L.R.640—14 M.L.T 33—(1913) M.W.N. 566—25 M.L.J. 148—19 I.C. 526 (P. C.)

(2) [1920] 45 B. 648—23 Bom. L.R. 110—60 I.C. 919.

(3) [1920] 43 Mad. 91—37 M L.J. 599—26 M L T. 377—10 L.W. 606—(1920) M.W.N. 19—53 I.C. 847 (F. B.)

essence of a Code is to be exhaustive on such matters. In that case, the Court held that O. 9, Rr 8 and 13 were exhaustive in respect of cases where the plaintiff made default in appearance in a suit and I think that we are bound to say that O 41, Rr. 17 and 19 are equally exhaustive. The Privy Council case referred to baove can be distinguished on the ground that there has been in fact, no failure to appear because failure to appear cannot include the case of a man who is dead ; whereas in this case there has been a failure to appear by the Vakil and, if it is held that in such a case as this, the Court can act under its inherent powers, it would involve a finding that in every case of dismissal of an appeal or a suit by reason of the non-appearance of the Vakil, the Court has inherent powers which it must exercise almost *ex debita justitia* in favour of setting aside the order dismissing the suit or appeal. In our judgment *Sonu Bai* v. *Shivaji Rao* (2) was wrongly decided. To hold otherwise in this case would be merely an evasion of the definite words of Art. 168 of the Limitation Act.

We regret that we have came to this conclusion because, in our view, it is not right that a party's suit or appeal should be irrevocably dismissed by non-appearance through no fault of his own, and again through no fault of his own, by his not becoming aware of the dismissal for the short period of 30 days. The remedy for such injustice is not in our hands. S. 5 of the Limitation Act might have been made applicable by an enactment or rule to applications under Rr. 17 and 19, and, in our judgment, it is very desirable that this should be done. It will, however, not help the present appellant. We regret that this appeal must be dismissed. In view of the fact that the respondent did not bring the full facts before the Original Court at an early stage and has brought before us facts which we do not accept, we think that the right order as to costs will be that there will be no costs here or below.

Appeal dismissed.

✱ 1924 MADRAS 116

ODGERS AND HUGHES, JJ.

Mukambike Shettithi and another—Defendants, Nos. 7 & 8 — Appellants.

v.

Shiddaya Shetti and others—Plaintiff and defendants, Nos. 1 to 6 — Respondents.

S. A. No. 501 of 1921, Decided on 23rd July 1923, against the decree of Sub. J. S. Kanara, in A. S. No. 129 of 1920.

Civil P. C., S. 100—New plea—Plaint alleging title by purchase-Decree on title by prescription given — Objection not raised in the lower Courts is not permissible in Second Appeal.

Where the title was alleged to arise by purchase, but both the lower Courts decreed on the basis of title by prescription, without any objection by the defendant, he cannot for the first time raise that objection in Second Appeal. 31 Mad. 531 ; 2 Cal. 418 Dist. and 14 Cal. 594 Foll. [P. 117, C. 1]

B. Sitarama Rao—for Appellants.

K. Y. Adiga—for Respondents.

Judgment.—In this appeal it is contended that the question of adverse possession has not been properly pleaded or considered. The plaintiff at first based his title on purchase of *muli* right, which is said to refer to a judicial decision in 1897, whereby the suit property was declared to belong to the ancestors of defendants Nos. 7 and 8. Defendants Nos. 7 and 8 were not original parties but subsequently added as parties to the present suit and the plaint was accordingly amended and plaintiff based his right on ownership also. It is urged for defendants Nos. 7 and 8 that this only arose in 1916, when the *Arthamulgani* interest was assigned to plaintiffs by certain members of the Kanabettu Manjeya's family, who had held the land, since 1887 at least. It is said that this title by adverse possession to the ancestors of defendants Nos. 7 and 8 ought to have been distinctly pleaded and that defendants Nos. 7 and 8 have been prejudiced by this omission. It is to be remarked that by 1919, the date of the present suit, the plaintiff had acquired title by the assignment of 1916, and that long before this, the prescriptive title of

the Kanabettu family had accrued. The Munsif went very carefully into the facts and came to the conclusion that plaintiff and his predecessors had been in possession of the suit property, through their *chalgeni* tenant (the 1st defendant) for over the statutory period and that defendants Nos. 7 and 8 were never in possession. On appeal, these defendants did not plead thet they had been prejudiced or taken by surprise, or that plaintiff's title by prescription ought not to have been considered by the District Munsif. Tne lower appellate Court gave judgment to the same effect, as the District Munsif. There is no evidence that any objection was taken at the trial as to the consideration of these facts. We think the plaint sufficiently raises the question of plaintiff's title and that the lower Courts were justified in considering the steps by which plaintiff's title had been completed. The plaintiff was entitled to rely on his assignment of 1916. as to the ownership in that title. Mr. Sitarama Rao relies on the case of *Somasundarum Chetty* v. *Vadivelu Pillai* (1), for authority that a declaratory decree cannot be passed on a title, neither, stated in the plaint nor raised by the issues; and a plaintiff who simply alleges title cannot succeed on the basis of title by adverse possession. This case follows *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2), which was distinguished in *Sundari Dassee* v *Muthoo Chunder Sircar* (3), which was a case (as here) for possession upon proof that plaintiff was entitled to the land. The present case is closely analogous to the later Calcutta decision. *Somasundarum Chetty* v. *Vadivelu Pillai* (1) has no application. We dismiss the second appeal with costs.

Appeal dismissed.

(1) [1908] 31 Mad. 531—4 M.L.T. 344.
(2) [1877] 2 Cal. 418.
(3) [1887] 14 Cal. 592.

✱ 1924 MADRAS 117

AYLING AND ODGERS, JJ.

Tota Varahaliah and another—Defendants—Appellants.

v.

Sree Rajahvatsavaya Venkata Suryanarayana Jagapathiraju Bahadur Garu and others—Plaintiffs—Respondents.

S. A No. 649 of 1921, Decided on 29th March 1923, against the decree of Sub. J., Cocanada, in A. S. No 40 of 1920.

(a) *Civil P. C., S. 100—Question of fact—Whether lands were excluded in calculating peishcush is question of fact.*

Whether certain Inam lands were excluded from the assets of a Zemindari in calculating peishcush is a question of fact. [P 118, C 1 & 2]

(a) *Madras Estates Land Act. S. 3—Lands granted in 1798 cannot be treated as part of estate.*

Lands granted in Inam in 1798 cannot be treated as part of the estate within the meaning of S. 3 merely because it was not proved that the rentals on them had been deducted from the assets of the Zamindari for the purpose of assessing peishcush The fact that Inam was granted prior to 1802 may raise a rebuttable presumption that the land so granted was excluded from the permanent settlement. [P 118, C 1]

(c) *Practice—Public document rejected and produced with a new entry at later stage requires special application.*

Where after the return of a public document by the trial Court and before its production again in the Appellate Court, an entry is made therein, and the party producing it wishes the Appellate Court to treat the new entry as part of the record, a special application should be made to that effect. [P 118, C 2]

D. Appa Rao, P. Narayanamurthi and *A. Krishnaswami Aiyar*—for Appellants.

V. Ramadoss and *K. Venkatarazu*—for Respondents.

Judgment.—The only question for our disposal in this appeal is whether the suit lands formed part of an estate within the meaning of S. 3 of the Madras Estates Land Act, so as to oust the jurisdiction of the Civil Court. Both the Lower Courts have found that they did not, and after a long argument on both sides we see no reason for interfering with that decision. We must take it as a fact that the suit lands were granted as inam lands in the year 1798, at any rate, before 1802. This was not disputed before the Lower Appellate

Court; and the case proceeded on the assu nption that it was so. The argument adduced by the defendants, the appellants before us, was that in spite of this fact the lands should be treated as par .f the estate, because it was not shown that the rentals on them had been deducted from the assets of the Zamindari for the purpose of assessing peishcush. The Lower Appellate Court has considered this aspect of the case and has come to the conclusion that although the Circuit Committee's accounts, prepared with a view to the assessment of peishcush, would only extend to two years before 1798, the date of the grant, yet nevertheless it must be found as a fact that the lands were excluded from the assets of the Zamindari in calculating peishcush. This we take to be the conclusion arrived at the end of paragraph 7 of the Lower Appellate Court's judgment

Mr. Ramadoss for the respondents has drawn our attention to a recent decision of this Court reported in *Kuppu Reddi Nookayya* v *Bheemanna* (1), from which it would appear that the Lower Appellate Court might have approached the consideration of the evidence from a point of view much more favourable to the respondents than he did. The learned judge in that case held that the fact of grant prior to 1802 afforded, at any rate, strong evidence that the lands so granted were excluded from the Permanent Settlement. It may be that this is a rebuttable presumption. But we think it is quite clear that the Lower Appellate Court has not found the presumpt on to be rebutted in the present case. In fact it has arrived at the conclusion it has, while practically throwing the burden of proof on the respondents. We can see no reason for questioning this finding.

The learned vakil for the appellants has laid great stress on an entry in the 'Remark' column in Ex. II, the B. Register of the village, to the effect that the enfranchisement of these properties was cancelled in 1920. The learned Subordinate Judge referred to the enfranchisement but has not referred to the cancellation. The reason appears to be this: When Ex. II was originally filed in the First Court, there was no such entry in the 'Remark' column. The Register being a public document appears to have been returned to the party producing it, after the disposal of the case by the First Court and in the interval before it was produced again on the hearing in the Lower Appellate Court, this entry appears to have been made in the 'Remark' column strictly speaking therefore the entry in the 'Remark' column is not a part of the record in the case, and if the present appellants wished the Lower Appellate Court to treat it as part of the record, a special application should have been made to that effect. Nothing of the kind appears to have been done; and, although we are told that the learned subordinate Judge's attention was drawn to this 'Remark' column, he makes no reference to it and it may quite well be that he declined to consider it in the absence of such a special application. We can see no reason for interfering with the Lower Appellate Court's finding of fact, as to exclusion of the suit lands from the Zamindari and we must dismiss this second appeal with costs.

We see no reason to interfere with the Lower Appellate Court's order as to costs.

The memorandum of objections is dismissed with costs.

Appeal dismissed.

(1) 1923 Mad. 451—45 M.L.J. 91—17 M. L. W. 712—(1923) M. W. N 176—73 I. C. 733.

✱ 1924 MADRAS 118

KRISHNAN, J.

Balaguru Naidu by his authorised agent Chidambaram Chetty—Petitioner.

v.

Muthu Ratnam Aiyar and others—Respondents.

Civ. Rev. Pet. No. 804 of 1921, Decided on 11th April, 1923, praying the High Court to revise the order D/-27th June 1921, of the Court of D. M., Trichinopoly in O. P. No. 18 of 1920.

Civil P. C., O. 33, R. 15—Dismissal of application is not rejection of plaint and Court can grant extension to pay Court fee.

When a petition is dismissed, whether on the ground that the petitioner is not a pauper, or on the ground that a dismissal of a similar previous petition bars the present petition, it is the application that fails; but the plaint remains and may be validated by payment of Court fees, within a time to be fixed by Court, if the Court in the exercise of its discretion is prepared to grant time. 2 All. 241 (P. C.) Foll. [P 119, C 1]

C. A. Seshagiri Sastri—for Petitioner.

T. V. Muthu Krishna Aiyar—for Respondents.

Judgment.—A pauper application is really a combination of a plaint and an application to excuse the payment of Court fee on it. When the petition is dismissed, whether on the ground that the petitioner is not a pauper, or on the ground that a dismissal of a similar previous petition bars the present petition, it is the application that fails; but the plaint remains and may be validated by payment of Court fees, within a time to be fixed by Court, if the Court in the exercise of its discretion is prepared to grant time. The District Munsif is not right in thinking that there should be a competent application to sue in *forma pauperis* on record, before time can be given to pay Court fees on the plaint filed at the same time. No case has laid that down. The case will therefore go back to the District Munsif to decide whether he considers there is proper ground to grant plaintiff time to pay the Court fees till the date when he actually paid it and if he holds in favour of the plaintiff, on the point, the plaint will have to be taken as filed on the date it was originally put into Court along with the pauper petition. See *Stuart Skinner* alias *Nawab Mirza* v. *William Orde* (1). The question is one for the exercise of the Munsif's discretion on the facts of the case.

The order of the Lower Court is set aside and the case remanded to it for a fresh disposal in the light of the above.

Costs of this Civil Revision Petition and of the proceedings in the Lower Courts will abide and follow the result.

Case remanded.

(1) [1880] 2 All., 241—6 I.A. 126—4 C L. R. 331—4 Sar. 31—3 Suther 627.

1924 MADRAS 119

SPENCER AND DEVADOSS, JJ.

Burla Appanna and another—Petitioners.

v.

Anala Latchayya and others—Counter-Petitioners—Respondents.

C. R. P. No. 852 of 1921, Decided on 7th September 1923, under S. 115 of the Act V of 1908 praying the High Court to revise the order of the Board of Revenue at Madras in Mis. case No. 1936, D/-26th September 1921.

Madras Estates Land Act, Ss. 171, 172 173 and 192 Board of Revenue is not a Court subordinate to High Court under S. 115 C.P.C.

Per Spencer J. (Contra Devadoss, J). The Board of Revenue is not a Court subordinate to the High Court for the purposes of this section. [P 121, C 1 & P 123, C 2]

B. Jayannatha Doss—for Petitioners.

Spencer, J.—This is an application to the High Court to revise under S. 115, Civil Procedure Code, the proceedings of the Board of Revenue acting in the exercise of the powers vested in it by R. 21 of the Rules made by the Local Government under S. 215 of the Madras Estates Land Act, whereby the Board was constituted an appellate authority under S. 171 for the purpose of hearing appeals from decisions of Revenue Officers passed under S. 169 the Chapter relating to Record of Rights in Act I of 1908. It is alleged that the Board of Revenue acted illegally in the exercise of its jurisdiction by dismissing the petitioner's appeal without hearing him in person or by Vakil.

It is a question whether the High Court can and should in the circumstances of this case exercise its revisional powers under the Civil Procedure Code. At the hearing of this

etition the respondents were not represented. We have not therefore had the advantage of hearing arguments on both sides of this difficult question.

Under the Rent Recovery law in force in Madras before Madras Act I of 1908 became law, judgments and orders of Revenue Courts were specially exempted from revision by any higher authority [*Vide* S. 76 of Act VIII of 1865 and *Velli Periya Mira* v. *Moidin Padsh* (1), *Appaindai* v. *Srihari Joishi* (2) and *Venkata Narasimha Naidu* v. *Suranna* (3)].

By S. 192 of the Madras Estates Land Act, S. 622 of the Code of Civil Procedure of 1882 (corresponding to S. 115 of the Code of 1908) has been made applicable to all suits, appeals and other proceedings of the Madras Estates Land Act, and under S. 115, the High Court has power to revise the decision of any Court subordinate to it when no right of appeal is provided. The question thus arises whether the Board of Revenue is a Court subordinate to the High Court for the purpose of this section. S. 3 of the Civil Procedure Code defines what subordination of Courts means. The Board of Revenue is not included in this definition. Neither does it answer the test of subordination in S. 195 (7) of the Criminal Procedure Code, as appeals do not ordinarily lie to the High Court from its decisions. Nor is the Board of Revenue one of the Civil Courts over which the High Court exercises control by virtue of S. 27 of the Madras Civil Courts Act. It is evident that when Civil Courts are mentioned in Ss. 172, 173, 179 and 189 of the Estates Land Act, Courts which have power to try all sorts of Civil Suits are designated, as distinguished from Revenue Courts which only have jurisdiction over the suits and applications detailed in the schedule to the Act. But the Privy Council has held in *Nilmoni Singh Deo* v. *Taranath Mukherjee* (4) that Rent Courts passing decrees for rent under Bengal Rent Act are Civil Courts for the purpose of the Civil Procedure Code of 1859, and by cl. 16 of the Letters Patent, all the Civil Courts in the Presidency have been subordinated to the High Court. Following this ruling, the Calcutta High Court interfered in revision with the order of a Deputy Collector passed in execution of a decree under the Rent Recovery Act. [*See Chaitan Patjosi Mahapatra* v. *Kunja Behari Patnik* (5)].

From this, it follows that Collectors and other Revenue Officers trying suits enumerated under 21 heads in Part A of the Schedule or disposing of applications described in Part B are Revenue Courts in all cases where an appeal is provided to the District Court, and are also inferior Civil Courts within the meaning of S. 3 of the Civil Procedure Code, because the High Court hears Second Appeals from the decrees of the District Court passed in appeals from such Courts' decisions and can revise the District Court's proceedings in cases where no Second Appeal is provided. It has already been held in this Court in *Paramaswami Iyengar* v. *Alamelu Nachiarammal* (6) that the High Court can revise an order made by a Revenue Court in the course of trying a suit for rent. Further, these Courts are subject to the superintendence of the High Court by virtue of the Letters Patent.

It does not however follow that the Board of Revenue, when discharging the functions vested in it by the Government Notification No. 159 of April, 5th, 1910, is a Court exercising judicial functions.

As an example it could not be contended for a moment that decisions of the Board of Revenue under Ss. 18 and 23 of Madras Act III of 1895, on appeal from orders made by Collectors upon claims to hereditary village officers, are open to revision by the High Court under S. 115, Civil Procedure Code even if there were no specific provision in these sections as

(1) [1886] 9 Mad. 332.
(2) [1892] 16 Mad. 451.
(3) [1894] 17 Mad. 298.
(4) [1882] 9 Cal. 295—9 I. A. 174—12 C.L.R. 361—4 Sar. 392 (P.C.)
(5) [1911] 38 Cal. 832—15 C. W. N 863—14 C.L.J. 284—11 I.C. 207.
(6) [1918] 42 Mad. 76—35 M L J. 632—9 L W. 26—(1918) M.W.N. 107—49 I.C. 11.

to the finality of the decisions. S. 21 of that Act, like S. 189 of Act I of 1908, bars the original jurisdiction of Civil Courts. Again, we have been shown no authority for the theory that the Board of Revenue, when proceeding under Ss. 171, 172 and 205 of the Madras Estates Land Act, is subordinate to the High Court. As an instance of the limitation of the High Court's powers of interference under S. 115, I would cite the ruling in *Manavala Goundan* v. *Kummarappa Reddi* (7) that the High Court cannot interfere in revision with the proceedings of a District Registrar. *Chatterjee* v *Tribedy* (8) is distinguishable by the fact that, under the rules framed under the Calcutta Rent Act, a Rent Controller has been constituted a Court of Civil jurisdiction. I am of opinion that we should decline to interfere with the order of the Board of Revenue in this case for three reasons. First, because the Board of Revenue's order is not a judicial proceeding of a Court subordinate to the High Court; secondly because the powers vested in the Board of Revenue to revise settlement orders of Revenue Officers are powers of a revisional character, as may be seen from S. 172 and from the headnote to S. 171, and the exercise of revisional powers by two independent authorities would lead to inconvenient conflicts of jurisdictions [*Vide Ramaswami Naiker* v. *Subbarayulu Naiker* 9); thirdly because S. 173 provides a separate remedy by suit in a Civil Court and because this Court has held in *Ittiachan* v. *Velappan* (10) that where that is the case, there is no power of revision.

The petition is for these reasons dismissed without costs.

Devadoss, J.—This is an application under S. 115, Civil Procedure Code, to revise the order of the Board of Revenue, Madras, passed on a petition of appeal presented by the petitioner against the proceedings of the Revenue Officer who prepared a record of rights for Haripuram Village in the Mandasa Estate, Ganjam District, under S. 166 (1) of the Madras Estates Land Act, 1908. The petitioner appealed to the Board of Revenue, Madras, under S. 171 of the said Act, and his petition of appeal was dismissed by the Board of Revenue without hearing him. It is this order of dismissal that is sought to be revised. Though the respondents are not represented here it is but fair to observe that Mr. Jagannatha Doss who appears for the petitioner has brought to our notice all the cases *pro* and *con* which bear on the points raised by him.

Before considering whether this is a fit case for exercising revisional powers, it is necessary to see whether there is revisional jurisdiction in the High Court over orders passed by the Board of Revenue under Chapter II of the Madras Estates Land Act. Mr Jagannatha Doss puts forward three contentions: (1) The Letters Patent of the High Court classifies all Courts into Criminal and Civil, and, therefore, a Revenue Court is included in the expression 'Civil Court' and the High Court has, therefore, jurisdiction over the Revenue Courts. (2) The Board of Revenue, in exercising jurisdiction under Chapter II of the Estates Land Act, is a Civil Court and, therefore, is subject to the revisional jurisdiction of the High Court. (3 S. 192 of the Madras Estates Land Act makes the Civil Procedure Code applicable to proceedings under the Act and, therefore, the High Court has appellate jurisdiction over the decision of the Board of Revenue.

The first point is not supportable on any authority. It is a fallacy to say that because the Letters Patent do not specifically refer to Revenue Courts, therefore they are included in the expression 'Civil Court.' To use the term "Court" with regard to revenue officers is a misnomer, but where they exercise judicial functions by virtue of the provisions of any enactment, they may be termed Court. The appellate and revisional powers of the High Court may be sought in S. 15 of 24 and 25 Vict. Ch.

(7) [1907] 30 Mad. 396—2 M. L. T. 267—17 M.L.J 313.
(8) 1922 Cal. 427—49 Cal. 528—26 C.W.N. 78—68 I.C. 274.
(9) [1915] 3 L.W. 158—32 I.C. 567.
(10) [1885] 8 Mad. 484 (F.B.)

104, now S. 107 of 5 and 6 Geo V, Ch. 61 and S 16 of the Letters Patent. It cannot be successfully contended that the Board of Revenue as such is a Court exercising judicial functions subject to the appellate jurisdiction of the High Court.

The next point is that the Board of Revenue exercises judicial functions when it decides appeals under S. 171 of the Madras Estates Land Act and, therefore, is subject to the revisional jurisdiction of the High Court. Under Chapter II of the Estates Land Act, a survey may be made and a record of rights may be prepared by a revenue officer in respect of an estate or a portion of an estate in certain cases specified in S. 164, and an appeal is provided against a record of such rights; and S. 172 gives power to the Board of Revenue to direct the revision of any record of rights or any portion of a record of rights. Does the Board of Revenue become a civil Court by reason of its hearing an appeal from the order of the Revenue Officer? S. 192 of the Act makes the Civil Procedure Code except certain sections, applicable to proceedings under the Act. The Board of Revenue, being governed in its proceedings under the Madras Estates Land Act by the Civil Procedure Code, becomes a civil Court for the purposes of the Act. It is urged that, by S. 16 of the Letters Patent, all civil Courts in the presidency are subject to the superintendence of the High Court and the Board of Revenue, being a civil Court when it acts under the Madras Estates Land Act is subject to its revisional jurisdiction. If the Board of Revenue is a civil Court for any purpose, however limited, so far as that purpose is concerned, it is subject to the jurisdiction of the High Court. The Estates Land Act does not give a right of appeal to the High Court from the orders of the Board of Revenue. The cases relied on by Mr. Jagannatha Doss do not help him materially. In *Paramaswami Iyangar* v. *Alamelu Nachiar Ammal* (6) it was held that the High Court was competent to revise the order of the Revenue Court under S. 115, C. P. C., which is made applicable to proceedings in revenue Courts by S. 192 of the Madras Estates Land Act. In another case *Ramasami Gounden* v. *Kali Goundan* (11), the same Bench which decided the case reported at page 76 held that the revision petition to the High Court was competent, because S. 192 of the Madras Estates Land Act rendered S. 115 of the Civil Procedure Code applicable to all suits, appeals and other proceedings under the Act, even though S. 205 thereof gave a power of revision to the Board of Revenue and the District Collector; but where the petitioner had previously applied to the revenue authorities and failed, the High Court would decline to exercise its discretionary power in revision, unless it was imperatively called upon to do so to prevent miscarriage of justice. In *Nilmoni Singh* v *Taranath Mukerjee* (4) the High Court interfered in revision with the orders of the Deputy Commissioner transferring a decree for rent made by one Court to another. The learned Judges observe at page 297. "If the orders complained of are passed without jurisdiction, we think we have the power to interfere under S. 15 of the Act of Parliament constituting this Court." Their Lordships of the Privy Council "entirely agree with the view taken by the High Court of their own jurisdiction." *Vide Chaitan Patjosi Mahapatra* v. *Kunja Behari Patnaik* (5). The Madras cases lay down that the High Court could interfere in revision with the orders of the Collector under the Madras Estates Land Act, and the cases decided by the Calcutta High Court recognise the jurisdiction of the High Court to interfere in revision with orders passed by the revenue Courts under the Bengal Rent Recovery Act, X of 1859. It was uniformly held under the Madras Rent Recovery Act, VIII of 1865, that the High Court had no jurisdiction to revise the order of the Revenue Court under S. 622 of the old Code, now S. 115 of the present Code, *vide Velli Periya Mira* v. *Moideen Kadsha* (1). *Annandar* v. *Srihari Joshi* (2) and

(11) [1918] 42 Mad. 310—36 M.L.J. 571—52 I.C. 634.

Venkatanarasimha Naidu v. *Suranna* (3). The present Estates Land Act has removed the bar placed upon the revisional jurisdiction of the High Court by S. 76 of Act VIII of 1865 *vide Ramaswami Naicker* v. *Subbarayalu Naicker* (9). S. 205 of the Estates Land Act gives revisional powers to the Board of Revenue and Collectors, and it cannot be said that it has denied the same to the High Court. The Act specifically provides for appeals to the District Court in certain cases from the decisions of Collectors and it follows that under S 100, C. P. C., a second appeal will lie in prope cases, and the provisions of S 115 will, therefore, apply to cases where an appeal would be incompetent. In *Chatterjee* v. *Tribedy* (8), the Calcutta High Court held that it had jurisdiction to interfere with the order of the Rent Collector's Court under S. 107 of the Government of India Act on the ground that "the rules framed by the Local Government under S. 23 of the Calcutta Rent Act lay down that in all proceedings before them under the Act the Controller and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suits. See also Rule 4 which says that in making inquiries under the Act, the Controller or the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure for the regular trial of suits, the substance only of the evidence being recorded as in appealable cases." The question that is not free from difficulty is this Is the Board of Revenue, when it exercises jurisdiction under the Madras Estates Land Act, a Court from which appeals lie to the High Court or a Court subject to its superintendence? The subordination of Courts is determined according to the Criminal Procedure Code, S 195, by the fact that appeals ordinarily lie from one Court to another. So far as I am aware, in no case does an appeal lie to the High Court from the decision of the Board of Revenue. S. 15 of 24 and 25 Vic. Ch. 104 and S. 16 of the Letters Patent have been construed as giving jurisdiction to the High Court over all the Civil Courts of the presidency. If that construction is correct, it necessarily follows that the Board of Revenue, being a Civil Court when it acts judicially under S. 171 or 172 or any other section of the Madras Estates Land Act, is subject to the revisional jurisdiction of the High Court.

It is unnecessary to consider the third point in the view that I have expressed on the second point. S. 173 of the Madras Estates Land Act gives a remedy to a person aggrieved by an entry in a settlement record prepared under Ss. 168 to 171, or by omission to settle a rent by way of suit in a civil Court. As a rule, the High Court does not interfere in revision with decrees or orders of subordinate Courts when the party aggrieved has another remedy by way of appeal, suit or otherwise. On this ground the petition fails and is dismissed.

Petition dismissed.

✱ 1924 MADRAS 123

PHILLIPS, J.

Ramakrishna Annavi — Plaintiff—Petitioner.

v.

Pichandi Chettiar — Defendant—Respondent.

Civil Rev. Petition No. 604 of 1921, Decided on 26th March 1923, Praying the High Court to revise the order of Sub. J., Tinnevelly D/-4th March, 1921.

Limitation Act, S. 19 Part payment of interest and principal saves limitation.

The payment of interest saves limitation even though a part of the principal is paid at the same time. [P. 124 C. 1]

T. M Ramasawami Aiyar — Petitioner.

P. N. Appaswami and *P. V. Krishnaswami*—for Respondent.

Judgment.—The evidence of plaintiff's witnesses shows that the payment was made towards principal and interest. If any portion was paid towards interest the ruling in *Lold Govindoss Krishundoss* v. *Rukmani Bai* (1), is inapplicable and I agree

(1) [914] 38 Mad. 43 —14 M. L. T. 310—1 L.W. 529—21 I. C. 302.

with the decisions reported in 6 I. C. 16 and 4 B. L R, 281 that the payment of interest saves limitation even though a part of the principal is paid at the same time. The Subordinate Judge has not however decided the question of whether the payment was made on the date alleged in the plaint. The suit is accordingly remanded for disposal in the light of the above remarks. The costs will abide the result.

Case remanded.

✱ 1924 MADRAS 124

OLDFIELD AND DEVADOSS, JJ.

Pakkiri Kanni—Plaintiff—Appellant.

v.

Haji Mohammad Manjoor Saheb by *Agent Habibulla Saheb*—Defendent—Respondent.

A. A. O. No. 60 of 1922, Decided on 11th April 1923, against the order of Addl. Sub. J., Tanjore D/-11th August 1921, in Appeal suit No. 59 of 1921.

Partition—Partial partition of common property is allowed.

There is no direct authority that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the joint property in respect of which it might have been brought, has not been included. The plea of partial partition is not available when a suit for division of common property, and not joint property, is in question.

[P 124, C 2]

R. Kuppuswami Aiyar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondent

Judgment.—Objection has first been taken to the lower appellate Court's findings that two items of common property are available for partition but are referred to in the plaint Those findings are findings of fact; and we have not been shown any ground on which we can interfere with them in second appeal.

The second appeal is then argued against the lower appellate Court's order remanding the suit with a direction to the District Munsif to give the plaintiff an opportunity to amend his plaint by including a prayer for relief in respect of the properties just referred to and other properties if any left by the deceased, and in case he does not so amend to dismiss the suit. We have not been shown any direct authority that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the joint property, in respect of which it might have been brought, has not been included. Shortly we have not been shown that the objection founded on what is usually described as the plea of partial partition is available when a suit for division of common property, not joint property, is in question.

It is true that in *Mahomed Fuzlur Rahman* v. *Mahomed Fazzur Rahman Chowdhury* (1). *Moideensa Rowther* v. *Mahomed Kasim Rowthen* (2) and *Moideen Kutti* v. *Mariam Umma* (3), an opinion was expressed against the expediency of suits for partition of common property, in which the whole of the property available for partition was not included. But we have not been shown any decision that such suits are actually unsustainable and we are not prepared to hold that they are so. It is, we may point out, always open to the defendant in such a case as the present, if he thinks himself prejudiced by the exclusion of any property, himself to bring a suit in respect of it and have it tried with the suit already pending. Taking this view we must allow the appeal to the extent that we set aside the lower appellate Court's order and direct it to dipose of the appeal in the light of the foregoing and with reference to the District Munsif's findings on the issues. Costs in this Court will be costs in the cause and will be provided for by the lower appellate Court in the decree to be passed.

Order :—(11-4-1923). It is pointed out to us that the additional Sub-Court of Tanjore, from which this appeal came has been abolished in consequence of the bifurcation of the district into Tanjore East and Tanjore West for judicial purposes and that therefore our order of remand to the lower

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(1) [1911] 15 C.W.N. 677—10 I.C. 354.
(2) [1915] 28 I. C. 895.
(3) [1921] 41 M. L. J. 457—14 L. W. 502.

appellate Court requires explanation. So far as we can ascertain, the District Court of Tanjore East now exercises appellate jurisdiction over Tiruthuraipundi District Munsif's Court to which this case belongs. The remand must therefore be to the District Court of Tanjore East, and our orders must be read accordingly.

Appeal allowed.

✱ ✱ 1924 MADRAS 125

SCHWABE, C. J., AND COUTTS TROTTER, J.

Shanmugappa and another—Plaintiffs—Appellants.

v.

Sangaraya Chetty alias *Sangappa Chetty*—Defendant—Respondent.

F. A. No. 7 of 1922, Decided on 2nd March 1923, from the judgment of Kumaraswami Sastri J., in C. S. No. 446 of 1920.

(a) *Limitation Act, S. 10—Suit by co-trustee against his co-trustee is covered by the section.*

The words of S. 10, are wide enough to cover a case by one of two trustees who claims against the other that the property ought to be held by the two. [P. 125, C. 2]

(b) *Minor — Guardian cannot make admissions on his behalf but intention to hold adversely will not be ascribed to minor if guardian did not so hold.*

Guardians cannot make admissions on behalf of their wards. As a general proposition this is perfectly sound; but where the guardian does not either by words or acts show that he believed or intended to hold adversely on behalf of his ward, that intention cannot be inputed to the ward. [P. 126, C. 2]

T. R. Kothanda Rama Mudaliar—for Appellants.

V. Radhakrishnayya—for Respondent.

Schwabe, C. J.—In this case, plaintiff claims joint possession of certain trust property, in respect of which he was appointed a co-trustee with his brother, now deceased. It would appear that he and the brothers lived together for some time and the brother was the person, who for many years was the only executor under the will, by which they were appointed trustees and was also the acting trustee of this trust, which was created for certain charitable purposes. The brothers seem to have fallen out somewhere about 1907 and litigation ensued. One brother died in 1910, leaving two infant sons surviving him and a widow. From that time till now, the widow and her sons continued to manage the trust property. The plaintiff now claims to be entitled to joint possession and joint management of the trust property.

It is admitted that the plaintiff was a trustee but it was said that his rights are barred by limitation. There seem to me to be three complete answers to that. In the first place, S. 10 of the Limitation Act says that, notwithstanding anything contained in the Limitation Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time.

In my judgment, this is an action by one of two co-trustees, it is true, but against a trustee for the purpose of following in his hands a trust property. In my judgment, the words are wide enough to cover a case by one of two trustees who claims against the other that the property ought to be held by the two. It would have been very remarkable if it were not so; for one of two trustees would be left in possession and the other who is liable for the acts of his co-trustee would be unable in any way to control his co-trustee, because if he sued his co-trustee for joint possession, he would be met by a plea of limitation.

Even if this view of S. 10 of the Act is wrong, there remains to be considered the effect of some correspondence within two years of the launching of this suit. The plaintiff had written to the widow stating that he had taken out probate, he being the sole surviving executor under the will which appointed him and his brother trustees, and he claimed from her and his nephews possession of the property. The answer that was given by the widow and guardian of the infant children written by a Vakil on her behalf was this:

"I am further instructed to state that on the death of my client's husband you.....declined to have anything to do with the management of the estate and asked my client to manage the same on behalf of her sons."

I entirely fail to see how possession obtained or retained under those circumstances can be adverse possession, amounting to ouster; for, she writes through her own legal advisers saying that she is managing by request and with the consent of the co-trustee, the plaintiff jointly with her sons acting through herself; and it passes my comprehension to understand an argument put forward on the basis that, when one of two trustees says to the other. "You take possession and hold possession of the property," that other can afterwards say that he is in adverse possession.

The other point turns on the next paragraph of the letter and it is in these terms:

"I am further instructed to state that even if your client has now obtained probate, as mentioned in your letter under reply, my client on behalf of her sons and your client are jointly entitled to administer the properties of the estate in accordance with the will"

There, one has, in words, an admission of the plaintiff's right made by the Vakil on behalf of the defendants, within two years of the suit being brought, which is in itself sufficient evidence that the possession held by her, on behalf of her sons was not possession adverse to the plaintiff.

For these reasons, I agree with the judgment of the learned Judge and this appeal must be dismissed with costs.

Coutts Trotter, J.—I am of the same opinion. There are two points which appear to me to be fatal to the appellants in this case The first is S. 10 of the Law of Limitation to which the only answer of the learned Vakil, who has argued the case with great fulness, is that that section only applies when the trustee is being called to account by a stranger, and not when the person who seeks to investigate the affairs of the trustee is a co-trustee; for that position I find no authority and none was suggested to exist, and it seems to me to be a proposition that, on the face of it, would do away with half the benefit that the section of the Act intended to confer.

The next is the letter, Ex. V, written by the mother of the infants. It is argued against that by Mr. Kothandarama Mudaliar that guardians cannot make an admission on behalf of their wards. That, no doubt, as a general proposition is perfectly sound; but here we are investigating a certain fact, namely, was the possession of the guardian on behalf of her minor children adverse to the plaintiff or was it not, it being in her possession? The answer is, that what she said about it is perfectly admissible, as showing *quo animo* as she, representing her children, remained in possession of the property. She could perhaps have given some evidence by her words or her acts that she believed herself and intended herself on their behalf to be occupying adversely to the plaintiff. But if she did not, you cannot impute to the minors an intention and a character in possession which was not the intention or the character in which their guardian who represents them acts for them. You cannot manufacture *ex post facto*, merely because they were minors, the adverse quality which the actual possession was never clothed with.

In my opinion, this appeal fails, and I agree to the order proposed by my Lord.

Appeal dismissed.

✱ 1924 MADRAS 126

SCHWABE, C. J. AND RAMESAM, J.

T. R. Venkatarmana Aiyar — Appellant.

v.

The Coimbatore Mercantile Bank Ltd. —Respondent

F A. No. 19 of 1922, Decided on 2th March 1923, from the order of Phillips, J.

Companies Act (VII of 1913) Ss. 10, 12 & 14—Court is not bound to confirm special resolution revoking appointment of Agent and Secretary.

One of the clauses in the Memorandum of association of a company was as follows:—

"T. R. Venkataramana Ayyar has been appointed agent, principal secretary and director to the Bank and given the powers to enter on

the responsibility of this Bank, into any agreement or transaction with the registered Banks in the following places and other places and with busines and industrial concerns of local traders with a view to Bank's earning commission or profits."

The company by a special resolution altered the clause by revoking the appointment of the said Venkataramana Ayyar and applied to the Court for confirmation of the special resolution under S 12.

***Held* that the clause was not one relating to the objects of the company alterable under S. 13, (1) (a) nor one relating to a detail of management, but was a clause embodying a very important condition, within the meaning of the term in S. 10. [P. 128, C. 1 & 2]**

***Held* further that even if the clause could be construed as referring to the objects, the Court had a discretion in confirming it which it ought to exercise, having regard to the interests of various persons concerned and that in the present case the alteration was of a character which the Court ought not to confirm [P. 127, C. 2]**

V. Krishnan—for Appellant.

N Srinivasachariyar and *K. S. Rajagopala Aiyangar*—for Respondent

Schwabe, C. J.—This is an appeal from an order of Phillips, J., on a petition made under S. 12 of the Indian Companies Act, asking the Court to confirm the special resolution of a company, for an alteration in the Memorandum of Association. Cl. 7 of the Memorandum is in the following words:—

"T. R. Venkataramana Iyer has been appointed agent, principal secretary and the director to the Bank and given powers to enter, on the responsibility of this bank, into any agreement or transaction with the registered Banks in the following places and other places and with business and industrial concerns of local traders, with a view to the bank's earning commission or profits."

The actual words are in Tamil and the translation given above, I think, adequately represents the meaning.

The only power that the Court has to confirm resolutions of a company, in regard to an alteration of the Memorandum of Association, is in respect of matters covered by S. 12; for S. 10 enacts that:

"A company shall not alter the conditions contained in its memorandum, except in the cases and in the mode and to the extent for which express provision is made in this Act."

Other specific conditions of the memorandum can be altered, in the manner provided for, in other parts the Act. It is not contended that this clause comes under any of them. It is contended that it comes under S. 12, as being "with respect to the objects of the company," which may be altered in this way. "so far as may be required to enable it to carry on its business more economically or more efficiently, or to restrict or abandon any of the objects specified in the memorandum." In my judgment, this is not an object of the company at all. The object of the Company as stated in Cl. 3 of the memorandum, is to carry on banking business and things ancillary thereto, and the appointment of this gentleman, as agent, secretary and director, is a method of carrying out the object of the company but it is not in itself an object at all. If, however, it ought to be regarded as one of the objects of the company, the question would arise whether the Court ought to confirm the resolution of the company putting an end to it. I call attention to this, because the confirmation or otherwise of such a resolution is a matter of discretion, and, in this case it is clear that no discretion has been exercised at all; because the learned Judge says that he "is satisfied that this is an alteration that can be made by the company and therefore ordered the alteration as prayed." He gives no reasons for exercising his discretion in that way, but apparently treats it as a matter which the company has the power to do; it is the duty of the Court to assist the company in so doing and I think it desirable to point out that that is not the intention of the legislature at all. The intention of the legislature is as indeed is clearly stated in S. 14, that the Court should exercise a discretion, having regard to the interest of the various persons, share-holders, creditors and others.

Now, if this were one of the objects of the company, and the resolution has therefore to be confirmed by the Court and I had to exercise my discretion upon it, without any hesitation, I should refuse and for this reason, that the company has made a contract with this man in the most

solemn form that the company can, namely, by putting it into its memorandum, and I can see no justification for a Court, so to speak, to unmake the contract, or to permit the company to unmake the contract, by altering its Memorandum of Association. Nor indeed do I think it would have the least effect because if there is such a contract, the man has his contractual rights and the fact that the company purports to revoke, with the consent of the Court, that contract does not, as between that man and the company, interfere in any way with his rights.

But there are other things that can be put into a Memorandum of Association than the objects and the matters set out in the Companies Act, such as name, capital, address etc. They have been described as conditions. A very common one is a provision for the rights *inter se* of preferential and ordinary share-holders. It has been held that in respect of such conditions no power is given in the English Companies Act, which corresponds completely with the Indian Companies Act on this point, to alter the conditions in the memorandum. Such a condition is unalterable either by the company or, by the Court, at all. See *Ashbury* v. *Watson* (1) followed and approved in *In re Welsbach Incandescent Gas Light Co., Ltd.* (2).

It is, however, argued that this is not a condition but is something else. It was suggested in *Ashbury* v. *Watson* (1) by Lord Justice Fry that there might be some details of management of a company, contained in the memorandum, which would be alterable not being conditions. No case of this kind has ever arisen, and I am quite satisfied that this clause is not a detail of management at all. Condition for this purpose is also described as stipulation and. in my judgment, this is one. It is a very important provision. It is not necessary to discuss now the duration f that agreement. That may be a matter for discussion elsewhere, but, at any rate, for the time there was a man set up with, and he agreed himself to have, almost unlimited powers of control in the affairs of this company ; and share-holders, who took their shares in the face of the memorandum, would know that they were to have the advantage of that man's efforts. It may indeed have been one of the important reasons guiding people to become share-holders in the company. I think it is a condition, within the meaning of S. 10, and is therefore unalterable. If it were not a condition and it is not one of the objects—it is at the least a statement of fact, solemnly made in the memorandum, namely that this man has undertaken this business and is given these powers, and how a Court can be asked to delete from a memorandum, or how the company by its resolution can delete a statement of fact like this, I do not see. I find no provision in the Company's Act permitting it and I see no ground on which the resolution of the company so doing could be sustained.

It follows, in my judgment, that this petition must fail and ought to have been dismissed. I think it is desirable to say that nothing that we are saying will affect the rights under the contract as between Mr. Venkatarama Aiyar and the company. Whether in fact he has resigned, in a binding fashion, as is alleged by the company, whether he has been guilty of misconduct as is alleged by the company, whether the company have broken their contract by dismissing him or refusing to employ him further, are questions which can be determined in the ordinary course of law : and it does not assist any one to arrive at a resolution of those questions to apply to the Court in this way, or for the company to pass special resolutions, as they purport to have done in this case. These matters are entirely open and remain for decision in any suit that has been instituted or may be instituted between the parties.

This appeal must be allowed with costs on the higher scale.

Ramesam, J.—I agree.

Appeal allowed.

(1) [1885] 30 Ch. D., 376.
(2) [1904] 1 Ch. D., 87—73 L.J. Ch. 104—>9 L.T 645—52 W.R 327—11 Manson 47—20 T.L.R. 122.

** 1924 MADRAS 129

Full Bench

SCHWABE, C.J. AND COUTTS TROTTER AND KRISHNAN, JJ.

In the matter of a Second Grade Pleader, Ramachandrapur.

24th July, 1923

Legal Practitioners Act, S. 13(f)–Persistence in conduct and advising nonpayment of taxes or boycott of Courts, in short, breaking law and order justifies refusal to issue sanad.

Courts should not consider what the political opinions of anybody are, whether they are members of the legal or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, an applicant who comes to ask for the issue or renewal of a sanad, is applying to be treated as a part of the machinery, for the maintenance of law and order in the body politic and to take an active part in administering, for the other subjects of the Crown, the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position, while at the same time he is saying that law and order should be disobeyed, and taxes are not to be paid and that all public offices are to be abandoned, in order to paralyse the very life of the body politic, apart altogether from any other views he may entertain, as to the desirability of the person or the particular members of the Government he attacks, or the particular character of the transactions carried on, in these Courts. A Court would not without stultifying itself, issue a certificate to a man, who, in the same breath that he is asking for it, cuts himself off and announces his intention to do his best to cut off others, from the life of the state.

[P 129 C 2, P 130 C 1]

The Advocate General—for Government.

The Pleader in person

V. V. Srinivasa Iyengar for *T. R. Ramachandra Aiyar*—for the Vakil's Association.

Schwabe, C. J.—In this case, a Second Grade Pleader has applied for a renewal of his certificate. The facts stated to us by the District Judge are that he was convicted, for refusing to give security, he having been called upon to do so, by reason of two speeches said to have been delivered by him, in the Godavari District, at meetings held about the 6th of April, 1921, and on the 28th of January, 1922. The effect of these speeches, as proved in evidence–short–hand notes being produced by the police officials who heard them—was instigating the people, among other things, not to pay taxes, till there had been a meeting of the Congress, the decision of which, the respondent apparently advised, should guide the population, as to whether they should or should not pay taxes to the recognised authorities. It was also alleged that he stated that he objected to the English Courts and the methods of English Courts and recommended the people to eschew those Courts, or to go to the Courts set up, or to be set up, by the said Congress.

It is quite clear that, so long as a man professes views of that kind and advises the people to act in that way, he is not a fit person to be entrusted with a part of the administration of justice, in the existing Courts of this Country; and I am quite clear that the making of these speeches is such conduct, as calls upon this Court in the exercise of its disciplinary powers, to take action.

Mr R comes up before us and puts in a statement, denying the accuracy of the reports of the speeches. His denial however, does not go very far; nor do I think that he can disregard the evidence that was given and accepted in the Court, before which the matter came He expresses no regret for the tone of his speeches and he does not say that he has seen the error of his ways, or that he promises in future, if permitted to practise, in the Courts, to conduct himself as a loyal adherent of the Government, responsible to those Courts, or anything of that kind; and we can only say that, as long as his attitude remains as it is, we cannot permit a *sanad* to be issued to him. It will be open to him, on some future occasion, if he is so minded, to attempt to satisfy this Court of a genuine change in the attitude that he has at present adopted and to ask the Court to take a different view hereafter. Of course, nothing that we can say now will in any way fetter the Court, which is to deal with such an application, if and when it is made.

Coutts Trotter, J.–I am of the same opinion. I want to make it as clear as I can, that, speaking for myself, the last thing that I think that we should consider ourselves concerned with, in the the ordinary way, is what the political opinions of anybody are, whether they are members of the

legal, or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, an applicant, who comes to ask for the issue or renewal of a sanad, is applying to be treated as a part of the machinery, for the maintenance of law and order in the body politic and to take an active part in administering, for the other subjects of the Crown, the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position, while at the same time he is saying that law and order should be disobeyed, and taxes are not to be paid and that all public offices are to be abandoned, in order to paralyse the very life of the body politic, apart altogether from any other views he may entertain, as to the desirability of the person or the particular members of the Government he attacks, or the particular character of the transactions carried on, in these Courts. With these matters, I have nothing to do. But I feel assured that this Court could not without stultifying itself, issue a certificate to a man, who, in the same breath that he is asking for it, cuts himself off and announces his intention to do his best to cut off others from the life of the state.

Krishnan, J.—I entirely agree with the judgments that have been just delivered by the learned Chief Justice and my learned brother Coutts Trotter J. I think it is perfectly clear, that so long as the applicant is in the frame of mind, which is evidenced, by his two speeches, Exs. A and B, it is not possible to give him a sanad to practise in Courts. When he changes that frame of mind effectively and makes it clear to this Court that he has done so, in a manner which we could rely upon, it would be then time to consider whether his sanad should be renewed. For the present, I agree that our order should be that his sanad should not be renewed.

Sanad refused.

★★ 1924 MADRAS 130

SPENCER AND KRISHNAN, JJ.

Doraiswami (Minor) and others—Defendants 3, 4 and 5—Appellants.

v

Chidambaram Pillai and others—Plaintiff and defendants 6, 7 and 8 Respondents.

S. A. No. 924 of 1921, Decided on 7th March 1923, against the decree of the Addl. Sub. J., Trichinopoly in O. S. No. 351 of 1920.

(a) *Execution sale—Sale without notice under O. 21 R. 22 may be nullity but without notice to legal representative of J—D dying just before actual sale is not a nullity. (Case law discussed).*

If any order is passed by an executing Court against a party without notice being given to him of the application which gave rise to the proceedings the party behind whose back such proceedings are taken, will not be bound by the order. Further, if process is issued without the notice, which Order 21, R. 22 prescribes in cases where the judgment-debtor is dead or the decree is more than one year old, the want of notice might constitute a material irregularity entitling a person whose interests have been affected to apply either under O. 21, R. 90 or by suit to have any sale of property that has been held upon the decree-holder's application set aside. But if the decree-holder has done all that the law requires him to do and if the judgment-debtor or one of the several judgment-debtors, where there are more than one, happens to die during the course of the execution of the sale warrant, or it may be while the auctioneer is actually holding the auction, the sale is not invalidated by the accident of the owner's death before the sale is completed. 22. M. 119, 26. M L. J. 267 and 41. M. L. J. 547. 6 Mad. 180; 15. M. 399 Dist. [P. 131, C. 2 P. 132, C. 1]

A decree once passed does not become barred or incapable of being executed by reason of the death of a judgment-debtor, nor do execution proceedings abate owing to the failure of the decree-holder to bring the legal representatives of a judgment-debtor on the record. O. 21, R. 22 is the only provision which deals with legal representatives of parties to decrees and that only applies to the commencement of execution proceedings. The legal representatives of judgment-debtors who die during the course of processes of Court being executed are able to watch public sales without being personally served with notice. When the law only prescribes the issue of notice to them at the commencement of execution proceedings, they cannot claim as a matter of right to have fresh notice, if their representation of the deceased's estate commences during the progress of the carrying out of the processes of the Court,

nor are they justified in treating such processes as invalid for want of jurisdiction on the part of the Court and its officers. 1922 Mad. 307 Diss. and 25, Bom. 337 (P. C.) Foll.
[P 132 C 1 2]

(b) *Civil. P. C., O. 21, R. 22—Process without notice does not affect jurisdiction.*

So long as O. 21, R. 22 (2) permits an executing Court to dispense with notice for reasons to be recorded it is difficult to see how the issue of process without notice and without recording reasons would affect the jurisdiction of the Court or would be more than an irregularity. 1922 Mad. 307 Exp., 20 Cal. 370. Foll. 32 Cal. 396 Exp., 12. Mad., 211 and 15. Mad. 399 Foll., 22. Mad. 119. Diss., 61 I. C. 291. Exp., and Dist., 23. Cal. 636 Foll.
[P 132 C 1]

S. Srinivasa Aiyangar—for Appellants.

L. S. Veeraragava Aiyar and *S. Muthia Mudaliar*—for Respondents.

Spencer, J.—This suit was brought by one of the reversioners to the estate of one Muruga Pillai for a declaration on behalf of himself and defendants 6 and 7 that the private sale of items 1 to 8 in the plaint schedule and the Court sale of items 9 to 11 during the lifetime of Muruga Pillai's widow (1st defendant) are not binding beyond the life time of the widow, who died during the pendency of the appeal in the lower appellate Court. The District Munsif dismissed the suit in toto.

In appeal the Additional Subordinate Judge held that the Court sale of items 9 to 11 was void and gave the plaintiff a decree accordingly. He held that the private sale of items 1 to 8 by the widow under Ex. B was binding on the reversioners to the extent of Rs. 1,000 only and made the amount a charge on these items excepting item 5 and half of item 8.

The learned Subordinate Judge's reason for holding the Court sale to be void was that it took place on January 17th, 1916 after Muruga Pillai had died on December 16th, 1915, and that no representatives of the deceased owner were brought on the record. He was of opinion that the Court had no jurisdiction to sell the properties of deceased person without any representatives being brought on the record and in support of this view he cited *Ramaswami* v. *Bagirathi* (1), *Krishnayya* v. *Unnissa Begam* (2), *Groves* v. *Administrator-General* (3) and *Rayarappan Nambiyar* v. *Malikandai Aketh Mayan* (4). Besides these cases there is a recent decision of a Bench of this Court in *Raghunathaswami Aiyangar* v. *Gopal Rao* (5) in which Ramesam, J., in holding that a sale in execution carried out against a dead person (or no person as he says) was void and should be regarded as a nullity and had not got to be set aside, observed that it was "opposed to all notions of justice to allow legal proceedings to be taken against an estate without there being some one on the record to represent the estate." I presume that the learned Judge when he used these words had in his mind the principle of *audi alteram partem* which in *Narayana Kothan* v. *Kalia anasundaram Pillai* (6) was spoken of as a principle which could not justifiably be disregarded except where it was necessary to do so in order to protect *bona fide* purchasers at Court sales. If any order is passed by an executing Court against a party without notice being given to him of the application which gave rise to the proceedings, I entirely agree that the party behind whose back such proceedings are taken, will not be bound by the order. Further, if process is issued without the notice, which Order 21 Rule 22 prescribes in cases where the judgment-debtor is dead or the decree is more than one year old, I consider that the want of notice might constitute a material irregularity entitling a person whose interests have been affected, to apply either under O. 21 R. 90 or by suit to have any sale of property that has been held upon the decree-holder's application set aside. But if the decree-holder has done all that the law

(1) [1883] 6 Mad. 180.
(2) [1891] 15 Mad. 399.
(3) [1898] 22 Mad. 119—8 M. L. J. 288.
(4)]1914] 26 M. L. J. 267—23 I. C. 251.
(5) 1922 Mad. 307—15 L. W. 123—(1921) M. W. N. 732—41 M. L.J. 547—68 I. C. 667.
(6) [1895] 19 Mad. 219.

requires him to do and if the judgment-debtor or one of the several judgment-debtors, where there are more than one, happens to die during the course of the execution of the sale warrant, or, it may be, while the auctioneer is actually holding the auction, with due respect I fail to see how the sale is invalidated by the accident of the owner's death before the sale is completed. It has been suggested that as soon as a judgment-debtor dies his interest in the property passes to his legal representatives, and that the law nowhere permits the sale of a dead man's assets. On the other hand Ss. 50 and 53, Civil Procedure Code, speak of "the property of the deceased" and S. 50 provides for decrees being executed against such property in the hands of legal representatives. Although it may not be accurate to speak of a dead man as owning property, it is well understood that in law there are estates of deceased persons. The definition of "legal representative" in S. 2, clause 11, C. P. C. speaks of such estates So long as O. 21, R. 22 (2) permits an executing Court to dispense with notice for reasons to be recorded, it is difficult to see how the issue of process without notice and without recording reasons would affect the jurisdiction of the Court or would be more than an irregularity. The operation of O. 22, R. 4, which provides for the legal representatives of defendants who die during the pendency of a suit being brought on the record, has been excluded from execution proceedings. So a decree once passed does not become barred or incapable of being executed by reason of the death of a judgment-debtor, nor do execution proceedings abate owing to the failure of the decree-holder to bring the legal representative of a judgment-debtor on the record. O. 21, R. 22 is the only provision which deals with legal representatives of parties to decrees and that only applies to the commencement of execution proceedings. The legal representatives of judgment debtors, who die during the course of the processes of Court being executed, are able to watch public sales without being personally served with notice. When the law only prescribes the issue of notice to them at the commencement of execution proceedings, they cannot claim as a matter of right to have fresh notice if their representation of the deceased's estate commences during the progress of the carrying out of the processes of the Court, nor are they justified in treating such processes as invalid for want of jurisdiction on the part of the Court and its officers. In my opinion the view taken in *Raghunathaswami Aiyangar* v. *Gopala Rao* (5) that a sale in execution carried out against a dead person is *per se* void is based on a fallacy, and I think we are bound to follow the judgment of the Privy Council in *Malkarjun* v. *Narhari* (7) in preference to the decision of a Bench of our own Court. Their Lordships distinctly say that a judicial sale is not a nullity if it is held without a notice being given to the proper legal representative of a deceased person. They observe that to treat such an error (that of serving with notice a person who did not legally represent the estate) as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. They add that strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do. They point out that when a Court tries a suit without a debtor or his estate being subject to its decree it actually never possesses the jurisdiction which it purports to exercise, but it is a different matter when the Court has by its decrees established the debtor's liability and is in the process of working it out against his estate.

My learned brother Remesam, J. distinguished this case on the facts from those in *Raghunathaswami Aiyangar* v. *Gopal Rao* (5). He observed that in *Malkarjun* v. *Narhari* (7) an application was made to bring the legal representatives of the deceased judgment-debtor on the record, the

(7) [1901] 25 Bom. 337—27 I.A. 216—2 Bom. L. R. 927—10 M. L. J. 368 (P. C.)

Court received the application and did issue notice to the party named as the heir. Only it issued notice to the wrong heir. But in the case before him he said that the procedure laid down by the Code was not followed. He does not state what procedure he means, but from what precedes he can only mean that general obligation of bringing some one on the record at every stage to represent the estate of the judgment-debtor. I have tried to show already by a reference to O. 22, Rr. 1 and 12, Civil Procedure Code that there is no statutory obligation of such a kind cast upon decree-holders during the processual stages of execution of their decrees. The above are my reasons for considering that the Subordinate Judge was wrong in reversing the decree of the District Munsif and that we should now restore the trial Court's decree so far as these items are concerned. But some of the reported decisions relied on by the Subordinate Judge and some quoted in the arguments in this Court remain to be noticed.

The judgment in *Ramaswami* v. *Bagirathi* (1) is a very short one. The learned Judges do not say that the sale was a nullity, but they set it aside on the ground that the further process of sale could not lagally issue without some representatives of the deceased judgment-debtor being on the record. In revision they reversed the order of a Subordinate Court which confirmed a sale under S. 312 of the old Code (O. 21, R. 92 of the present Code). It is not clear from the report whether the order for sale was passed behind the back of the legal representatives. If that was the case, they naturally objected under S. 311 to its legality.

Biyyakka v. *Fakira* (8) is an authority for the proposition that if a judgment-debtor dies between an order for possession being made under S. 318, Civil Procedure Code (now O. 21, R. 95) and being executed, there is no necessity to bring his legal representatives on record between that date and the date of executing the order. This supports the view I have taken, the difference being only in the nature of the decree to be executed.

In *Krishnayya* v. *Unnessa Begum* (2) the omission to bring legal representatives on the record is treated not as making the sale void but as being a material irregularity which the learned Judges say must necessarily cause substantial injury to the legal representative. Why this is necessary is not made clear.

In *Narayana Kothan* v. *Kaliyanasundaram Pillai* (6) the confirmation of a sale without notice to a judgment-debtor, who had been declared insane after the decree and before the sale, is treated as an irregularity but not as making the sale void. In *Groves* v. *Administrator-General* (3), Boddam, J. repeats the fallacy about the sale of a dead man's property passing no rights to the purchaser but in the result the sale was not treated as a nullity, but it was set aside in revision of an order passed in execution. *Rayarappan Nambiar* v. *Mallikandai Akketh Mayan* (4) follows *Ramaswami* v. *Bagirathi* (1) and *Groves* v. *Administrator-General* (3) and attempts to distinguish *Malikarjun* v. *Narhari* (7) as being a case of a *bona fide* purchaser. It is not clear whether there was an order for sale made in this case without notice to the legal representative of the deceased mortgagor. If an order of Court was made without notice to the party concerned, the decision may be right.

Sheo Prasad v. *Hira Lal* (9), the judgment of a Full Bench of five Judges (one dissenting) dissents from *Ramaswami* v. *Bagirathi* (1) and refutes the theory that the death of a judgment-debtor would cause an attachment to abate or make it necessary for a judgment-creditor to take steps to keep the attachment alive. The observations of Edge, C. J. at p. 446 are very pertinent to the present case. He says "I do not find in the Code of Civil Procedure any provision requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment."

(8) [1889] 12 Mad. 211.

(9) [1890] 12 All. 440—(1890) A.W.N. 103 (F. B.)

"To hold otherwise would be to impose upon the purchaser at an execution sale under a decree the necessity of ascertaining before he paid the purchase money whether the judgment-debtor was alive at the actual moment when the sale took place, on the risk of losing the purchase money which he paid and the property in respect of the purchase of which that money was paid, and would in any event render it difficult for such a purchaser to maintain his title under his sale certificate if subsequently challenged by the legal representative of the deceased judgment-debtor the exact date of whose death it might be impossible for the purchaser to ascertain or prove."

In *Aba* v. *Dhondu Bai* (10) one of the learned Judges (Jardine, J.) follows *Sheo Prasad* v. *Hira Lal* (9) and the other (Ranade, J) prefers the Madras view. This was prior to the Privy Council decision in *Malikarjun* v. *Narhari* (7) which settled the question.

Gopal Chunder Chatterjee v. *Gunamoni Dasi* (11) treats the issue of a notice to the legal representative of a deceased judgment-debtor as a condition precedent to the issue of a warrant of execution. This is the view about jurisdiction in execution matters which the Privy Council condemn as being calculated to introduce great confusion into the administration of the law.

Premmoyi Chowdhrani v. *Preonath Dhur* (12) follows *Sheo Prasad* v. *Hira Lal* (9). The learned Judges observe that the omission to place on the record the heir of a judgment-debtor who died during the course of execution did not vitiate the sale but was at most an irregularity.

In *Khiarajmal* v *Daim* (13) there was a sale of the estate of a deceased man which estate was not represented in the suit itself. This made the sale of property without jurisdiction and null and void. This is not an authority on the legal consequences of failure to get representation of a deceased judgment-debtor's estate in execution, but it belongs to the first class of cases described in *Malikarjun* v. *Narhari* (7) where a defendant does not come under the jurisdiction of the Court that tries the suit and passes the decree.

Bepin Behary Beva v. *Sasi Bhushan Dutta* (14) is another case that follows *Sheo Prasad* v. *Hira Lal* (9) and *Malikarjun* v. *Narhari* (7). A sale held when the Court was aware of the death of one of the judgment-debtors was treated not as a nullity but as voidable at the instance of the persons affected. It again was followed in *Jagadish Bhattacharjee* v. *Bama Sundari Dasya* (15) where the judgment-debtor died after attachment but before the sale and the sale held without his legal representatives being brought on the record was held to be not necessarily invalid but open to attack on the ground of irregularity.

In *Ruhni Nandan Ghose* v. *Rajendra Nath Ghose* (16) the principal defendant died before the preliminary decree was made absolute in a mortgage suit and his legal representative was not brought on the record. The High Court observed that the executing Court had no jurisdiction to sell the property and the decree or sale would be a nullity as against persons who were not properly represented, and might be disregarded. The want of jurisdiction here was in the Court that tried the suit, and not in the executing Court and therefore it was a radical defect like it was in *Khiarajmal* v. *Daim* (13).

These decisions show that, apart from the Privy Council decision in *Malikarjun* v. *Narhari* (7), the balance of authority is in favour of the view taken in *Sheo Prasad* v. *Hira Lal* (9) and against that in *Ramaswami* v. *Bagirathi* (1), *Rayarappan*

(10) [1895] 19 Bom. 276,
(11) [1893] 20 Cal. 370.
(12) [1896] 23 Cal. 636.
(13) [1905] 32 Cal. 296—32 I. A. 23—1 C.L.J. 584—8 Sar. 734—2 A.L.J. 71—9 C.W.N. 201—7 Bom. L.R. 1 (P. C.)
(14) [1913] 18 C.W.N. 766—18 C.L.J. 628—22 I. C. 95.
(15) [1919] 23 C.W.N. 608—29 C.L.J. 411—51 I. C. 972.
(16) [1920] 61 I. C. 291.

Nambiar v. *Mallikandi Aketh Mayan* (4) and *Raghunathaswami Aiyangar* v. *Gopal Rao* (5).

As regards items 1 to 8 excluding item 5 which was found by the District Munsif to belong to the 2nd defendant the Subordinate Judge found that the sale of these items was not for a proper price and that out of the sale price of Rs. 1,740 only Rs. 1,000 was received for purposes binding on the estate. I do not think that sales should be revised long after they have taken place on a mere estimate as to what price the property sold ought to have fetched. The mortgages on items 2, 3, 6 and 7 were usufructuary and there was no necessity to sell items 1, 4, 5 and 8 which were not encumbered in order to discharge usufructuary mortgages. When the mortgagee gets the usufruct of the land in lieu of interest the debt does not by lapse of time become an increased burden on the land, but if such mortgaged property is sold outright the reversioners are deprived of the chance of redeeming it. The sale of these items was evidently neither a prudent nor a *bona fide* transaction. The Second Appeal is dismissed as regards this part of the claim. Each side will pay and receive proportionate costs throughout. The memorandum of objections is not pressed and is dismissed with costs.

Krishnan, J.—This Second Appeal arises from a suit brought by a reversioner to have it declared that certain alienations of properties of one Muruga Pillai the last male owner after his death, are not binding on the reversioner. One of the sales so challenged is a Court sale of items 9 to 11, in execution of a decree obtained against Muruga Pillai. These items had been attached in execution of that decree, and ordered to be sold by the Court and the proclamation for sale had been also issued during the life-time of Muruga Pillai. Muruga Pillai seems to have died some time thereafter and just before the auction sale actually took place; and no one had been added to the record as his legal representative. His widow the 1st defendant was the proper party to be so added. The 2nd defendant who, though a reversioner himself, was not a party to that decree, purchased the properties in Court auction and he claims to be a *bona fide* purchaser for value and that claim has not been displaced by any finding of the lower appellate Court. No applications under Rr. 89, 90 or 91 of O. 21, C. P. C. having been made the sale was in due course confirmed under R. 92 and a sale certificate issued to the 2nd defendant. The legal representative, the widow, has never challenged the validity of the sale but the reversioner, the plaintiff, contends that the sale was a nullity and was void because at the time it took place the estate was not represented by any one on the record. The Subordinate Judge has upheld his contention and declared the sale void following *Ramaswami* v. *Bhagirathi* (1) *Krishnayya* v. *Unnissa Begum* (2), *Groves* v. *Administrator-General* (3) and *Rayarappan Nambiar* v. *Malikandi Aketh Mayan* (4). It may be mentioned that there is further a recent ruling of a Bench of this Court in *Raghunathaswami Aiyangar* v. *Gopal Rao* (5) in support of his view where it was held that "a sale in execution carried out against a dead person (or no person) is void and should be regarded as a nullity and has not got to be set aside."

This extreme view introduces a most serious uncertainty into Court sales and will tend to further dissuade bidders from coming forward in Court auctions, a result to be avoided if possible. As pointed out by my learned brother it does not seem to be in accord with the principles laid down by the Privy Council in *Malkarjun* v. *Narhari* (7) and we must of course follow the former in preference to the decisions of our own Court In *Rayunathaswami Aiyangar* v. *Gopal Rao* (5) Ramesam J. has tried to distinguish this case by confining its effect to its own facts: the principles laid down in that case do not however seem to me to be affected by the particular facts here. Their Lordships say that "if the Court took proceedings wholly without jurisdiction the plaintiffs (the legal representatives) would remain unaffected by them but a decree had

been made and partially, though to a minute extent, executed against Nagappa (the original debtor) and his estate was liable to make good the balance and that to enforce this liability was within the jurisdiction of the Court." Then they go on to distinguish the case of *Baswantappa* v. *Ranu* (17) on the ground that the decree there was itself a nullity. They say that in that case "neither the debtor nor his estate was ever made subject to the decree, the liability was never established and the process of execution had nothing to rest upon" and they point out that "it is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against the estate. The case of *Khairajmal* v. *Daim* (13) relied on by Ramesam, J. in *Raghunathaswami Aiyangar* v. *Copal Rao* (5) above cited is a similar case where the decree was itself void. Their Lordships proceed to say in *Malkarjun's* case (7) that "it was necessary for the plaintiffs to set aside the sale and that the omission to serve notice on the proper legal representative was a serious irregularity." Now under O. 21 R. 22, C. P. C. a proviso has been added enabling the Court in certain circumstances to dispense with such notice so that even the non-service of notice may not always be an irregularity. It is clear from *Malkarjun's* case (7) that when the Court has jurisdiction its sale cannot be treated as a nullity but can only be set aside if at all for irregularity. I am inclined to agree with the view of Mahomood, J. in the Full Bench case in *Sheo Prasad* v. *Hira Lal* (9) that failure to add the legal representative of a deceased judgment-debtor is only an irregularity and that to set aside a sale on the ground of irregularity, it must be shown that it has led to substantial loss or injury otherwise the sale must be supported more especially when the puachaser is a *bona fide* purchaser for value. I am unable to adopt the view in *Krishnayya* v. *Unnissa Begum* (2) that the failure to add the legal representative to the record is a material irregularity which necessarily leads to substantial injury. Such injury must be proved whether the sale is sought to be set aside by an application under O. 21, R. 90 or by suit.

That the failure to add the legal representative of a deceased judgment-debtor to the record after attachment is only an irregularity is the view accepted by the other High Courts and the weight of authority, as my learned brother who has dealt with the authorities cited at length points out. is in favour of that view. I should have however in view of the Madras cases cited referred the point to a Full Bench but the ruling of the Privy Council in *Malkarjun* v. *Narhari* (7) renders it unnecessary to do so.

Now in the case before us though the suit has been brought within one year as provided in Art. 12 it has not been established that any substantial injury has been caused by the failure to add the widow to the execution record. As already stated she does not dispute and she has never disputed the validity of the sale nor has she asserted that by not being added to the record she has been injured by losing any opportunity that she otherwise would have had for getting the sale set aside. For the above reasons I agree with my learned brother that the decree of the Sub Judge must be reversed and that of the District Munsif restored with regard to items 9 to 11.

The next question is as regards items 1, 2, 3, 4, 6, 7 and half of item 8. These items were sold by the widow to the 2nd defendant for Rs. 1 000, Rs. 875 were due under a usufructuary mortgage by Muruga Pillai himself on items 2, 3 6 and 7 and Rs. 125 were required for 1st defendant's maintenance. The Subordinate Judge finds that the consideration of Rs. 1,000 is binding on the estate. But he holds that the sale was fraudulent as it was for a very inadequate price, the properties being worth at least Rs. 1,740 at the time of the sale and as it was made by the widow very shortly after her husband's death

(17) [1885] 9 Bom. 86.

and in favour of her brother's brother-in-law, the 2nd defendant. There was no real necessity to sell all the 7 items to pay off a usufructuary mortgage on only 4 of them. I think therefore that the Subordinate Judge was right in setting aside the sale as fraudulent and giving the 2nd defendant a charge for Rs. 1,000 on the properties. It was not argued that the sale should be upheld as the whole of the consideration for it under the sale deed had been found to be for purposes binding on the estate; but it was only contended that the purchaser should be allowed to pay Rs. 740 more, the deficiency in the price to the reversioners and the sale should thereupon be affirmed. I do not think that that can be done as the sale is shown to be fraudulent one; this is not the case of a sale, being a proper sale, where a small portion of the consideration is shown to have been not binding on the reversioners.

I agree in dismissing the Second Appeal as regards these items and to the order of costs proposed by my learned brother and also to the dismissal of the memorandum of objections with costs.

Appeal allowed in part.

✱ ✱ 1924 MADRAS 137

SPENCER AND DEVADOSS, JJ.

T. K. V. Paramasiva Thevar—Defendant—Appellant.

v

Pulukaruppa Thevar and others — Respondents.

A. A. O. No 74 of 1922, Decided on 29th August 1923, against the order of the D. J. Tinnevelly D/-6th Jan. 1922.

(a) *Limitation Act, Art 166—Applies to every application to set aside a sale whether for illegality or for irregularity.*

The wording of the article includes all applications made under the Code to set aside a sale and not only aoplications specifically provided for by the Code, under Rr. 89, 90, or 91. Whether the ground for seeking to set aside a sale is the commission of an irregularity or illegality and whether S. 47 or O. 21, R 90 is the appropriate provision of Law, to be entered at the head of the petition, an application under the Code of Civil Procedure to set aside a sale in execution of a decree falls within the definition in Art 166. 11 L. W. 59 16 L. W. 934, 38 M. 1076, 1 L. W. 969, 16 L. W. 178. 46 Cal. 975 and 61 I. C. 833 (Pat.) Foll. [P. 138 C. 1, P. 140 C. 2]

(b) *Execution sale—Not necessarily a nullity because representative is not on record.*

A sale does not necessarily become a nullity, in consequence of a judgment debtor being dead and his legal representatives not being on record, when it takes place. 26 M. L. J. 267 Diss. 18 L. W. 577. 43 M. 313, 1 L. W. 969. 11 L. W. 59, 16 L. W. 934. 16 L. W. 178, 46 Cal. 971, and 61 I. C. 833 Foll. 43 Bom 235 and 27 Cal. 528 Diss. 42 M. 732 and 10 L. W, 410 Dist.

[P. 138 C. 2]

A. Krishnaswami Ayyar and *K. Balasubramania Ayyar*—for Appellant.

T. Rangachariar and *P. V. Krishnaswami Ayyar*—for Respondents.

Spencer, J.—This appeal is concerned with an application, to set aside a Court sale of mortgaged property, which took place on November 21st, 1919. It was filed by the 6th defendant on January, 17th, 1920, more than 30 days, after the date of the sale and was rejected by the Subordinate Judge, as being out of time. The learned District Judge confirmed his order.

It is now contended that the omission to publish the sale in Rayagiri, which is the village, where the land is situated, was not a mere irregularity but an illegality, that the petition though treated by the Subordinate Judge in his judgment as an application under O. 21, R. 90 of the Code of Civil Procedure, was properly (as it purported to be) one under S. 47 and that the limitation period in such cases is 3 years under Art. 181 of the 1st Schedule of the Limitation Act.

Assuming that the publication of the sale notice in Sivagiri, the parent village to which the suit land belongs according to the plaint and the mortgage deed, and the failure to publish it in Rayagiri was something more than a material irregularity in publishing the sale, we have to see whether a party to the suit who asks to have the sale set aside has 30 days under Art. 166, or 3 years under Art. 181, to come in with his application.

It is clear that Art. 181 is a residuary article, which can only be applied, if no other article dealing with applications under the Code of Civil Procedure is applicable.

Whether the ground for seeking to set aside the sale in this case is the commission of an irregularity or an illegality and whether S. 47, or O. 21, R. 90 is the appropriate provision of law, to be entered at the head of the petition, it is undoubtedly an application under the Code of Civil Procedure to set aside a sale in execution of a decree and thus falls within the definition in Art. 166

There is so much authority for the view that Art. 166 applies to all such cases that it hardly needs demonstration that the residuary Art. 181 cannot be applied.

By authority I have in mind the case in *Neelu Neithiar* v. *Subramania Moothan* (1). *Kamayya* v. *Ramamma* (2), *Payidanna* v. *Lakshminarasamma* (3), (see the judgment of Sadasiva Ayyar, J.,) and *Muthia Chettiar* v. *Bava Sahib* (4) and *Ganapathi Mudaliar* v. *Krishnamachari* (5), *Satish Chandra Kamungoe* v. *Nishi Chandra Dutta* (6) and *Das Narayan Singh* v. *Muhammad Yusuf* (7). Unfortunately so long as contrary decisions remain in the law reports, without being overruled, it is possible to found arguments upon them. It has therefore become necessary to examine the cases which lend support to the argument that Art. 181 is appropriate.

It is not uncommon to hear a sale described as a nullity, if there is an illegality affecting the jurisdiction of the executing Court, and illegalities are commonly supposed to take applications, to have sales set aside, out of the scope of O. 21, R. 90.

Ever since the Privy Council decision in *Malkarjun* v. *Narhari* (8) distinguished between a total absence of jurisdiction and an erroneous working out of a valid decree against an estate, after its owner's liability is established, there should be no room for misconception. But unfortunately, it is not uncommon to hear the expression "nullity" indiscriminately applied to sales by Court, as if by the magical word the Statute of Limitations was abolished. If in the present instance the sale was a nullity, there was no need for the appellant to apply to have it set aside, under S. 47, or O. 21, R. 90. He could simply ignore it, so long as his possession was not disturbed.

Rayarappan Nambiar v. *Malikandi Aketh Mayan* (9) is one of the cases in which a sale was held to be a nullity. It is one of those rare instances, where a person applies to be brought on the record as a defendant in execution. The decree-holder, when executing the decree, after the death of the mortgagor, judgment-debtor, failed to bring the mortgagor's legal representatives on the record. So this representative, having got himself placed on the record, applied to the Court to record satisfaction of the decree and incidentally to set aside the sale held behind his back.

The learned Judges may have felt themselves justified by the circumstances of the case, in adopting the somewhat unusual procedure, but with due deference, I am unable to agree with their opinion that the sale was a nullity. It is unnecessary to repeat the reasons for my opinion, which I expressed at some length in *Doraiswami* v. *Chidambaram Pillai* (10), that a sale does not necessarily become a nullity, in consequence of the judgment-debtor being dead and his legal representatives not being on the record, when it takes place.

The next case is *Seshagiri Rao* v. *Srinivasa Rao* (11) (Seshagiri Iyer and Moore, JJ.) The persons who

(1) [1919] M.W.N. 897—11 L.W. 59—53 I.C. 809.
(2) 1922 Mad. 95—16 L.W. 934—(1922) M.W.N. 176.
(3) [1915] 38 Mad. 1076—28 M.L.J. 525—29 I.C. 314.
(4) [1915] 1 L.W. 969—27 M.L.J. 605—26 I.C. 46.
(5) 1922 Mad. 417—43 M.L.J. 184—16 L.W. 178—(1922) M.W.N. 514—31 M.L.T. 135—70 I.C. 743.
(6) [1919] 46 Cal. 975—54 I.C. 431.
(7) [1921] 2 P.L.T. 401—61 I.C. 823.
(8) [1901] 25 Bom. 337—27 I.A. 216—5 C.W.N. 10—2 Bom.L.R. 927—10 M.L.J. 368.
(9) [1914] 26 M.L.J. 267—23 I.C. 251.
(10) 1924 Mad. 130—45 M.L.J. 413—18 L.W. 577—(1923) M,W.N. 817—33 M.L.T. 25—75 I.C. 46.
(11) [1920] 43 Mad. 313—38 M.L.J. 62—(1920) M.W.N. 127—56 I.C. 260.

applied to have the Court sale set aside were parties to the suit, who had besn exonerated, but they had no notice of the execution proceedings. The learned Judges recognised the fact that under the explanation to S. 47 a defendant, who has been exonerated, would yet be a party to the suit. Yet, they attempt to distinguish *Muthiah Chettiar* v. *Bava Sahib* (4), where it was held that Art. 166 governed applications, under S. 47 to set aside sales, on the ground that the application in that case was by a judgment-debtor. If the explanation to S. 47 means anything, this is no distinction at all. There is no provision in the Code, for persons who are not parties making an application, with reference to a Court sale, except O. 21, R. 89, which requires persons interested to make a deposit, before the confirmation of the sale, that is, within 30 days of its taking place, R. 90 which is available to persons entitled to reteable distribution besides persons having an interest in the property sold, and R. 100 which requires persons dispossessed by a purchaser in execution of a decree to come to Court within 30 days of their dispossession. Strangers to the decree must under Art. 12 (of the Limitation Act) file a *suit*, within one year of the confirmation of the sale; or, if there has been fraud, then under Art. 95, within three years of their becoming aware of it

I respectfully agree with the observation of Oldfield, J., in *Ganapathi Mudaliar* v. *Krishnamachari* (5), as to the soundness of the reasons given in *Seshagiri Rao* v. *Srinivasa Rao* (11), for apylying Art. 181 to the facts of that case.

The case of *Shivbai* v. *Yesoo* (12), quoted by Moore, J., was one in which *ex parte* decree had first to be set aside, before the *ex parte* defendant could ask to set aside the sale. She might have obtained an *interim* injunction, against the execution of the decree, or she might have asked the Court to excuse the delay occupied in getting the *ex parte* order set aside. No definite reasons for holding Art. 166 inapplicable are given in the judgment, except that it would work harshly in the circumstances of that case. *Ram Kinkar* v. *Sthiti Ram* (13), was a case under S. 18 Limitation Act, of fraudulent suppression of process. Mookerjee, J's reasons for applying Art. 181 are not explained.

Lastly, there is the Full Bench case of *Vachali Rohini* v. *Komb Aliassan* (14). This is an authority upon the scope of Art. 165, not of Art. 166, and its applicability to applications made by judgment debtors under S. 47. On the same analogy, it is argued that Art. 166 should only be applied to applications made by persons who are not judgment-debtors. But the *ratio decidendi* of the Full Bench decision was a comparison of the language of S. 230 of the Code of Civil Procedure of 1859 and that of Arts. 158 and 165 in the Limitation Acts, of 1871 and 1908. The scope of Art. 166 must depend on quite different considerations, *viz*, the wide language of the article itself and the change in language between S. 244 and S. 47 of the Codes of 1882 and 1908 and between S. 311 of the old Code and O. 21, R. 90 of the new Code.

The Full Bench had before them a case, in which a judgment-debtor complained that in executing a decree for possession more property had been delivered to the decree-holder than what the decree authorised.

Without doubting the correctness of the decision, that such a complaint would be governed by Art. 181 of the Limitation Act, we may consistently hold that the application before us, which is one by a judgment-debtor to set aside a sale is covered by Art. 166.

My learned brother agrees with me. The appeal is therefore dismissed with costs.

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(12) [1919] 43 Bom. 235—20 Bom.L.R. 925—48 I.C. 130.

(13) [1918] 27 C.L.J. 528—46 I.C. 221

(14) [1919] 42 Mad. 753—10 L.W. 410—37 M.L.J. 340—(1919) M.W.N. 732—26 M.L.T. 297—53 I.C. 437 (F.B.)

Devadoss, J.—This Second Appeal arises out of an application, under S. 47 of the Civil Procedure Code, to set aside a sale held in execution of a decree, on the ground of fraud and illegality in publishing and conducting it. The Subordinate Judge of Tuticorin held that the fraud alleged was not proved, that the sale was vitiated by material irregularity, as regards item 1, that the property was under-sold in consequence, and that the application was barred by limitation. On appeal, the District Judge of Tinnevelly held that the sale was not a nullity and that the application was barred by limitation, under Art 166 of the Limitation Act.

The 6th defendant has preferred this appeal, and the sons of the decree-holder, who was also auction purchaser, are respondents 1 and 2. Mr. T. Rangachariar who appears for the respondents raises a preliminary objection that no Second Appeal lies, as the application was made under O. 21, R. 90, Civil Procedure Code and only one appeal is provided by O. 43 (*j*), against orders under O. 21, R. 90. Mr. A. Krishnaswami Aiyar for the appellant contends that there was illegality in the conduct of the sale and the application was made under S. 47, Civil Procedure Code and not under O. 21, R. 90, inasmuch as there was no publication of the sale, in the village in which the property is situate as required by law, and that such an omission is not merely an irregularity, but is an illegality; and where illegality is brought about by fraud or otherwise, the application to set aside a sale falls under S. 47 Civil Procedure Code and a Second Appeal therefore lies. It is unnecessary to decide this point, in the view that I take of the question of limitation involved in the case.

The sale was held on 21st November, 1919, and the application to set it aside was made, on 17th January, 1920. Art. 166 of the Limitation Act gives a period of 30 days to set aside a sale in execution of a decree. The contention of the appellant is that Art. 181, which allows a period of 3 years applies to the case and the application is therefore in time. It is argued that the words "under the same Code" in Art. 166 should be taken to apply only to applications specifically provided for, by the Civil Procedure Code and not to applications under the general S. 47. The Article is in these terms:

"Under the same Code to set aside a sale in execution of a decree.....30 days.....the date of the sale."

The wording of the article includes all applications made under the Code to set aside a sale, and unless there are very strong grounds for holding that it was meant to apply only to applications specifically provided for, by the Code, under Rr. 89, 90, or 91, there is no warrant for departing from the plain meaning of the words of the Article. It is a well known principle of construction that where there is a specific article of limitation, applicable to a suit or application, the residuary article should not be applied, unless the application or suit cannot be brought, within the clear wording of the specific article. The appellant relies on the following cases in support of his contention. In *Rayarappan Nambiar* v. *Malikandi Aketh Mayan* (9), a mortgagee brought a suit on his mortgage and impleaded the puisne mortgagee as a defendant. The puisne mortgagee died after the decree, and the plaintiff brought the mortgaged property to sale, without bringing the legal representatives of the puisne mortgagee on record and without giving them notice and bought it himself. The legal representative of the puisne mortgagee applied to set aside the sale, on payment to the plaintiff, auction purchaser the amount due under the decree. The High Court held that the application was not barred by limitation, as the sale was a nullity, so far as the applicants were concerned and the application was clearly not barred. The application to set aside the sale could not have been entertained and the redemption of the prior mortgage could not have been ordered, till the appellants were placed on record, as the legal representatives of the puisne mortgagee. An application under R. 89 cannot be entertained, as long as an application under R. 90 is pending. R. 89 (2) specifically lays down:

"Where a person applies under R. 90, to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule."

The puisne mortgagee was entitled to redeem the prior mortgage and as his legal representatives were not on record, when the sale took place, they applied for relief, as soon as they came to know of the sale of the mortgaged property and therefore Art. 166 was held not to apply to a case of that kind. Even if Art. 166 should have been held applicable to that case, the judgment could be supported, on the ground that the appellants had no knowledge of the sale and they could not have come in, therefore, within the 30 days provided for, by the Article.

In *Seshagiri Rao* v. *Srinivasa Rao* (11), the plaintiff brought a suit for maintenance against 12 defendants. Defendants 9 to 12 belonged to a divided branch of the family and their shares were exonerated and a decree was passed against defendants 1 to 8, with a charge on certain items belonging to them. The plaintiff executed the decree and certain items of property were brought to sale in execution, as if they belonged to defendants 1 to 8 and were purchased by a person not a party to the decree. One year and seven months afterwards, the plaintiffs who were defendants 9 to 12, filed a suit to set aside the sale, so far as their shares were concerned. The District Munsif dismissed the suit, as being barred by S. 47 Civil Procedure Code. On Second Appeal, the High Court remanded the suit to the District Munsif for disposal, as a proceeding under S. 47. The District Munsif and the District Judge held that the application was barred by limitation. The High Court held that Art. 181 was applicable to the case and that the application was not barred. The learned Judges (Seshagiri Aiyar and Moore, JJ.), observed at page 315 :

"If an execution sale is a nullity (*i.e.*, is made without jurisdiction, or is void *ab initio*) Art. 166 has in our view no application and the residuary Article 181 should be applied."

We are justified in our conclusion by the decision in *Ramavenkatasubbier* v. *Subramania Chettiar* [S. A. No. 38 of 1914 (unreported).] With very great respect, I am unable to follow the reasoning of the learned judges. The Appellants were parties, according to the explanation to S. 47, which was expressly enacted, to set at rest the conflict of views, that prevailed with regard to the parties to a suit, but were not parties to the decree; and they were bound to pursue the remedy, as provided for, by the Code. The judgment can however be supported, on the ground that the appellants were not parties to the execution proceedings and they applied to set aside the sale, as soon as they became aware of the sale and the period of limitation had to be calculated, from the time when they came to know of the sale. In the present case, the appellant was a party to the decree and the finding is that notice of sale was served upon him. The facts in *Seshagiri Rao* v. *Srinivasa Rao* (11) being different from those of the present case, that decision has no application to the latter. In *Ram Kinkar* v *Sthiti Ram* (13), it was held by the Calcutta High Court that omission to issue notice to the judgment-debtor was an illegality and that was a sufficient ground, for setting aside the sale and that Art. 181 applied to the application in that case.

It is difficult to follow the reasoning, that if there is illegality in publishing, or in conducting the sale, Art. 181 applies and if there is fraud or irregularity Art. 166 applies. O. 21, R. 90 enables a decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, to apply to the Court to set aside the sale, on the ground of a material irregularity, or fraud, in publishing, or conducting it. If a party is prevented by fraud, from knowing of the sale, such fraud will prevent limitation running against him, or where he is kept out of the knowledge of the illegality, by means of fraud, he may contend reasonably that by means of fraud he was prevented from knowing, or having the means of knowledge of the illegality and therefore

limitation should count against him, only from the time when he discovered the illegality. S. 18 of the Limitation Act would apply to such a case. Therefore, there is no reason, why, when there is a specific article, such as Art. 166 governing certain applications, the aid of the residuary Article should be invoked, to help a party, who could justify his application, as being within time, by virtue of S. 18, of the Limitation Act. It is urged that the reasoning, adopted in a decision reported in *Vachali Rohini* v. *Kombi Aliassan* (14), with regard to Art. 165, should be applied to Art. 166. In *Vachali Rohini* v. *Kombi Aliassan* (14), it was held by a Full Bench that where a judgment-debtor was dispossessed of immoveable property, the Article applicable to an application by him, for restoration of possession, was Art. 181. The learned Judges in the course of the judgment relied on the fact that O. 21, R. 100 applies only to a stranger to the decree, seeking for restoration of possession and not to a judgment-debtor, seeking a similar remedy. They expressly overruled the decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (15), which decided that Art. 165 was the proper Article to be applied to an application by a Judgment-debtor, who was dispossessed of immoveable property, for restoration of possession. The decision in *Vachali Rohini* v. *Kombi Aliassan* (14), being the decision of a Full Bench, no purpose would be gained by expressing doubts as to its soundness. But I may be permitted to observe that the result of the decision is that a stranger to the decree and execution proceedings, if dispossessed of immoveable property, has to apply within 30 days, under O. 21, R. 100; whereas a judgment-debtor has 3 years under Art. 181 of the Limitation Act, to make a similar application, by claiming the benefit of S. 47, Civil Procedure Code. Whether the legislature intended such a result is neither necessary nor profitable to inquire. In *Shivbai* v. *Yesoo* (15), the facts were: In 1906 an *ex parte* decree was passed against the defendant, in execution of which the defendant's house was sold and purchased by the plaintiff decree-holder in 1910. The *ex parte* decree was subsequently set aside. But at the retrial, a decree was again passed in plaintiff's favour in 1914. In the meanwhile, the defendant applied to have the sale of the house set aside. With regard to limitation, Hayward, J., observed :—

"It was also suggested that the application ought to be regarded as time-barred, under Art. 166 of the schedule to the Limitation Act. But this article appears to be hardly applicable to the facts of this particular case. The cause of action accrued upon setting aside the *ex parte* decree in 1914 and taking that as the date from which limitation ran, the application would clearly be within the time, under the provisions of Art. 181 of the schedule to the Limitation Act."

In that case, the right to apply to have the sale set aside arose, only on the *ex parte* decree being set aside. The Court could very well have held that Art. 166 applied and that the delay should in the circumstances be excused, under S. 5 of the Limitation Act, and if there was fraud, under S. 18 of the Limitation Act. If Art. 181 of the Limitation Act is the proper article applicable to such a case, the question arises from what date should limitation be held to run against the applicant, granting he has three years. Under Art. 164 time begins to run from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree. If no summons was served and the defendant came to know of the passing of the decree more than three years after it was passed, his remedy to have the decree set aside is not barred, till he comes to know of the passing of the decree. The learned Judges did not say from what date time would begin to run against a person who seeks to set aside a sale, on the ground that he was not aware of the passing of the decree. With due respect, I think the proper course in such a case is to excuse the delay, as the defendant was kept out of the knowledge of the passing of the decree, or had no means of knowing of the passing of the decree and therefore he could not have made an application to have the

(15) [1898] 21 Mad. 494—8 M.L.J. 75.

sale set aside, within 30 days of the sale and therefore the delay in making the application should be excused. None of the cases to which I have already referred has any direct bearing upon the present case.

In *Muthiah Chettiar* v. *Bava Sahib* (4), it was held that the application to set aside a sale under S. 47, Civil Procedure Code, was governed by Art. 166 of the Limitation Act. With reference to the question of limitation Oldfield, J., observes at page 607 :

"It is not disputed that his petition was presented too late, if it was one under R. 90. If however it was under S. 47, it is urged that Art. 181, Sch. I of the Limitation Act applied and he was in time the special Art. 166 covering only applications under Rr. 89 & 90. This restriction of Art. 166, corresponds with nothing in its wording, which is absolutely general ; and the attempt to impose it has been supported by reference to the fact that the article was substituted for Arts. 166 and 172, in the prior Act of 1877, which related only to applications under Ss. 310 A and 311 of the Code, then in force. It is stated that this is borne out by the Statement of Reasons and Objects connected with the present Act. But it has not been shown how reference to such a statement is a legitimate or necessary aid to the interpretation of a provision, the language of which is clear. The 1st respondent's application, though it may have been made under S. 47, was one to set aside a sale, and under Art. 166 it must be held to have been out of time."

With the reasoning of the learned Judge, I fully concur. In *Neelu Neithiar* v. *Subramania Moothan* (1), it was held that Art. 166 was the proper Article applicable to an application to set aside a sale. The learned Judges observe at page 62 :

"It is then contended that, as the petitioners were parties to the litigation, the article of Sch. I of the Limitation Act to be applied is No. 181, not No. 166. This is contended with reference to the recent decision of the Full Bench [reported in *Vachali Rohini* v. *Kombi Aliassan* (14).] But that decision dealt with a claim to apply Art. 165 : and we do not think that its application and that of Art. 166 stand on the same footing, or can be dealt with on similar considerations. We have not been shown reasons for restricting the very comprehensive wording of the latter to exclude the present case."

Another Bench of this Court held the same view in a case reported in *Kamayya* v. *Ramanna* (2). In *Ganpati Mudaliar* v. *Krishnamachari* (5), it was held that Art. 166 of the Limitation Act was the proper article to apply to the application to set aside the execution sale, whatever its nature, whether it fell under S. 47, Civil Procedure Code, or under O. 21, R. 90. The learned Judges observe at p. 189 :

"The wording of Art. 166 is unrestricted and we do not consider that we are at liberty to impose restrictions, which nothing in it suggests. It, no doubt, covers, only applications under the Code : but that is immaterial, as in the present case the controversy is between the parties and an application, instead of a suit, is authorized by S. 47. We therefore hold that Art. 166 of Act IX of 1908 is applicable."

The same view has been held in *Satish Chandra Kamungoe* v. *Nishi Chandra Datta* (6). There also the learned Judges refused to uphold a contention that Art. 166 should be restricted to cases falling under O. 21, Rr. 89 and 90. They observe at p. 977 :

"It is argued for the appellant that Art. 181 of the Limitation Act applies and not Art. 166. There appears to be no good reason for limiting the scope of Art. 166 to applications under O. 21, Rr. 89, 90 and 91 of the Civil Procedure Code. The Article is perfectly general in its terms and refers to an application under the Code, to set aside a sale in execution of a decree."

The same view was held by the Patna High Court in *Basu Das Narayana Singh* v. *Muhamad Yusuf* (7). Following these decisions, I hold that this application is barred by limitation under Art. 166 of the Limitation Act. The Appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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SPENCER AND DEVADOSS, JJ.

Vikrama Deo, Maharajah of Jeypore and others—Plaintiffs—Appellants.

v.

Lakshminarasimha Garu and others—Defendants—Respondents.

Appeal No. 55 of 1918, decided on the 26th March 1923, against the decree of the Temporary Sub. J., Vizagapatam, in O. S. No. 34 of 1915.

Civil P. C., S. 39—Transmitting Court cannot be presumed to request the Agent's Court to execute against property outside its jurisdiction nor has the latter the power to do so.

When the decree is transmitted to the Agent's Court for execution, if nothing more is said, it is presumably intended that it should be executed against those properties over which the Agent's Court has jurisdiction. It would not be reasonable to presume that the Court which passed the decree intended the unusual course to be taken of the decree being executed against properties situated within the jurisdiction of the transmitting Court, for, as regards such properties, the natural course would be that the Court which passed the decree should execute its own decree. [P. 144 C. 2]

(b) *Execution of decree—Court can't sell property beyond jurisdiction.*

A Court which sells immoveable property must have territorial jurisdiction over such property, 17 Cal. 699; 42 Mad. 813; 42 Mad. 821, 11 L. W. 63 (F. B.) Foll. [P. 145 C. 1]

(c) *Execution sale*—Bona fide *purchasers are not protected where Court has no initial jurisdiction.*

Courts will, as far as possible, protect innocent purchasers from the consequences of irregularities and defects of procedure at Court sales for the reason that strangers are entitled to presume that the proceedings of Courts are regular, but such help cannot be extended to the overlooking of patent want of inherent jurisdiction on the part of the executing Court. [P. 145 C. 2]

C. Madhavan Nair and *P. Somasundaram*—for Appellants.

P. Narayanamoorthy, D. Appa Rao and *B. B. Satyanarayana*—for Respondents.

Judgment.—This suit was brought by the Maharajah of Jeypore to obtain an order for separate registry in his name, of certain portions of the Pachipenta Zamindari, which were sold in Court auction upon the suit of the Maharajah of Bobbili, against the Pachipenta Zamindar, in O. S. No. 1 of 1903 and purchased by him. The Vizagapatam District Court which passed the decree transmitted the decree for execution to the Court of the Government Agent of Vizagapatam and that Court held a sale of the right to collect Kattubadi from Mokhasadars, whose mokhasas were situated not only in the Agency tracts but also outside those tracts in the ordinary plain villages.

Issue 16 raises the question whether the Agent's Court had any jurisdiction to sell the ordinary villages of Pachipenta Zamindari and whether the plaintiff acquired any rights by such sale ? The Subordinate Judge has now found this question against the plaintiff who preferred this appeal against the decree dismissing his suit.

The order transmitting the decree for execution to the Agent's Court has not been produced. It is suggested that we should presume that the decree was transmitted under S. 39 (*d*) of the Civil Procedure Code. That provides for a Court which has passed a decree sending it, upon the application of the decree-holder, for execution to another Court, if it considers for any reason to be recorded in writing that the decree should be executed by such other Court. It might fairly be presumed that, when the decree was transmitted to the Agent's Court for execution, if nothing more was said, it was intended that it should be executed against those properties over which the Agent's Court had jurisdiction. It would not be reasonable to presume that the Court which passed the decree intended the unusual course to be taken of the decree being executed against properties situated within the jurisdiction of the transmitting Court; for, as regards such properties, the natural course would be that the Court which passed the decree should execute its own decree. Assuming that the District Court had jurisdiction under S. 39 to transfer the decree to another Court to which the Civil Procedure Code does not apply, the only provisions under which the Agency Court could execute that decree are those contained in the

Rules and Orders for the Administration of Justice in the Agency Courts; and R. 26 (1) of them provides that "when it is sought to execute within the Agency tracts a decree passed by a Court in British India situated beyond the Agent's jurisdiction, the Court issuing the decree shall forward the decree and a copy of the judgment in the suit to the Agent, who shall cause the decree to be executed in the manner provided by these rules for the execution for the decrees of his own Court." Decrees of the Agent's own Court are executed under R. 26 (2), which contains no machinery for the execution of decrees by sale of landed property situated outside his jurisdiction. There is no evidence and no reason for presuming that the District Court consciously sent its decree under S. 39 (1), for execution against property withint its own jurisdiction. In *Prem Chand Deb* v. *Mokhada Debi* (1), it was held that a Court had no jurisdiction, in execution of a decree, to sell property over which it had no territorial jurisdiction at the time it passed the order of sale. This is an authority for the principle that a Court which sells immoveable property must have territorial jurisdiction over such property. A similar principle underlies the Full Bench decision in *Seeni Nadan* v. *Muthusami Pillai* (2), In *Rimabhadra Raju Bahadur* v. *Maharaja of Jeypore* (3), the Privy Council held that the territorial jurisdiction conferred on Courts by S. 17 of the Civil Procedure Code would not include the jurisdiction of Courts which are not subject to the Civil Procedure Code and that a Court in a non-scheduled district in which a suit to enforce a mortgage was instituted would have no power to order a sale of mortgaged property within the scheduled districts.

(1) [1890] 17 Cal. 699. (F. B)
(2) [1919] 42 Mad. 821—11 L.W. 63—37 M. L. J. 284—26 M.L. T 223—(1919) M.W.N. 640—53 I.C. 213—(F B.)
(3) [1919] 42 Mad. 813—46 I.A. 151—17 A. L J. 694—37 M. L. J. 11—(1919) M. W. N. 502—21 Bom. L. R. 914—26 M. L. T. 127—30 C. L. J. 209—23 C W.N. 1033—10 L. W. 362—51 I. C. 185 (P. C.)

It is clear, for these reasons, that the Agent to the Governor had no jurisdiction to sell the right to collect Kottubadi in mokhasa villages situated beyond his territorial jurisdiction and that there is no proof or presumption that the Court which passed the decree intended to confer such authority on the Agent, even if it had the power to do so.

A special plea has been put forward in plaintiff's favour on the strength of some observations of the Calcutta High Court in *Paresh Nath Mullick* v. *Hari Charan Dey* (4), as to the duty of Courts to protect *bona fide* purchasers at Court auctions. No doubt Courts will, as far as possible, protect innocent purchasers from the consequences of irregularities and defects of procedure at such sales for the reason that strangers are entitled to presume that the proceedings of Courts are regular; but such help cannot be extended to the overlooking of patent want of inherent jurisdiction on the part of the executing Court.

The suit, therefore, fails for other reasons than those set out in the Lower Court's judgment, and it was rightly dismissed. It is unnecessary to discuss the other points raised in the appeal memorandum. The appeal also is dismissed with costs of the contesting Respondents Nos. 14, 26, 33, 39 and 46 (one set).

Appeal dismissed.

(4) [1911] 38 Cal. 622—15 C.W.N. 875—14 C. L. J. 300—10 I. C. 361.

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SPENCER AND DEVADOSS, JJ.

Candaswamy Chettiar — Plaintiff—Appellant.

v.

Maruda Pillai — Defendant—Respondent.

S. A. No. 14 of 1922, Decided on 1st August 1923 against the decree of the S. J. Kumbakonam.

Civil P. C., S. 11 Expl. IV.—Execution proceedings—Earlier order not deciding the point raised in the latter application is not res judicata.

An order in an earlier execution proceeding will not operate as, *res judicata* if there is no adjudication of the point sought to be raised in the latter applicati [P. 146 C. 2]

R. Kuppuswami Aiyar and ***M. Krishna Bharati***—for Appellant.

K. Ramachandran—for Respondent.

Judgment.—In O. S. No. 346 of 1904, the present appellant obtained a decree against one Singaravelu Pillai, who was the 1st defendant in the suit and died after judgment. His minor son, who was 2nd defendant in the suit, was first represented by the present respondent, who is 1st defendant's undivided brother, as his guardian *ad litem*. That decree was attempted to be executed in E. P. R. No. 883 of 1917 and, on the 6th of March, 1918, it was held by the District Munsif of Kumbakonam, in execution, that the execution petition was barred by limitation and it was dismissed. While that execution petition was pending, the 3rd defendant, the respondent in these proceedings, who was made a party to the execution application, as one of the legal representatives of the 1st defendant, came forward with an application, E. A. No. 305 of 1918, to set aside the order making him a legal representative of the deceased 1st defendant and at the same time asking that the attachment of a portion of the property should be released, as it belonged to him under a partition deed. That petition was not enquired into, but when the execution petition was dismissed on the 6th of March, 1918, it also was dismissed as unnecessary. There was an appeal by the decree-holder against the District Munsif's order, dismissing the execution petition and in those proceedings the 2nd defendant was represented by his mother, as guardian *ad litem*. As a result of that appeal, the Subordinate Judge set aside the District Munsif's order and in Second Appeal the High Court confirmed the judgment of the Lower Appellate Court. The respondent, the 3rd defendant, then applied for review of the order, dismissing his petition; but the District Munsif held that it was unnecessary to review his previous order, which was consequential on the order, passed on the execution petition and as the respondent had put in a separate petition for the release of his property from attachment, he recorded the application for review.

Now, it is contended that the respondent's claim to have a portion of the property attached released, as being his private property and so not liable to attachment, is barred by *res judicata*, in consequence of his petition, E. A. No. 305, having been finally dismissed. Secondly, it is contended that as he refused service of notice of the execution petition and attachment was ordered and he did not get the *ex parte* order set aside, or appeal against the Subordinate Judge's order restoring the execution petition, which had been dismissed by the District Munsif, he is now debarred from raising any objection to the attachment of the property.

The dismissal of the respondent's petition, E. A. No. 305 of 1918, was stated to be for the reason that it was unnecessary, owing to the execution petition having been dismissed. There was at that time no adjudication upon the merits of the application and there has never been any hearing and final decision by the executing Court upon the issue between the appellant and the respondent, whether the property attached belonged to the deceased 1st defendant or to the 3rd defendant in his individual right. This being so, the principle of *res judicata* arising out of S. 11 of the Civil Procedure Code will not operate to prevent the respondent from raising this question in the present proceedings.

The fact that there was an *ex parte* order against him for execution of the decree will not make him any more bound as regards his present claim, when the executing Court not only did not decide the point now at issue, but even declined to investigate the matter on the ground that it was unnecessary.

Some reliance was placed on the decision in *Subbiah Noicker* v. *Ramanathan Chettiar* (1). In that case

(1) [1914] 37 Mad., 462—26 M. L. J. 189—(1914) M.W.N. 205—1 L. W. 251—22 I. C. 899.

an argument was put forward that the principle of *res judicata* would not apply to *ex parte* orders passed in execution, but only to *ex parte* decrees in suits and this argument was not accepted by the learned judges. In the present case, it is not necessary to differentiate between *ex parte* orders and other orders, because there has been no decision, *ex parte* or otherwise, on the question, which is at issue in this application. Therefore, that decision does not assist the appellant. The Lower Courts were right in holding that the 3rd defendant was not debarred from putting forward his claim to the property, as having fallen to his share, in the prior partition. As he made this claim in his capacity as a party to the proceedings, the case falls under S. 47 Civil Procedure Code and an appeal lies. This is not a case of a claim made by a stranger who, if his claim is negatived, under O. 21, R. 58, has to bring a suit to establish his right.

The appeal against order therefore fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 MADRAS 147

SPENCER AND VENKATASUBBA RAO. JJ.

Panja Ramchandra Rao and another—Appellants.

v.

Gurraju and others—Respondents.

Appeals against Orders Nos. 28 and 29 of 1922, Decided on 4th January 1923, against the Order of the D. J. Kistna at Masulipatam, D/- 1st December 1921.

(a) Provincial Insolvency Act, S 68—Not appealing to District Court precludes later objection to sale.

Where the aggrieved party did not appeal against the official receiver's order to simply notify the objection, to District Court under S. 68.

Held that the objection cannot be gone into later on as an objection to the validity of sale. [P. 118 C. 1]

(b) Receiver—Official Receiver is officer of Court and is bound to help Court by giving information for ends of justice.

The Official Receiver as an officer of the Court is bound to bring to the notice of the District Court before which an appeal against his order refusing to confirm sale of insolvent's property may be pending the facts that are likely to affect its decision. He should also represent the insolvent's estate on the appeal. [P. 118 C. 2]

(c) Civil P. C. O., 21, R. 69—Notifying to bidders is irregular without deciding the right of claimant.

Where objection to a sale by official receiver is brought, simply ordering that the objection should be notified to the bidders at the time of sale is an objectionable procedure. 41. M. 985 & 8 L. W. 197 (F. B.) Foll. [P. 118 C. 1]

P. Somasundaram—for Appellants.

G. Lakshmanna, P. Venkataramana Rao and A. V. Krishna Rao—for Respondents.

Spencer, J.—One Panjah Venkatratnam was adjudicated insolvent on the 8th September, 1919, upon his own application as a debtor, presented on the 15th April 1919. The properties of the insolvent were vested in the Official Receiver by an order of 19th April, 1921. The Official Receiver sold on 19th August, 1921 the entire family property of which the insolvent was the manager, and the properties were purchased by the 1st respondent, P. Gurraju. There was a second sale of the insolvent's share only on the 26th of November, 1921. The order of the District Judge now appealed against has the effect of rescinding the Official Receiver's order, refusing to confirm the first sale, and it follows, therefore, that if the District Judge's order is upheld, the second sale is no longer a valid and good sale. For, if the first sale was a good one, there was nothing to sell at the second sale, the whole family property having been sold at the first sale.

The appellant in C. M. A. No. 28 of 1922 is the son of the insolvent. The appellant in C. M. A. No. 29 of 1922 is the purchaser at the second sale.

Three main objections have been taken to the District Judge's order. First, it is contended that the sale of 19th August, 1921, was bad, as the purchase money was not paid within the time given in the proclamation of sale, nor even within the time for which an extension was given.

Secondly, no notice of the application by the purchaser at the first

sale to set aside the Official Receiver's order was given either to the insolvent's son, or to the Official Receiver, or to the purchaser at the second sale. In the absence of such notice, it is contended that, the District Judge's order confirming the first sale should not be allowed to stand.

Thirdly, it is argued that the order to sell was initially wrong. as the Official Receiver refused to adjudicate on the objection of the insolvent's son that only the insolvent's share of the property was liable to be sold.

On this last point, what happened was that the Official Receiver, without deciding anything as to the son's liability to pay their father's debts, simply ordered that the objection should be notified to the bidders at the time of sale. This procedure was an objectionable one, as has been pointed out in *Venkataratnam* v. *Ranganayakamma* (1). But the petitioner, however much aggrieved he may have been by the Official Receiver's order, took no steps under S. 68 of Act V of 1920 to appeal to the District Court against it. We cannot go into this objection in the present appeal, (C. M. A. No. 28 of 1922), and this appeal therefore must be dismissed.

I now proceed to C. M. A. No. 29 of 1922. The District Judge's order cancelling the Official Receiver's order, which set aside the first sale is a very short one and contains no reasons for so deciding. It is obvious that the persons who were concerned in opposing the confirmation of the first sale should have been heard before any order was passed. There is simply a note that the respondents 1, 2, and 5 were represented and that the 5th respondent did not oppose. These respondents are creditors. The question of fact whether the purchaser made default in paying the initial deposit and the rest of the purchase money, within the time stipulated, has not been discussed and we are thus unable to form an opinion whether the District Judge's order was based on sound reasoning. This case must therefore go back for deciding the objections to the confirmation of the first sale upon such materials as the purchasers at the first and second sales namely, the Official Receiver and the creditors, may place before the Court.

In 1920, there was a suit brought by the appellant in C. M. A. No. 28, against his father and his five brothers for partition in the Ellore Sub-Court. The Official Receiver was made a party to the suit and did not contest it. A preliminary decree was passed on the 19th April, 1920, and a final decree on the 12th October, 1920, and the property was divided by an Amin, and one share was delivered to the appellant on the 9th August, 1921. The Official Receiver, as an officer of Court, had a duty to perform in respect of the insolvent's estate and he should have brought the circumstance of this litigation, which was well known to him, to the knowledge of the District Judge and he should have appeared and represented the insolvent's estate, at the time when the matter was before the District Judge, upon the first purchaser's petition.

His neglect to adjudicate on the son's application and his procedure in notifying the objections to the sale to the bidders, without deciding whether they were valid objections; further indicate a neglect of his official duty, of which we must express our di-approval.

Costs in C. M. A. No. 29 will abide and follow the result.

C. M. A. No. 28 of 1922 is dismissed with costs as the question of the son's liability to pay his father's debts cannot be adjudicated in these proceedings.

Venkatasubba Rao, J.—I entirely agree. I would like to add that a great deal of the difficulty that has arisen is due to the conduct of the Official Receiver. The order of adjudication was made on the 8th September, 1919. Subsequent to this, there was a partition suit the insolvent's son Ramchandra Rao being the plaintiff in that suit. The Official Receiver of Kistna was made

(1) [1918] 41 Mad. 985,—24 M. L. T. 197 (1918) M. W. N. 599—8 L. W. 292—35 M. L. J. 335—46 I. C. 270 (F. B.)

a defendant. We are not here concerned with the question whether at that time he was competent to represent the estate of the insolvent. However, the fact remains that the Receiver was aware of the suit and of the proceedings in it. On the 12th October, 1920, a final decree was passed adjudging one-sixth share to the insolvent. On the 9th April, 1921, the District Court made an order vesting the property in the Official Receiver. On the 25th April, the insolvent's son, Ramachandra Rao applied to the Official Receiver that only the share of the insolvent should be sold and that his own share should be exempted from any sale to be held. Instead of adjudicating upon the question raised by Ramchandra Rao, the Official Receiver, who was a party to the partition suit, issued a sale proclamation which purported to deal with entire property possessed by the family of the insolvent. This is the order made by the Official Receiver.

"Petition (of Ramchandra Rao) is filed late. This will be made known at the time of sale."

Presumably he intended that the petition of Ramchandra Rao should be notified at the sale and that the buyers should take the risk of their purchase being subject to the objections of the insolvent's son—a course almost certain to lead to litigation that could be avoided by an immediate disposal of the question raised. As has been pointed out by my learned brother, this course was extremely irregular. Then on the 19th August, the entire property was sold and Gurraju became the purchaser. What he purchased is described as "the immoveable property belonging to the family subject to all disputes by the insolvent's son." One of the conditions of the sale was that one-fourth of the purchase money should be deposited on the date of the sale. Gurraju was unable to comply with this term. The Official Receiver at his request gave him time till the 23rd August, 1921. It is now alleged that in spite of this extension Gurraju failed to pay the amount and therefore that on the 30th August, 1921, the Official Receiver rescinded the sale. It must be noticed that the Official Receiver before rescinding the sale did not give notice to the creditors of the insolvent, though they are the persons vitally affected by the order and the obligation to give notice was all the more incumbent, especially in view of the fact that Gurraju had tendered the entire amount within the 15 days of the date of sale.

On the 6th September, Gurraju appealed to the Court from the order of the Official Receiver dated 30th August, 1921. The appeal was from his order and he certainly should have been aware of the fact that an appeal was pending before the District Judge. Notwithstanding that, he proceeded to sell one-sixth share of the insolvent on the 26th November, 1921, and Linga Murthi became the purchaser of this one-sixth share. The Official Receiver who knew that an appeal from his order was pending, proceeded to sell the property and by his sale introduced a complication. As events turned out, the order of the Official Receiver was set aside by the District Judge on the 1st December, 1921. The Official Receiver was thus responsible for there being two purchasers, one of the entire property and the other of a sixth share, putting forward their rival contentions before the Court. I must add that Gurraju made several allegations which tended to show that he did not make default and the Official Receiver does not appear to have taken any steps to bring to the notice of the District Judge what the Official Receiver's view of the matter was and whether the facts stated in the affidavit were correct or not. Finally the District Judge himself made his order cancelling the order of the Official Receiver, without giving notice to the second purchaser whom his order affects.

One more observation I would like to make, and it is this. So far as Ramchandra Rao, the insolvent's son, is concerned, an order was made by the Official Receiver on the 2 th April, 1921, which practically amounted to negativing his contention that only the insolvent's share could be sold by the Official Receiver. From this order the insolvent's son did not

prefer an appeal to the District Court. It was not, therefore, open to him to have raised this question at the subsequent stage in the insolvency proceedings. Of course his right to assert in a regular proceeding that his interest in the property did not pass to the purchaser was not affected; but so far as the proceedings before us are concerned, he put himself out of Court. The question before us must be, therefore, decided after notice to the crditors, to the second purchaser and to the Official Receiver and a decision must be arrived at, by the District Judge on materials to be placed before the Court by these respective parties and I therefore entirely concur in the order passed by my learned brother.

Order set aside.

1924 MADRAS 150

SCHWABE, C. J. AND RAMESAM, J.

Rose Charlotte Pritchard — Appellant.

v.

Walter Edger Pritchard—Respondent.

O. S. Appeal No 31 of 1922, Decided on 23rd March, 1923, from the judgment and decree of Phillips, J., D/- 31-1-1922.

Husband and wife — Divorce — Meagre evidence may suffice—Husband must pay costs.

Where it was found in a divorce suit that the wife after the marriage lived in a notorious house of ill-fame, that at night time hung about outside bioscopes where she at any rate conversed with soldiers and that on one occasion she quarrelled in the street with another woman of bad reputation, the cause of the quarrel being that the respondent accused the other lady of taking away soldiers from her who had promised to go to her place.

Held that this evidence was sufficient to grant a divorce. [P. 150, C. 2]

The general principle is that the wife, who is charged rightly or wrongly by her husband in Divorce Court, is entitled to be given her costs in defending that suit. The proper way of doing that is to give her taxed costs. [P. 160, C. 2]

Vere Mocket—for Appellant.

Sydney Smith—for Respondent.

Schwabe, C. J.—This is an appeal from an order of Phillips, J., granting a decree *nisi* to a husband against his wife. He found, as a fact, that the wife was leading an immoral life since her marriage, that she committed adultery with persons unkown and that, therefore, the husband was entitled to a decree.

I agree with the learned Judge that a great deal of the evidence is not very clear and definite but you cannot expect, in such a case, to get very definite evidence. There is evidence, which the learned Judge accepted that the wife after the marriage lived in a notorious house of ill-fame, that she at night time hung about outside bioscopes where she at any rate conversed with soldiers and that on one occasion she quarrelled in the street with another woman of bad reputation, the cause of the quarrel being, according to the police evidence, that the respondent accused the other lady of taking away soldiers from her who had promised to go to her place. The learned Judge, having seen the witnesses and heard the evidence, accepted it and I think there was ample evidence on which he could come to that conclusion, and this decree must, therefore, stand.

Another point is taken and that is the question of costs. In this case the learned Judge has, before the hearing of the case, given Rs. 75 costs to the respondent. It was something, at any rate, to go on with, but I do not think that it was intended to be a final order at all. He says that some of the witnesses who were called were possibly unnecessary, and he refused to make any further order, having found the wife guilty. I do not think he attempted to apply the right principle to the matter at all. Except, at any rate, in two cases, firstly, where the wife has ample means of her own to defend herself, and, secondly, where the solicitor who is employed has been guilty of misconduct, she would have to be provided with funds by the husband; but apart from that the general principle to my mind, is that the wife, who is charged rightly or wrongly by her husband in a Divorce Court, is entitled to be given her

costs in defending that suit. The proper way of doing that is to give her taxed costs, and I think in this case the order must be varied by giving her taxed costs of the suit, of course, it will be for the Taxing Officer in taxing the bill to say whether any of the witnesses were necessary or not. However when you go to the Court of Appeal, the position is different and the respondent would naturally have to be paid his costs of the appeal; but as the appellant has succeeded in the matter of costs though she has failed as ragards the main part of the appeal, the fair order would be that there will be no costs of the appeal.

amesam, J.—I agree.

Appeal dismissed.

1924 MADRAS 151

SPENCER AND VENKATASUBBA RAO, JJ.

Rosa Maria and another — Defendants—Appellants

v.

Jacob Souza — Plaintiff — Respondent.

A. A. O. No. 34 of 1922, Decided on 7th November. 1922, against the decree of the Dt. Court, S. Canara in Original Suit No. 4 of 1921.

Will-Disinheritance requires stringent proof

Where the instrument is inofficious i. e., not consonant to the testator's natural affection and moral duties stringent proof is demanded. It is usual to demand an explanation when there is unreasonable delay in applying for probate. [P. 152 C. 2 P. 153 C. 2]

B. Sitarama Row—for Appellants.

K. Ramanath Shenai—for Respondent.

Spencer, J.—I have come to the same conclusion as my learned brother that letters of administration should not have been granted on the will propounded by the plaintiff.

The delay of 20 years in presenting the will for probate has not been sufficiently explained. It is said to have been handed over by the testator to his brother's son, the sole legatee. He died in 1902 or 1903 without taking any action.

It is not clear in whose custody the will has been since, but his son, who has been granted letters of administration by the District Judge on the present application, says that he only came to know of the existence of the will 3 or 4 years ago.

He adds that some documents were with his mother, but she has not been examined as a witness to prove proper custody since 1899 when Exhibit D purports to have been prepared.

I regard it as one suspicious circumstance that this will should have first seen the light of day 20 years after Francis Padivala's death on the occasion when the persons who would be entitled to his property if he died intestate are suing to redeem a mortgage executed by him which the legatee was instructed in the will to discharge: and other suspicious circumstance that of the only two persons who have come forward at this juncture to vouch for the genuineness of the will one is a witness, who having access to the burial registers of the parish is in a position to make the date of the will accord with the known facts as to the deceased's death and the other is that witness's first cousin; a third that when letters of administration of the deceased's estate were applied for by a creditor 22 years ago the statement in Exhibit II that the deceased had died intestate was allowed to go unchallenged by the executor and the legatee; and a fourth that they both allowed the testator's disinherited widow and children to take possession of his moveable property and to discharge his debts without protest.

The identity of the testator's "shrikara" or mark on Exhibit A has not been established. The mark of the executant on Exhibit B looks as if it might have been written by the writer of that document. That on Exhibit A is in the same ink and style as the signature of the witness P. W. 2.

As the plaintiff has failed to disperse the doubts that naturally arise as to the authenticity of this unregistered will the appeal is allowed, the grant of letters is revoked and

suit is dismissed with costs here and in the District Court.

Venkatasubba Rao J.—The question to be decided is, has the execution of the will by the testator been proved? The will is dated the 7th September 1899 and the application for probate was made in 1920. The testator did not sign his name but made a mark. Of the three attesting witnesses two subscribed the will with their marks, and the other wrote his name, There is an endorsement at the foot of the will indicating who the writer of it was. The testator died 22 days after the date of the alleged will, leaving a widow, two sons and one daughter. The sons were of the ages of 20 and 14 or thereabouts and the daughter was of the age of about 9. The will makes no reference to the testator's wife and children and contains no provision in their favour. Almost the whole of the property was bequeathed to the testator's brother's son Rossario Padivala, and the latter's brother-in-law was appointed executor. Of the three attesting witnesses the two, who subscribed on the will their marks, are said to have died some years ago though no evidence has been given as to when they died. The other attesting witness and the scribe have been examined in support of the will. The party propounding the will is the son of the legatee Rossario Padivala above mentioned who died about 20 years ago or about 3 years after the death of the testator. It is in evidence that the executor died in 1918 or 1919.

The grant of probate is opposed by the widow and the surviving son. They contend that there are several suspicious circumstances and that the evidence in support of the will is not sufficient to remove the suspicion and to satisfy the Court that the will was in fact executed by the testator.

[His Lordship after discussing evidence of the witnesses proceeded as follows.]

I would like to say another word on this aspect of the case. Granting that the institution of a criminal complaint by the wife against the husband has been proved, this may account for there being no provision in favour of the wife. No motive has however been suggested in regard to the act of the testator so for as his children were concerned. Where the instrument is inofficious i. e., not consonant to the testator's natural affections and moral duties stringent proof is demanded [*see Williams on Executors Edition* 1921 Vol. i Page 250 *Jagrani Koer v. Durga Prasad*.(1).]

The next circumstance of suspicion is the very long delay in applying for probate. The testator's property was under mortgage at the date of the will, and the legatee was directed to pay the amount due to the mortgagee and redeem the properties. The legatee however took no steps in this direction. The defendants filed a suit for redemption about 1918, and it is said that at the instance of the mortgagee the applicant put forward this will. So far as the mortgagee was concerned. if he proved a title to the properties in a third party, the redemption suit was liable to be dismissed. Whether the mortgagee was responsible for the application for probate or nor, it is clear that until this suit was filed the will was not brought to the notice of the heirs of the testator. The applicant first filed an application in 1919, withdrew it and filed the present application in 1920. There is scarcely an explanation for this extraordinary delay. A witness has deposed that the executor was short of money, and did not therefore obtain probate. The reason given is incredible because on the plaintiff's side there is also evidence to the effect that the net value of the property about the time of the testator's death, was only Rs. 60 odd, and it is common knowledge that the amount required for obtaining a probate in respect of an estate of so little value would be almost trifling. Even if this excuse should be

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(1) [1914] 36 All. 93—41 I.A. 6—1 O.L.J. 57—16 O C. 386—12 A. L.J. 125—26 M.L J. 153—15 M. L T. 125—(1914) M.W.N. 137—19 C.L J. 165—18 C.W.N. 521—16 Bom. L.R. 141—22 I.C. 103.

(P. C.)

considered sufficient for the non-obtaining of the probate, it seems strange that those who were directly affected by it were not even informed of it or of its contents during this long period of time. The legatee and his representatives acted just as if no such will had been left. Some moveables and cattle belonging to the testator were disposed of by the testator's widow and children without objection. A creditor to whom the testator owed rent applied, about a year after the testator's death for letters of administration in respect of his estate on the basis of intestacy. An order was passed directing grant to the creditor and it may be presumed that the application was duly published before the order was made. The creditor however did not actually obtain the grant because testator's widow paid up the amount due. We thus see that such assets as existed were taken possession of by the heirs and the only subsisting unsecured debt was also discharged by them. Not only was the conduct of the widow and the children consistent with the absence of a will but the conduct, though negative in its character on the part of the legatee and the executor lends great support to the case of the defendants. Muthuswamy Iyer, J. observes in *Gananamuthu* v. *Venakoil Pillai* (2) that it is usual to demand an explanation when there is unreasonable delay in applying for probate. There is no inflexible rule as regards the nature of the evidence required in any particular circumstances but the evidence in favour of a will propounded after a long lapse of time must extend to clear proof of execution. This very case tests the truth of the proposition. If this will had been set up soon after the testator's death, it would have been more easy to the heirs to rebut the evidence regarding the alleged ill-feeling between the husband and the wife. They might then show by evidence easily procurable that the writer and the attestors could not have, and did not in fact, come to the house of the testator. The widow and her son have deposed that the writer and the testator were on bad terms. How can an allegation like this be proved or disproved at this distance of time? It is said that the two attesting witnesses who subscribed their marks on the will are dead. On the point where they died there is no evidence. The opponents may well allege that these persons were not alive even at the date of the will. But owing to the lapse of time these are matters on which no satisfactory evidence can be given. By his unreasonable delay, the applicant places the caveator under great disadvantages, and it is but just that very stringent proof should be demanded in support of the instrument put forward.

The question then arises has the applicant removed the suspicion which naturally attaches to a will produced in these circumstances? I am clearly of the opinion he has not. The witnesses whom he has examined in support of the will are persons of no particular credit and the explanation offered in regard to the various suspicious circumstances is far from convincing.

The learned District Judge relies on these circumstances, firstly that a draft petition for probate bearing the date 1899 was produced, which, it was alleged, was prepared at the instance of either the legatee or the executor but was not filed in Court on the ground of expense. A pleader who was examined for the plaintiff has deposed that the draft is in his handwriting. The will was not shown to him in the witness-box and identified by him. He, however, deposes that he saw "the will and in the circumstances he must have meant that he saw "a will." This evidence does not carry the matter very far Even assuming that this particular will was then in contemplation of the parties no reference in favour of its genuineness can be drawn. It is quite possible that the person or persons concerned dropped the application for valid reasons and if a spurious will had been intended to be put forward it is unlikely that the attempt was abandoned because they thought

(2) [1894] 17 Mad. 379.

better of it. It is indeed very difficult to accept this circumstance as affirmative proof of the execution of the will. Secondly it is said that the applicant produced in Court the documents, which the District Judge was satisfied belonged to the testator. The title deeds of all the properties were with the mortgagee and the recital in Exhibit III, one of the two deeds of mortgage executed by the testator in favour of the mortgagee, runs thus . "As I have given you the mulgeni and other original documents already along with the mortgage deed, I have this day further delivered the property to you." The documents produced in Court have not been shown to be so utterly unconnected with the properties mortgaged that they could not be among the documents handed to the mortgagee. If these documents were as a matter of fact in the possession of the mortgagee the probabilities are that the applicant obtained them from the mortgagee, who, as already observed, has been charged by the defendants with having instigated the filing of the application for probate. In any event the legatee and his son the applicant being the relations of the testator no inference in their favour can be drawn from the mere possession of some documents belonging to the testator. It is not suggested that these documents evidence or create any valuable rights and the possession of them confers, from a pecuniary point of view, no advantage.

Thirdly, the District Judge seems to think that as the legatee did not attempt to redeem the mortgage earlier, there was no need on his part to have applied for probate. This reason is hardly convincing. If the will was true, those that had a claim upon the testator were completely disinherited, and the entire property devolved upon the legatee, and he would not have allowed a valuable document to remain unknown, and it is, on the other hand, extremely probable that he would have taken the earliest opportunity to assert his rights under it.

In the result I am of the opinion that the applicant has failed to discharge the onus that lies heavily upon him and that the appeal must be allowed. The suit is dismissed with costs here and in the District Court.

Appeal dismissed.

✱✱ 1924 MADRAS 154

COUTTS TROTTER J.

E. E. Mack—Plaintiff.

v.

The Madras and Southern Mahratta Railway Company Limited—Defendants.

O.O. C. J. No. 83 of 1922, Decided on 5th December 1922.

Tort — Negligence — Railway Company is liable to damage done on account of unprotected pits on platform.

Railway Company is not entitled to set traps upon its premises and to keep them in total darkness and take the attitude that the passengers who are waiting for the trains which are late walk up and down the platform, when waiting for the train, at their own peril. [P. 156 C. 2]

Nugent Grant—for Plaintiff.

V. Mockett—for Defendants.

Judgment.—This is an action by Mr. Edmund Elmar Mack, a Member of the Indian Civil Service, against the Madras and Southern Mahratta Railway Co., Ltd, for damages for personal injury sustained by him on the early morning of the 30th August, 1921 and alleged to be due to the negligence of the defendant Railway Company in keeping an unprotected and unlighted pit on the platform of Nellore Station. At that time Mr. Mack was stationed at Nellore and had been instructed to join a survey party at Bellary. On the night of the 29th August he dined at the house of Mr. Bateman, Deputy Director of Survey, at Nellore, and the party consisted of Mr Bateman and Mrs. Bateman, Miss Baxely, Mr. Lewis, District Superintendent of Police, Mr. Ramamurthi, the Acting Collector and the plaintiff. The train by which the plaintiff was to go to Madras *en route* for Bellary was due to arrive at 2-15 a. m. and depart 8 minutes later. At about 1-30 Mr. Lewis, the plaintiff and the two ladies left in a jutka to

go to the station, the plaintiff to catch the train and the others to see him off, and they arrived at the station a few minutes after 2 o'clock. When they arrived at the station, the ladies stayed below, and the plaintiff and Mr. Lewis went upstairs to the platform. The plaintiff's luggage was on the platform in charge of a servant, and it seems probable that the servant had a hurricane-lantern with him. If he had, I think it is quite clear that its light afforded no assistance to the plaintiff in the events which followed. The account that the plaintiff has given in the box is that he wanted to relieve himself and that he had an idea that somewhere at the north end of the platform there was a gentleman's urinal. He says that he had noticed it before when he had been on the platform but had never gone into it but had a general idea where it was situated. He says that all the lamps on the platform were extinguished and that it was in complete darkness. When he got to where he thought the urinal was, he left Mr. Lewis and walked towards it, and then he says that his foot struck the parapet of the urinal, that he put his left foot on the parapet which at this point was about a foot high or a little more, then he felt about with his right foot for a step or something to lead him down to it, and that he then fell vertically and landed on his right foot. He fell as we know from the photographs and plans a sheer drop of 6 feet. He was unable to use his right foot and called out to Mr. Lewis after hobbling up the stairs which he found on his left hand side. Mr. Lewis came towards the sound of his voice and he helped him along the platform till they got a chair for him in which he sat until the train came in rather more than two hours late. Mr. Lewis entirely corroborates the plaintiff's evidence. He says that the plaintiff said to him when he got to the platform that he wanted to make water and that he walked towards the back wall of the platform on which Mr. Lewis says there were no lights. He goes on to say that the plaintiff seemed to get up on something and that he saw his figure dimly silhouetted against the wall which he was facing and then suddenly disappear from view. Mr. Lewis says that he called out, "Mack, where are you ?" and walked towards the place where he saw him disappear, that he found the plaintiff hopping up the stairs on one foot and that then by lending his shoulder to lean on he helped him down the platform, still hopping on one foot to somewhere near the waiting room where he got a chair for him and placed him on it. Mr. Lewis is as positive as the plaintiff that none of the lights on the platform were lighted, and adds that there was no moon and that he was only able dimly to see the plaintiff's figure by a little star light. These two gentlemen are the only people who can speak as to what actually happened, and on their evidence and the known facts as to the state of the platform as revealed by the drawings and plans, I have to determine whether a *prima facie* case of liability has been made out. I have no doubt whatever from the photographs and, above all, from the drawing put in evidence by the Railway Company that this latrine was a most dangerous place, and ought either to have been protected by a wall at least 3 or 4 feet high or ought to have been lighted by lamp No. 7 on the platform which stands in front of it. It is useless to spend words on such a subject. The sketch speaks for itself.

I now turn to the written statement, and on the question of liability as distinguished from the question of the amount of liability, it appears to raise the following contentions. Paragraph 3 appears to suggest that it was the duty of the plaintiff or any other passengers to betake themselves to the waiting room forthwith and there remain until the train by which they were travelling should come in however late and that to walk up the platform in its unlighted state affords good ground for a plea of contributory negligence, which has been set up in this case. Paragraph 6 suggests that the plaintiff was imprudent and careless in finding himself in the neighbourhood of the urinal except he were attempting to use it, and that again is alleged as contributory negligence. I have the plaintiff's evidence which I believe, that he found himself there

because he did desire to use it, though it may be that at the time they put in this plea the defendant Railway Company were not aware of this, because it is not stated in the plaintiff's first letter of complaint dated the 17th September that he was endeavouring to enter the urinal. But I desire to say that in my opinion that would afford no defence whatever to this action, even if it were a fact. I do not think that any Railway Company is entitled to set traps upon its premises and to keep the place in total darkness and take the attitude that passengers who are waiting for trains which are late walk up and down the platform, when waiting for the train, at their own peril. The remaining pleas in the written statement, if I understand them aright go rather to the question of the amount of damages than to the question of liability.

The Railway Company called two witnesses, Chinnaswami Naidu, the Station Master, and Raghviah, the Ticket Collector. The only material thing they say is that lights Nos. 3 and 5, one opposite to the third class waiting room and one opposite to the main station building, were alight at the time of the accident. The ticket collector's evidence is worthless, as he merely says that these lights were lighted on this night because it was the rule generally that they should be lighted. The Station Master is obviously unworthy of belief, because his evidence is that all the 9 lamps on the platform should be kept lighted 25 minutes before the time when the train is expected, and kept alight till its departure and he goes on to say that it was not until 2-30 a. m. that he was informed from up the line that the train was running ate. The obvious suggestion is that all the lights were on at the time of the accident. That is now nobody's case, and I do not for a moment believe it. Further discrediting, as I do, the evidence of these two witnesses, I accept the statement of the plaintiff and Mr. Lewis that there was no light on the platform, and I do not believe that the defendant's witnesses were speaking the truth when they said that lights Nos. 3 and 5 were lighted. Even if they were, it seems quite clear that they could not have thrown any appreciable light on the entrance to the latrine.

I now follow the history of the plaintiff. He managed to get into the train to Madras at about 4-30 a.m. with the help of his servant. He says he suffered great pain during the journey, that when he arrived at Madras he was put in a chair and wheeled in a trolley to the waiting room where he remained all day waiting for his train to Bellary. He was helped into the train to Bellary and arrived there on the 31st August. It is quite clear that at that time he thought that he was suffering from nothing worse than a sprained ankle which however painful would cure itself fairly rapidly and that opinion was shared by Dr. Verghese whom he saw 2 or 3 days after he arrived at Bellary because he found his foot no better. Dr. Verghese as I see, appears to have thought like the plaintiff that it was nothing worse than a severe sprain and so he put the foot in plaster of paris and got the plaintiff crutches from the hospital which he advised him to use. The plaintiff went through his survey course with the help of hired conveyances and the use of crutches when his foot got tired, and on the 1st December he finished his course and came back to Madras, and then he saw Col. Symons. Col. Symons examined him on that date and found a swelling on the outer side of the right ankle which gave pain on pressure and in his own words was "bony hard" Col. Symons at once had him X-rayed, and the skiagraphs were produced before me. They conclusively show, as Col. Symons explained, that there had been a fracture of the small bone of the ankle, that the ligaments of the heel had been torn and that new bone had been thrown out from the position of the injury. Col. Symons has seen him comparatively recently again and finds that the trouble caused by the fracture is now over but that torn ligaments are not yet completely restored to their normal state and

that he is unable to say when they will be completely restored.

The plaintiff did not make any claim against the Railway Company until the 17th September from motives which one can readily understand. Gentlemen in the plaintiff's position are naturally reluctant to make claims for injuries which they do not anticipate to be serious. Until the 1st December he was ignorant that he had suffered from anything worse than a severely sprained ankle, and when he wrote in September he only claimed on that footing. The letter of the 17th September is now complained of by the Railway Company as not apprising them of the true facts, namely that the plaintiff was endeavouring to reach the urinal over the parapet of which he fell. The exact words he used in his letter are these: "I was walking up the platform the greater part of which was in total darkness with Mr. E.H.H. Lewis, Acting District Superintendent of Police, who was seeing me off. I suddenly fell six feet sheer over the side of an unprotected latrine which is set in the platform and sustained a badly sprained ankle." That letter was acknowledged by the Agent of the Railway on the 28th September, and was I believe ignored until Mr Mack reiterated his claim by his letter of the 2nd November. That in its turn was not acknowledged till the 21st November, when Messrs Brightwell and Moresby wrote a letter to the plaintiff which contained the following remarkable statement:—"You complain that the platform was in darkness, but the Company is under no obligation to illuminate its platform until just prior to the reception of trains; those of the public who elect to wander about them do so at their own risk, and it would seem that in the present case the accident could have been avoided by the exercise of ordinary care." The writers of the letter seem to have overlooked the fact that the train was running two hours late, a matter which perhaps was within the knowledge of the Railway Servants but was not within the knowledge of the plaintiff.

The plaintiff in this case has put in a claim for Rs. 3,005 of which Rs. 255 was special damages which is not challenged. I think the claim was a moderate one. The plaintiff was a young active man who was a cripple for two months and was a partial cripple for many months more. He says, and I accept it, that he tried to go on snipe-shooting in January but had to give it up and he is not completely healed yet. I am at a loss to understand why the defendant Railway Company have elected to fight this case, either on the question of liability or on the question of the *quantum* of damages. In support of their plea that the plaintiff's letter of the 17th September did not reveal to them the real facts, on which they now say that they would have met the claim which the plaintiff had made, in the middle of the trial they tendered to the plaintiff's legal advisers a cheque for Rs 750 the sum which he claimed when he was in ignorance of the extent of his injuries. So transparent a device could deceive nobody, and the tender was in my opinion most properly rejected.

I need only make a passing allusion to the fact that a number of reports from the officials of the Railway were disclosed in the defendant's affidavit of documents and inspection of them was given to the plaintiff's solicitors. The affidavit having been signed by the Agent of the Railway, I entertain no doubt that though they are doubtless privileged documents the privilege was thereby completely waived. The documents are damaging to the Railway Company but I desire to say that in the conclusion to which I have come I place no reliance on them whatever. I am acting on the evidence of Mr. Mack and Mr. Lewis which I do not consider to have been shaken in the slightest degree.

I think that the whole history of this case discloses a lamentable failure on the part of the Railway Company to realise the nature and extent of their obligations to the travelling public, and though only a small sum of money is at stake I trust that the result of this case may tend to bring

home to the Railway officials some increased realisation of those obligations.

There will be a decree for the plaintiff for the amount claimed with costs. The fee of the expert witness will be fixed at Rs. 150.

Suit decreed.

✱ 1924 MADRAS 158

SCHWABE, C. J. AND COLERIDGE, J.

Janoo Hassan by his agent *Ahmad Esa*—Defendant—Appellant.

v.

Batchu Kamandu and another—Plaintiffs—Respondents.

O. S. App. No. 86 of 1922, Decided on 26th April 1923, from the order of Kumaraswami Sastri, J., D/-28th August 1922, in C. S. No. 496 of 1922.

Letters Patent (Madras) clause 12—Carrying on business through agent is within the clause.

'Carrying on business' includes carrying on business through an agent. 12 Ch. D. 522. Foll. and 12 B. 507, Diss.

Under Cl. 12 of the Letters Patent the power to try suits against persons is expressly conferred in the case of defendants dwelling or carrying on business or personally working for gain within the jurisdiction and it is impossible to construe 'defendant' to include foreigners in two out of three cases and not in the third, as all three occur in the same sentence. 'Defendant' therefore includes foreigners.

[P. 159 C. 1.]

K. Sundara Rao—for Appellant.

P. Somasundaram and P. Satyanarayana—for Respondents.

Schwabe, C. J.—This is an appeal from an order of Kumaraswami Sastri, J., dismissing an application by the defendant that the plaint filed herein should be rejected or the suit dismissed on the ground that the cause of action arose outside the jurisdiction of this Court. The question turns on the proper interpretation of clause 12 of the Letters Patent, which gives the High Court jurisdiction 'if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain' within the limits of Madras. Here, the whole cause of action arises outside the jurisdiction, and the defendant lives outside the jurisdiction, does not personally work for gain within the jurisdiction, but carries on business through an agent within the jurisdiction. The question to be determined is whether carrying on business includes carrying on business through an agent. It is argued that it does only in the case of British Subjects and not in the case of foreigners, and reliance is placed on the judgment of Scott, J., in *Kessowji Damodar Jairam* v. *Khimji Jairam* (1). He based his judgment on the principle enunciated in *Ex parte Blain* (2), namely, that *prima facie* Courts exercise jurisdiction over the subjects of the country or residents therein, and that words wide enough to confer jurisdiction over foreign residents ordinarily will not be so interpreted. The matter came before Sir Charles Sargent, C J. and Starling, J. in *Girdhar Damodar* v. *Kassigar Hiragar* (3) and after full argument, that Court differed from the view taken by Scott, J., and it is worth pointing out that that was the only point discussed before the Court and the only point decided. It was stated that the cause of action arose partly if not wholly within the limits of the ordinary jurisdiction of the High Court, Bombay, but no leave to sue had been obtained, and. therefore, for the purposes of the application before the Court, the only question in issue was whether carrying on business by an agent within the jurisdiction was sufficient. That case was decided under the Bombay Small Cause Courts Act but the words of that Act are identical with the words of the Letters Patent, and, in my judgment, the decision in *Girdhar Damodar* v. *Kassigar Hiragar* (3) is correct and that in *Kessowji Damodar Jairam* v. *Khimji Jairam* (1) must be considered as over-ruled. The principle which Scott, J. followed can only apply to sections or rules not dealing directly with the question of suits against foreigners, for, where jurisdiction is being conferred by the enactment

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(1) [1888] 12 Bom. 507.
(2) 12 Ch. D. 522—41 L.T. 46 28 W.R. 334.
(3) [1893] 17 Bom. 662.

itself against foreigners, one has only to construe the words of the enactment itself to ascertain whether foreigners are or are not included. Under cl. 12 of the Letters Patent the power to try suits against persons is expressly conferred in the case of defendants dwelling or carrying on business or personally working for gain within the jurisdiction and I think it is impossible to construe 'defendant' to include foreigners in two out of three cases and not in the third, as all three occur in the same sentence.

It is to be observed that the English authorities are of no assistance because in England the rules as to jurisdiction mainly O. 11, R. 11 of the Supreme Court Rules, do not confer jurisdiction on English Courts over defendants carrying on business within the jurisdiction unless they are residents.

In *Annamalai Chetti* v. *Murugesa Chetty* (4) the Privy Council called attention to the fact that in *Girdhar Damodar* v. *Kassigar Hiragar* (3) the cause of action had arisen wholly or in part within the jurisdiction, and stated that the matter might require further consideration: but, it is to be observed that the decision in *Girdhar Damodar* v. *Kassigar Hiragar* (3) as pointed out above, turned wholly on the point now in dispute, and I am prepared to follow it until higher authority has declared it to be wrong.

This appeal must be dismissed with costs.

Coleridge, J.—I concur.

Appeal dismissed.

(4) [1903] 26 Mad. 544—30 I.A. 220—7 C.W.N. 754—13 M.L.J. 287—5 Bom. L.R. 494—8 Sar. 523. (P. C.)

1924 MADRAS 159

PHILLIPS, J.

Kandaswami Goundan—Defendant-Petitioner.

v.

Narayanaswami Gounden-Plaintiff-Respondent.

Civil Revision Petition No. 297 of 1922, Decided on 20th March 1923, to revise the decree of the Dt. Court of Coimbatore, D/- 21-10-1921, in A. S. No. 107 of 1921.

Contract Act, S. 23 — Future adulterous intercourse is unlawful consideration.

The consideration of future adulterous co-habitation is obviously unlawful and therefore under S. 23, an agreement having such consideration is void and cannot be enforced although defendant has benefited by the illegal and immoral contract, inasmuch as the adulterous co-habitation had taken place. 1920 M. W. N. 547 Dist. [P. 159, C. 2]

A. Krishnaswami Aiyar—for Petitioner.

Grant and *Greatorex*—for Respondent.

Judgment—This is a suit upon bond executed in favour of one Alangi Ammal, and it has been found that the consideration was future adulterous co-habitation. The consideration is obviously unlawful and therefore under S. 23 of the Indian Contract Act the agreement is void and cannot be enforced. The district Judge has however, found that because defendant has benefited by the illegal and immoral contract, inasmuch as the adulterous cohabitation has taken place, he cannot succeed in his plea and has decreed the suit. He relies on *Deivanayaga Padyachi* v. *Muthu Reddi* (1) but that and other similar cases can be distinguished on the ground that the Court was not asked to enforce the immoral contract, but to set it aside after the object had been carried out. So far from defendants not being allowed to raise the contention that the contract is immoral it has repeatedly been laid down that when a Court finds a contract to be immoral

(1) [1920] 12 L.W. 291—39 M.L.J. 525—(1920) M.W.N. 547—28 M. L.T. 255—59 I.C. 1003.

or illegal it should decline to enforce it, even though defendants have not raised the plea. I need only refer to the Judgment of Lord Mansfield in *Holmon* v. *Johnson* (2) and to a recent case *North Western Salt Company Limited* v. *Electric Alkali Company Limited* (3). Objection is then taken that this Court can not interfere under S. 115 Code of Civil Procedure, because no question of jurisdiction is involved. Reliance is placed on the observations of the Privy Council on the subject in *Balakrishna Udayar* v. *Vasudeva Ayyar* (4).

Here however, the District Judge has not only failed to entertain the plea of illegality *suo moto* but has refused to allow defendant to raise it and has thus declined a jurisdiction which he undoubtedly possessed. He has clearly acted with material irregularity in the exercise of his jurisdiction within the meaning of S. 115 Code of Civil Procedure and in support of my view I refer to *Gangaya* v. *Venkatarayya* (5) and *Sundaram* v. *Mausu Mavuthar*, (6). The petition is accordingly allowed and plaintiffs suit dismissed with costs throughout.

Petition allowed.

(2) [1778] Cowp. 341.
(3) [1914] A.C. 457.
(4) [1917] M.W.N. 628.
(5) [1923] M.W.N. 51.
(6) [1921] 41 Mad. 551.

** 1924 MADRAS 160

Full Bench

SCHWABE. C. J., COUTTS TROTTER AND KRISHNAN, JJ.

In the Matter of a First Grade Pleader, Guntur—

Decided on 31st July 1923

Legal Practitioners Act. S. 13—Jurisdiction under is not vindictive—Object is to prevent a practitioner practising who expressly counsels dis-obedience to law and order.

The jurisdiction which the Court exercises under S. 13 is not a vindictive jurisdiction at all. Its main object in such a case is not to allow a man to practise in Courts, when he himself is counselling disobedience to the law and order enforced by Courts. When a man who has offended in that way comes before the Court and honestly expresses his regret and his intention to assist the administration of justice in future, there is no reason why he should not be given an opportunity of showing that his intentions are as he expresses them.

[P. 160, C. 2]

The Advocate-General—in support of notice.

C. Sambasiva Rao—for Pleader.

V. V. Srinivasa Iyengar for T. R. Ramachandra Aiyar — on behalf of the Vakils' Association.

Schwabe, C. J—In this case, which is a serious one, the pleader in question had quite clearly incited persons by public speech to disregard the local authorities, not to obey the Forest laws, to boycott the forest subordinates and to continue that boycott. He now comes before the Court and states that he has seen the error of his ways and expresses his regret for the attitude he then took in the agitations which were going on; and he states that he desires to have his sanad renewed and hereafter to co-operate in the administration of law and maintenance of order. That being his expressed attitude we are willing to renew his sanad and express the hope that he will carry out fully the solemn undertaking he has given to the Court.

This Court's jurisdiction in such cases is not a vindictive jurisdiction at all. Its main object in such a case is not to allow a man to practise in Courts, when he himself is counselling disobedience-to the law and order enforced by these Courts. When a man who has offended in that way comes before the Court and honestly expresses his regret and his intention to assist the administration of justice in future, I see no reason why he should not be given an opportunity of showing that his intentions are as he expresses them.

Under these circumstances, I think this man's sanad may be renewed.

Coutts Trotter, J.—I am of the same opinion.

Krishnan, J.—I agree.

Sanad granted.

1924 MADRAS 161

PHILLIPS AND VENKATASUBBA RAO, JJ.

Subramaniam Chetty and others—Defendants—Appellants.

v.

Lakshmanan Chetty and others—Plaintiffs—Respondents.

F. A. No. 339 of 1918. Decided on 9th August 1923, against the decree of the Temp. S. J. Sivaganga in O. S. No. 82 of 1916.

Accounts—Suit for partial account does not lie where suit for whole account is barred.

A suit to recover plaintiff's father's share of debt due to his firm by another firm in which one partner of the creditor firm is also a partner where accounts are not settled is an action for partial account. Such a suit will no doubt lie in certain cases but when a suit for an account is barred a suit for a partial account cannot be allowed merely on the ground that defendant could claim that a general account should be taken because it would not be fair to drive him to taking an account which the law thinks cannot be properly taken owing to the lapse of time. The rule leaves it to the Court to determine under what circumstances it would be equitable to order a partial account having regard to the rights of the parties. Ordinarily when one partner seeks to make another liable for one single item due to the firm, it would not be equitable to decree such a claim, when the defendant partner is not allowed to claim other items, which may be due by the plaintiff to the firm, 45 M 378, 16 L. W. 200 P. C. and 32 M. 76 Foll. [P 161 C 1, 2]

A. Krishnaswami Ayyar, K. Rajah Aiyar and V. Ramaswami Ayyar—for Appellants.

K. V. Krishnaswami Ayyar, R. Ganapathi Ayyar and A. Swaminatha Ayyar—for Respondents.

Judgment.—This appeal, which is connected with A. S. No. 340 of 1918 from the same decree, relates to a claim put forward by the plaintiffs against the A. M. Firm, consisting of the family of appellants. Plaintiffs' father, the first defendant's father and others were members of N. R. M. P. Firm, which deposited a sum of money with A. M. Firm, in which 1st defendant's father was a partner. The accounts of N. R. M. P. Firm have not been settled. This is a suit to recover plaintiff's father's share of a debt due to his firm by another firm, in which one partner of the creditor firm is also a partner. Even if plaintiffs were partners of the N. R. M. P., this would be an action for a partial account. Such a suit will no doubt lie in certain cases; but as pointed out by the Privy Council in *Gopala Chetty* v. *Vijayaraghavachariar* (1), when a suit for an account is barred, a suit for a partial account cannot be allowed, merely on the ground that defendant could claim that a general account should be taken because it would not be fair to drive him to taking an account, which the law thinks cannot be properly taken owing to the lapse of time. The principle, which determines the maintainability of a suit for partial account, is laid down in *Karri Venkata Reddi* v. *Kollu Narasayya* (2), where it is observed:

"The rule leaves it to the Court to determine under what circumstances it would be equitable to order a partial account, having regard to the rights of the parties."

We see then that such a suit will only be allowed in cases, where it is equitable to do so. Ordinarily, when one partner seeks to make another liable for one single item due to the firm, it would not be equitable to decree such a claim, when the defendant partner is not allowed to claim other items, which may be due by the plaintiff to the firm. This applies with additional force in the present case; for the firm sought to be made liable is a joint family and it would be inequitable to decree a solitary claim against them, without allowing them to put forward the right of 1st defendant's father, a member of the family, to the share of the other partnership assets. If plaintiffs could not bring this suit as partners *a fortiori* they cannot bring it as the legal representatives of a deceased partner.

The subordinate Judge has found that a suit for dissolution and taking of accounts is barred by limitation;

(1) 1922 P.C. 1 5—45 Mad. 378—49 I.A. 181—(1922) M.W.N. 386—30 M.L.T. 283—26 C.W.N. 977—16 L.W. 200—24 Bom. L.R. 1197—36 C.L.J. 308—20 A.L.J. 862—43 M.L.J. 305—74 I.C. 621 (P.C.)

(2) [1909] 32 Mad. 76—19 M.L.J. 10—4 M.L.T. 456—1 I.C. 384.

and although this finding is impeached, we think, that the evidence of the 6th defendant, coupled with the latter's directing the closing of the business and the fact that the 6th defendant's agency, which consisted only in collecting outstandings, terminated in November, 1910, show that the partnership was dissolved not later than that date.

We think therefore that this is not a case in which a suit for partial accounts can be allowed, for it would be most inequitable to do so.

The appeal is accordingly allowed and plaintiffs' suit dismissed, as regards this item, with costs throughout.

Appeal allowed.

1924 MADRAS 162

KRISHNAN, J.

Srirangam Municipal Council, represented by *its Chairman K. Singam Aiyangar*—Plaintiff—Petitioner.

v.

Bodi alias *Anganna Naidu*—Defendant—Respondent.

Civ. Rev. Petition No. 333 of 1922, Decided on 28th February, 1923, from the decree of the Court of Small Causes, Trichinopoly in C. S. No. 4055 of 1921.

Specific Performance—Executed consideration amounts to implied contract.

The defendant bought in auction the right to collect fees or tolls for slaughtering cattle in the slaughter house of the plaintiff corporation who brought a suit for the balance money due from him. The suit was dismissed by the lower Court on the ground that no written contract was executed, as required by S. 45 of the Old District Municipalities Act, IV of 1884.

Held, that the plaintiff Municipality is entitled to decree, as sued for, on the footing that defendant has enjoyed the right of collecting the tolls for the whole year contracted for and is liable as on an implied contract. [P. 162, C. 2]

N. Rajgopalachariar—for Petitioner.

Respondent—not represented.

Judgment.—In this case the defendant bought in auction the right to collect fees or tolls for slaughtering cattle in the slaughter house of the plaintiff corporation. This suit is for the balance money due from him. The suit has been dismissed by the lower Court on the ground that no written contract was executed, as required by S. 45 of the Old District Municipalities Act, IV of 1884, which was in force. It is argued before me that though no claims could be made on the basis of the oral contract, a decree should have been given at any rate on the footing of executed consideration, the defendant having been found to have enjoyed the right of collecting the toll for the whole year.

There is no doubt a conflict of authority on the point. So far as the English Law is concerned, it must now be taken as settled by *Lawford* v. *Billericay Rural Council* (1), the case in favour of such decrees being given. The learned Judges refer to *Young & Co.* v. *Royal Leamington Spa Corporation* (2), the case which was taken to have laid down the opposite view and point out that the question was expressly reserved there. In *Douglas* v. *Rhyl Urban Council* (3), Joyce, J., holds that the case in *Lawford* v. *Billericay Rural Council* (1) settles the English law on the point.

As regards the authorities in our High Court, the case in *Raman Chetti* v. *The Municipal Council of Kumbakonam* (4) does not really deal with this question. The observation in *Ramaswamy Chetti* v. *The Municipal Council, Tanjore* (5) is based on the decision in *Young & Co.* v. *Royal Leamington Spa Corporation* (2), which has now been explained away and is in the nature of an *obiter*. I do not propose to refer to the other Indian cases. I think the plaintiff Municipality is entitled to a decree, as sued for, on the footing that defendant has enjoyed the right of collecting the

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(1) [1903] 1 K.B. 772—72 L.J. K.B. 554—88 L.T. 317—51 W.R. 630—67 J.P. 245—1 L.G.R. 535—19 T. L.R. 322.
(2) [1883] 8 A.C. 517.
(3) [1913] 2 Ch. D. 407—82 L.J., Ch. 537—109 L.T. 30—77 J.P. 373—11 L.G.R. 1162—57 S.J. 627—29 T.L.R. 605.
(4) [1907] 30 Mad. 290—2 M.L.T. 294.
(5) [1906] 29 Mad. 360.

tolls for the whole year contracted for and is liable as on an implied contract.

The Civil Revision Petition is allowed and the decree of the lower Court is set aside and a decree given to the plaintiff as sued for with costs in this Court and the lower Court.

Petition allowed.

✱ 1924 MADRAS 163

OLDFIELD AND VENKATTASUBBA RAO, JJ.

Sivasubramania Pillai—Appellant.

v.

Theethiappa Pillai (dead) and others—Respondents.

A. A. O. No. 106 of 1920, Decided on 6th March, 1923, against the order of the Dt. Court, Tinnevelly, in I. A. No. 488 of 1919.

(a) Provincial Insolvency Act (1907) S. 24 (3)—Discharge—Conditional discharge is no discharge.

On the 20th September, 1918, the lower Court granted the insolvent a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire.

Held: that the order did not amount to a discharge as contemplated in S. 24 (3).

[P. 164 C. 1.]

(b) Provincial Insolvency Act, S. 46 (2)—Person aggrieved could be insolvent.

Where the claim of a creditor was wrongly admitted and the Insolvent appealed against the order.

Held: that the insolvent is a "person aggrieved" within the meaning of S. 46 (2) of the Act. For under S. 41 he will eventually be entitled to any surplus remaining after the creditors, who have proved, have been satisfied and will be deprived of such surplus if the proof of another creditor, whose claim may diminish or exhaust it, is wrongly admitted.

[P. 164 C. 1.]

(c) Provincial Insolvency Act, S. 24 (3)—'Any creditor may etc.', are not restrictive but are directory.

The words "any creditor may, at any time before the discharge of the insolvent, tender proof of his debt" are not restrictive but merely directory and non-compliance with them does not in any way deprive any creditor of his right or limit his right. [P. 165 C. 1.]

(d) Provincial Insolvency Act, S. 23 (1)—Debts not barred by time at commencement are never barred.

A debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. [P. 165 C. 2.]

(e) Civil P. C., S. 48—Does not apply to insolvency proceedings.

S. 48 deals only with execution and lays down that no order for execution of the decree shall be made upon an application presented after the expiration of 12 years from certain dates, but it does not mean that a decree more than 12 years old is not proveable in insolvency proceedings. [P. 167 C. 2.]

K. V. Krishnaswami Aiyar, T. L. Venkatarama Aiyar and *T. Anantha Aiyar*—for Appellant.

S. T. Srinivasagopalachari, T. Nallasivam Pillai and *Chidambaram* and *Marthandam*—for Respondents.

Oldfield, J.—This insolvency originated in the arrest by 1st respondent of the insolvent, here appellant. On the latter's adjudication however, only two creditors, now represented by other respondents, proved debts, the appellant refraining from proving his, until after a dividend of less than half an anna had been distributed and about nine years had elapsed. Evidently what has led him now to tender proof of his debt under S. 24 (3) of the Provincial Insolvency Act III of 1907 is that on the 20th September, 1918, the lower Court granted the insolvent what is described as a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire. This discharge was granted on the application of the insolvent based on the expectation that in case of his discharge his mother would relinquish a life estate, to which he was entitled in reversion, in his favour; and the appellant evidently thought it worth while to prove in order to obtain a share in these new assets. The lower Court held that he was entitled to do so notwithstanding the two points urged before it and here, that his claim was made after the order of discharge of 20th September, 1918 and that recovery of his debt would in proceedings other than insolvency be barred by limitation.

A preliminary objection has been taken to this appeal by the insolvent

on the ground that he is not a "person aggrieved" within the meaning of S. 46 (2) of the Act, because he has no interest in the distribution of assets, which have vested in the Official Receiver for his creditors, whoever they may be. But that is unsustainable. For under S. 41 he will eventually be entitled to any surplus remaining after the creditors, who have proved, have been satisfied and will be deprived of such surplus if the proof of another creditor, whose claim may diminish or exhaust it, is wrongly admitted. Another formal objection to the proceedings is, that the Official Receiver has not, so far as appears, been a party to them at any stage. But, as all the creditors concerned have had notice of them, we simply note this irregularity and proceed.

First, as regards the order of 20th September, 1918, it is, we may observe, defective, because it contains no definite provision for or directions to the Official Receiver regarding the manner in which it is to be given effect; and it should probably have been framed with reference to S. 44 (5) explicitly as imposing a condition and also suspending the discharge, until that condition had been fulfilled by the execution of the anticipated release in favour of the Official Receiver or otherwise for the benefit of the creditors. But its terms have already been stated and its meaning is clear. First, a point referred to by the lower Court, although in doubtful language, this order is consistent with the future declaration of a final dividend, since it contemplates the realization of further assets for distribution in one; and, it may be added, it is clear from the text of the order, by which the insignificant dividend already distributed was declared, that it was not final. Next, the order of 20—9—1918 was not one of absolute discharge. For it was in terms conditional, and expressly contemplated the continuance of the insolvent's disability to acquire property except for the benefit of his creditors and subject only to the reservation of a monthly income for himself and his family. Those terms are, as already stated, anomalous and it is doubtful what exact change in the insolvent's position they were intended to effect and whether they were intended to do or did more than release him from liability for his scheduled debts, those debts being made payable only from the property, which he was expected to acquire. Certainly, however, and this is the material point, there is nothing to indicate an intention on the part of the Court or other parties to the order to release such property from provable debts or to make any charge in respect of them except as regards the liability of the insolvent himself. It is then impossible to accept the first argument for the insolvent (appellant), that this order constituted such a discharge, as is referred to in S. 24 (3) as fixing the stage in the insolvency, after which no more proofs, such as the respondents,' could be received.

That argument is moreover open to objection on the further ground that the reference to discharge in that section does not fix that stage. No doubt the section is at first sight explicit—,"Any creditor may, at any time before the discharge of the insolvent, tender proof of his debt." But those words must be read in the light of S. 39 (4), under which debts, if notified, as was the respondents' in the present case, can be proved until a final dividend is declared and the fact that it will in many cases be harsh and useless to postpone the grant of discharge until its declaration. For, although it may be impossible for the purpose of S. 44 (3) (*a*) to ascertain the proportion between assets and liabilities at an early stage in the insolvency, it may be clear that the insufficiency of the former has arisen from causes, for which the insolvent is not responsible; and there will then be no reason for postponing his discharge, if he asks for it, as he can do under S. 44 (1), at any time after the order of adjudication. We have not, it is worth observing, been shown that this reference to the right to prove before discharge corresponds with anything in the Presidency Act or English Law; and it is possible that it

was worded with reference to the description of debts proveable under the Act in S. 28 (1) as including those, to which the debtor becomes subject before his discharge by reason of obligations incurred before his adjudication. S. 46 (3), Presidency Act III of 1909 and S. 30, (4) & (5) Geo. V, c. 59. In any case the general law of insolvency contemplates proof of debts at any time, so long as there are assets to be distributed and no injustice is done to other parties. *Ex-parte Boodam: Re Taylor* (1) and *Mc Murdo In re, Penfield* v. *Mc Murdo* (2). We accordingly hold as a fair construction and one, which will reconcile the policy of the Act and S. 39 (4) with S. 24 (3), that the words we are concerned with in the latter are not restrictive, but, as Vaughan Williams, J. said in the second of those decisions of similar words, "as soon as may be after the making of a receiving order" in the Bankruptcy Act of 1883, Sch. II R. 1 merely directory and that "non-compliance with them does not in any way deprive any credit r of his right or limit his right."

That contention failing, it is argued next that the respondent's debt is not proveable, because it would be time barred in other proceedings, or more definitely, because the decree, in which it is merged, would be unexecutable after the twelve years, which have elapsed since its date, under S. 48 C. P. C. That twelve years elapsed between the respondent's decree and the presentation of his proof is no doubt true. But we are still of opinion that his debt is proveable under S. 28 (1) of the Act. The definition in that section of a proveable debt contains no reference to the date, at which the proof is presented or to any date except that of the adjudication, when respondent's debt, embodied in the decree which he had lately been executing, was certainly recoverable; and the view that the existence of the debt at the date of adjudication alone is material is in accordance with English authority on the similar provision of the English Law. The matter is dealt with generally *In Ex parte Ross* (3), that decision, it may be observed, being unaffected by the facts that (1) the debts in question had not, like the respondents' debt been merged in a decree and that they represented obligations which became enforceable only after the date of the adjudication, but before that of the discharge, the Indian and English definitions of proveable debts alike including such liabilities. On the other side reliance has been placed on *Benson In re: Bower* v. *Chetwend* (4); and no doubt reference was made to the principle that, if the statute begins to run, it continues, whatever happens, to do so; and that principle would be applicable in the case before us, because the twelve years period available to respondent for execution of his decree had opened before appellant's petition was filed. But the principle was applied in the case then under disposal, only because that case was,—what the case before us is not,—one of an administration suit and not of insolvency. *Ex parte Ross* (3) would, as the earlier part of the judgment shows, have been followed and it would have been held that a debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. Respondent has then relied on the decision in *Subbarayan* v. *Natarajan* (5) that S. 48 contains an unqualified prohibition of execution of decrees over twelve years old. But the answer is that when (as we hold) the respondent can prove for his decree debt in the insolvency, no question of his right to execute is raised. In these circumstances we must, following *Exparte Ross*, hold that his debt is provable within the meaning of S. 28 (1).

The result is that the appeal fails and is dismissed with costs of legal representatives of 1st respondent.

(1) 2 Deg. F. and J. 625.
(2) [1902] 2 Ch. 684—71 L. J., Ch. 691—86 L. T. 814—50 W. R. 644.
(3) 2 Gl. and Jameson's 46 and 330.
(4) [1914] 2 Ch. 68—83 L. J Ch. 658—110 L. T. 926—21 Manson. 8—58 S. J 430—30 T. L. R. 435.
(5) 1922 Mad. 268—45 Mad 785—16 L. W. 68—43 M. L. J. 168—(1923) M. W. N. 424— 31 M.L.T. 140—70 I. C. 396.

Venkatasubba Rao, J.—I agree and I would like to state my reasons for the conclusion at which we have arrived.

It was first contended by Mr. K. V. Krishnaswami Aiyar for the insolvent-appellant that under S. 24 (3) of the Provincial Insolvency Act, 1907, a creditor would be bound to tender proof of his debt before the discharge of the insolvent and that as, in the present case, proof was submitted after the insolvent's discharge the creditor's application should not have been entertained. In the view I am taking, it is immaterial that the discharge in the present case was conditional. The relevant portion of S. 24 (3) is as follows: "Any creditor of the insolvent may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act and not entered in the schedule." I am unable to interpret this provision as rendering it obligatory upon a creditor to tender proof before the discharge of the insolvent. Under S. 44 a debtor may at any time after the order of adjudication apply for an order of discharge. There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication, and it seems to be inconsistent with the scheme of the Act to hold that a creditor who does not prove his debt before an order of discharge is deprived altogether of his remedy. I need only refer to S. 39. Cls. (3) and (4) of that section set forth the disabilities of the creditor guilty of laches in the matter of proving his debt. Cl. 3 while giving him a certain right provides that he shall not be entitled to disturb any dividend declared previous to the proof of his debts. Cl 4 refers to a declaration of a final dividend. It must be first observed that no inflexible rule is laid down as regards the point of time when a final dividend is to be declared. The clause only provides that when the receiver has realised all the property of the insolvent or so much thereof as can be realised without needlessly protracting the receivership, he shall declare a final dividend. The matter is largely one of discretion to be exercised by the Court. When a final dividend is to be declared in a particular case, will depend upon the circumstances of that case. It is next material to observe that the penalty prescribed for neglect or omission to prove a debt before making a final dividend is, that the dividend shall be declared without regard to the claim of the creditor who has failed to prove the debt. These are the provisions which limit or affect the right of a creditor who fails to tender proof of his debt before a specified point of time.

Mr. K. V. Krishnaswami Iyer's second contention was, that if a creditor omits to prove his debt before the declaration of a final dividend he is barred from doing so. There is no warrant for this position in the sections to which I have referred. It is unnecessary to deal with this contention further than to say that this argument is entirely destructive of the first argument to which I have referred. According to the first contention based on S. 24 (3), the discharge of the insolvent is the furthest point of time beyond which no debt can be proved, whereas the second contention fixes the declaration of a final dividend under S. 39 (4) as an event subsequent to which a proof of a debt cannot be tendered. In my opinion, neither of these arguments is sound. No limitation is fixed for the creditors to come in and prove their claims. This is the English rule and we have been shown nothing to induce me to hold that under the Provincial Insolvency Act a different rule is intended.

Rule 1 of the second schedule to the English Bankruptcy Act, 1883, runs thus: "Every creditor shall prove his debt as soon as may be after the making of a receiving order." It will be noted that the word used is 'shall.' But in *Mc Murdo In re: Penfield* v. *Mc Murdo* (2) Vaughan Williams, L. J. held that the rule was "merely a directory clause, a clause non-compliance with which

does not in any way deprive any creditor of his right or limit his right." He observed that in his experience of bankruptcy practice there never was any doubt as to the right of a creditor to come in and prove at any time during the administration. This rule was stated to be subject to certain conditions which are not material for the present purpose. See also Halsbury, Vol. 2, paragraphs 380 and 394.

No Indian cases were cited to us. But I find that in *Lakshman* v. *Muttia* (6) a Bench of this Court observed that it is open to a creditor at any time while the assets are undistributed to prove his debt and added "this is the course in all bankruptcy and insolvency proceedings." I am not quite clear how the statement in the judgment, that even if a schedule had been framed it was still open to the creditor, so long as assets were available, to apply to be admitted on the schedule under S. 352 of the Civil Procedure, Code of 1882, is reconcilable with the Art. 174 of the Limitation Act of 1877 which prescribed for an application under S. 353 of the said Code a period of 90 days from the date of the publication of the schedule. But I am referring to the case only for the purpose of showing that it was regarded as a settled doctrine that apart from any particular statute, in bankruptcy proceedings no limitation was fixed for creditors to prove their debts. I may state that the Provincial Insolvency Act III of 1907 repeals not only the provisions of the Civil Procedure Code relating to insolvency but also Art. 174 of the Limitation Act of 1877

I also find that in *Parshadi Lal* v. *Chuni Lal* (7), a distinction was drawn between applications under S. 353 of the Civil Procedure Code of 1882 governed in regard to limitation by Art. 174 prescribing a period of 90 days and applications under S. 353 to which Art. 178 prescribing a period of three years was held applicable. An argument based upon *Parshadi Lal* v. *Chuni Lal* (7) that an application by a creditor to prove his debt is governed by Art. 181 of the present Limitation Act, was not advanced before us, and possibly the omission to advance this argument was due to the fact that Art. 181 is held applicable only to applications under the Civil Procedure Code and that as at present the insolvency law is contained in the Insolvency Act and not in the Civil Procedure Code, Art. 181 can have no application.

The object underlying S. 24 of the Provincial Insolvency Act is the same as that which underlies R. 1 of the second schedule to the English Bankruptcy Act, 1883, namely, to enjoin upon creditors to tender proof as early as possible, a course tending to convenience in the administration of the insolvent's estate; and the provision clearly does not enact a rule of limitation.

I therefore hold, as my learned brother has done, that the creditor's application tc prove his debt was not made beyond the time allowed by the law, and this ground of appeal consequently fails.

The next argument of Mr. K. V. Krishnaswami Iyer was that the debt itself was barred, and as there was no subsisting debt there could be no proof of debt. In my opinion, this argument is also untenable. The creditor's debt was merged in a decree, and it was argued that under S. 48, C. P. C.. the decree became extinguished. This argument cannot be accepted because S. 48 deals only with execution and lays down that no order for the execution of the decree shall be made upon an application presented after the expiration of 12 years from certain dates which however it is immaterial to specify for the present purpose.

Then the general argument remains that a barred debt cannot be proved in insolvency. I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. *Ex prate Ross*(5,

(6) [1887] 11 Mad. 1.
(7) [1883] 6 All. 142—(1883) A.W.N. 264.

(3) to which Mr. Srinivasagopalachariar referred us, clarly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation, In re Westby* (8) which was also relied on by the learned Counsel. A very clear statement of the principle is contained in the following passage in the judgment of Bacon. C. J. in that case: "When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the Statute of Limitations has no application at all to such a case. or to the principles by which it is governed." The authority of these decisions has not in the slightest degree been shaken by *Benson In re*; *Bower* v. *Chetwynd* (4). On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the Statute of Limitations carefully distinguished *Ex parte Ross* (3) and other cases similar to it as being cases where the proof was in the bankruptcy itself. I cannot do better than quote the following passage from the judgment: "As to the second point cases were quoted beginning with *Ex parte Ross* (3). which show that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only in the bankruptcy."

The rule contained in S. 28 (1) as regards debts provable under the Act is consistent with the rule deducible from the English cases. All debts to which the debtor is subject when he is adjudged an insolvent (quoting only the material portions) are debts provable under the Act. Under the section therefore it must be a debt to which the debtor was subject on the date of the adjudication. If the debt was then subsisting it is provabe in insolvency.

On these grounds the second contention of the appellant also fails.

I therefore agree that the appeal should be dismissed with costs of the legal representatives of the 1st respondent

Appeal dismissed.

(8) 10 Ch. D. 776.

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SPENCER AND RAMESAM, JJ.

M. V. D. Gyana Sambanda Pandara Sannathi—Defendant—Appellant.

v

A. Vaithilinga Mudaliar and others—Plaintiffs—Respondents.

F. A. Nos. 133, 167, 195 and 196 of 1920, Decided on 18th April 1922, against the decree of the Dem. S. J., Tanjore.

Hindu Law—Religious endowment—Temple of Tyagarajaswami—Katlais Trustees or their incomes are not subject to Ulthurai trustees though idol is interested in their due performance.

The Katlias are independent institutions and the other trustees are not subject to control of the Ulthurai trustees, the common bond between them all being that they are supposed to exist for the glorification of the Deity, (Thyogarajaswami) either directly, by service rendered within the temple, or indirectly, by charities carried on outside the temple in the name of the Deity. The income of the various Katlais does not belong to Thiyagarajaswami (the idol) and cannot be mixed up and utilised for all the purposes of the temple indiscriminately though the idol is interested in the proper performance of the distinct duties attached to each Katlai. These trusts are somewhat analogous to temple services inams. In the present case the surplus income of Annadana Katlai cannot be utilised for the repairs or other expenses in connection with the temple. In framing the scheme for a temple having several Katlais some of which have borrowed heavily in the past it is very necessary that the scheme should contain stringent prohibitions against the borrowing or lending of money by the trustees from or to the trust funds or from one Katlai to another Katlai. 17 M. 199 Appr. The preparation of a budget, the proper keeping of accounts, in which the income and expenditure of the each of the Katlais may be separately shown, and the periodical audit of these accounts are matters most essentially to be provided for in the regulations in order to fix the trustees with responsibility for the due performance of their trusts and to avoid waste and indebtedness. The need for supervision and co-ordination by a controlling and inspecting body is also apparent. [B. 171 C. 1,2, P,172 C. 2 & P. 173 C.1]

S. Srinivasa Ayyangar, *M. Krishna Bharathi* and *A. C. S. Shunmuga Nainar*—for Appellants.

T. Narasimha Ayyangar, *V. C. Venkatachariar*, *S. Panchapagesa Sastri*, *K. S. Champakasa Ayyangar*, *T. K. Vijaya Raghava Naidu*, *K. Narasimha Ayyangar*, *S. K. Achariar* and *P. J. Kuppanna Rao*—for Respondents.

Judgment.—These appeals arise out of a suit under S. 92 of the Civil Procedure Code, for framing a scheme with regard to the administration of the temple of Sree Thyagarajaswami, at Tiruvalur in the Tanjore District. There are various trusts instituted for the purpose of either supporting the services in the temple, or of carrying on charities in the name of the deity, known as Katlais. Each Katlai has its own trustee and separate properties are endowed in connection with each Katlai. There are thirteen of them now and a list of these is given in Sch. A of the plaint. The most important of these are the first four, *viz.* (1) Ulthuraj, (2) Abhisheka, (3) Annadana, and (4) Rajan. The 5th and 6th are practically identical with the fourth. The trustees of the first (Ulthuraj) are defendants 1 to 3. The trusteeship of the 2nd (Abhisheka) and the 3rd (Annadana) is vested in the head of the Velukurichi Mutt (in the Tinnevelly District) for the time being, now the 12th defendant. Similarly that of the 4th (Rajan Katlai) (with which go the 5th and 6th) is in the head of the Dharmapuram Mutt (in the Tanjore District for the time being (now the 14th defendant). These heads of Mutts discharge the duties of trustees of their Katlais by means of local agents. The 14th defendant is the appellant in A. S. No. 136 of 1920: the 12th defendant in A. S. No. 195 of 1920; the plaintiffs in A. S. No. 167 of 1920, appeal in respect of the 7th (Palayee) Katlai; and the defendants 15 and 16 filed A. S. No. 196 of 1920 in respect of the 11th (Ardhajamam) Katlai.

It may be observed that, though, technically speaking the temple has no income of its own, and has to depend for all its services on the proper performance of the trusts connected with the Katlais, still for all practical purposes the Ulthurai (internal or central) Katlai represents the temple proper—its object being the internal management of the temple. It has an income of Rs. 8000 as a Mohini allowance from the Government and some lands (6 velis and odd). Other Katlais contribute their share of services or things in the various stages of the daily worship and in the various festivals of the temple (see paragraph 52 of the Subordinate Judge's judgment). The extent of their liability is determined by usage and is ascertained from the dittam (or scale) prepared by each Katlai, in connection with the daily worship and festivals. It is said for the plaintiff that the chief item of expense in connection with the Ulthurai Katlai is that of the car festival and it has been found difficult to carry on this festival with the income of the Ulthurai Katlai on account of the rise in wages. Whatever the true cause may be the fact remains that the Ulthurai Katlai has become hopelessly indebted. Its debt on the 16th September, 1917 was more than Rs 31,000 of which Rs. 17,000 was due to the 1st plaintiff and Rs. 14,000 to the 3rd defendant, one of its trustees. It is suggested for the contesting defendants that the object of this suit is to prop up the Ulthurai Katlai at the expense of the other Katlais and that the suit is the result of collusion between plaintiffs and 3rd defendant. It is frankly admitted by the 3rd defendant that he and 1st plaintiff are friends, that he co-operated with the 1st plaintiff in connection with the institution of this suit and he is also spending money along with the 1st plaintiff for this litigation (*vide* pp. 691 and 692 of the deposition). At the same time, it must be admitted that there has been gross mismanagement of the affairs of the temple and some scheme for the co-ordination of the various Katlais and for some control over the various Katlais in so far as it may ensure the harmonious working of the Katlais, whereever they have to co-operate, is necessary.

An objection was taken by the defendants (4 to 11) that the Katlais were distinct trusts and the suit as

originally framed was bad for misjoinder of parties and causes of action. Issues 1 and 2 were framed with reference to this contention and the arguments were heard on them in 1913. The Subordinate Judge who heard them held : "That as the Katlaidars are different and as each of them is in possession of a distinct Katlai charged with distinct duty and separate allegations of misconduct are made against the several Katlaidars." the suit was bad for misjoinder of parties and causes of action (Order dated 13th October, 1913). He, however, gave leave to amend the plaint, which was accordingly done. The plaint as it now stands in the printed papers is the amended plaint. The prayer for the removal of unfit trustees and the appointment of other trustees in their places has been omitted. Having regard to the amended plaint, the Subordinate Judge who finally tried the case excluded " Evidenceas to any acts constituting misfeasance or malfeasance, affecting the competency, conduct or character of the defendants individually." (Paragraph 16 of the judgment), but-he adds in paragraph 38; dealt "Though the 19th issue directly with the misconduct of the individuals and it has been deleted, I had to reluctantly admit the evidence having regard to the fact that, if the past management was unsatisfactory irrespective of any reference to any individuals, a scheme might be necessary to place the administration on a sound basis."

The scheme framed by the subordinate Judge appoints a Board of Trustees and directs that the various Katlaidars shall deliver over charge to the manager and treasurer after his appointment. No provision has been made for separating the accounts of the Katlais. This arrangement destroys the individual character of the various Katlais and has the effect in some cases of removing the trustees and in others, of adding other trustees to the existing sole trustee of each Katlai. This is inconsistent with the basis of the order of the First Subordinate Judge of 13th October, 1913. We have, therefore, to ascertain, at the outset, the nature of the various Katlais and see how far the scheme of the Lower Court can be justified in this respect.

It is admitted that the several Katlais came into existence at different times and have been managed separately for a long time, probably for centuries. Certain copper plate grants by which some of the lands of the Rajan Katlai were endowed (Exs. XLI, XLI-a (1740), XLI-c (1751), XLI-b (1754) are vailable and Ex. LXIII (1759) is the document by which the Ardhajamam Katlai lands were endowed. But beyond these we have no evidence of the original endowments. and usage is cur only guide. The trustees of some Katlais have added to the originally endowed lands by further purchases, out of the savings from their income (some of LII series, XXXIV and LXIV, being such sale-deeds). In 1810, the Government assumed management of the temple (Ex, 000). The supervision of the Government was exercised through a "*panchayat*" (by which one person was apparently meant and not a body of persons) who was counter signing the accounts of each Katlai (*vide* Ex. G, T, GG, AAA,, H, BBB, D, N, Q, SS, F, S, Z, CC, L, WW, E, EE, NN, GGG, P.).

The pandarams representing the Abhisheka and Rajan Katlais executed documents in 1820, in favour of Government binding themselves to certain details in the performance of the duties connected with the respective Katlais, (RRR, and FFFF). The Takids issued by the officers of the Government dealt with the Katlais separately (see BBBB, TTTT, PPPP, OOOO, SSS, CCCC, B, JJJJJ). In 1841 by Ex. LVIII, the Collector of Tanjore reported to the Board of Revenue on the pagodas of the District and in the statement enclosed with it, the Rajan Katlai was referred to as a separate item and the Abhisheka and Annadana Katlais together were referred to as another item. They were described as 'Athinam' in paragraph 8 of the report, on the ground that the right of appointment of the local managers belonged to certain

Mutts or Colleges of Tambirans. This was followed by similar documents in 1842, when Government divested themselves of the management of Hindu temples, Ex. LIV for Rajan Katlais and LXXI for the Abhisheka and Annadana Katlais (see also Ex. LXXIII). The Exs. LXVII, LIV-a, LXXIV, LVI, LVII and TTT, EEEE, DDDD, LXVII and LXXII, relate to the handing over charge of these Katlais, Exs. LIX, LXII, LXII-a relate to the appointment of a Pandaram or local agent at Tiruvalur on behalf of the Velukurichi Mutt and LV to the appointment of a similar local agent for the Dharmapuram Mutt. In 1847 the Government obtained Muchilikas from the several Katlaidars to ensure the due performance of the trusts (see Exs. HHHHH TTTTT, VVVV, FFFF, MMMMM, QQQQQ, RRRR, TTTTTT, MMMMM). These Muchilikas were taken by the Government "on grounds of expediency" and do not show that the Government had any right in particular over the Katlais (see *Ramiengar alias Ramanuja Chariyar* v. *Gnanasambanda Pandara Sannadi* (1). Following the last mentioned decision it was held in 1868 (see Ex. LIII) that the other Katlais were not subject to the superintendence of the Ulthurai Katlai, and that they were not dependent trusts. The plaintiffs in that case did not press their claim against the Katlais under the Mutts (see paragraph 34 of Ex. LIII). This judgment was affirmed by the High Court in *K. Venkatabalakrishna Chettiar* v. *Kaliyana Ramaigangar* (2).

In 1882, three persons were appointed as panchayats for the superintendence of the Ulthurai Katlais (Ex. QQQQQQ). The present defendants 1 to 3 are their representatives. It is not necessary to discuss in this case whether these trustees are hereditary. It is clear from the history of the temple from 1870 to 1882, above set forth, that the Katlais are independent institutions and that the other trustees are not subject to the control of the Ulthurai trustees, the common bond between them all being that they are supposed to exist for the glorification of the Deity (Thyagarajaswami) either directly, by services rendered within the temple, or indirectly, by charities carried on outside the temple in the name of the Deity. We do not agree with the remarks of the Subordinate Judge at the end of paragraph 32 which imply that the Ulthurai trustees have some right of supervision over the other Katlais. It cannot be said that the income of the various Katlais belongs to Thiyagarajaswami (the idol) or can be mixed up and utilised for all the purposes of the temple indiscriminately. These trusts are somewhat analogous to temple services inams. Just as the latter are different from inam properties belonging to a temple, being granted to office holders on condition of rendering services in a temple and do not belong to the idol, though the idol may be interested in the rendering of the services, similarly the incomes of the Katlais do not belong to the idol, though the idol is interested in the proper performance of the distinct duties attached to each Katlai. The remarks of Muthuswami Aiyar, J., in *Vythilinga Pandara Sannadhi* v. *Somasundara Mudaliar* (3), are instructive in this connection, as the decision related to this very temple. After describing two senses of the term Katlai, the learned Judge says:

"The term Katlai is used in the present suit in this sense"

referring to the second sense he had previously described, *viz.*

"a distinct endowment under a separate trustee to which specific items of expenditure are assigned as legitimate charges to be paid therefrom."

That suit was a suit by the Ulthurai Katlai against the Abhisheka and Rajan Katlais for contribution for repairs. At page 203 the learned Judge says:

"the muchilikas which these executed on that occasion contain a distinct acknowledgment that the Katlai lands were originally granted to Sri Thiyagarajaswami and an undertaking to apply the income derived therefrom to the said temple. This is significant as showing that the repair of the

(1) 5 M.H.C. 53.
(2) 5 M.H.C. 48.
(3) 17 Mad., 199.

temple was a trust to which the surplus income had to be devoted according to the original grant."

The decision then was to the effect that the Rajan and Abhisheka Katlais were liable to effect repairs from the surplus funds of their Katlais. It is now admitted that the duty of repairing the temple is one intimately connected with these two Katlais and that they are liable to contribute funds for that purpose. The learned Judge did not make any observation which is capable of being literally construed to mean that all the funds of the Katlais attached to this temple were then vested in the temple and at the disposal of the Ulthurai Katlaidars for any purpose whatsoever.

Some of the Katlais have now to be separately considered. We have already referred to the admission made by the trustees of the Rajan Katlai and Abhisheka Katlai that their surplus funds are liable for the repairs of the temple. The matter, however, is different as to Annadanam and other Katlais. In the case of the Annadanam Katlai the trustee argued (in Appeal 195 of 1920) that there are other temples which were the indirect object of the Katlais and the income cannot be solely spent for the benefit (direct or indirect) of Thyagarajaswami. This point was not raised in the written statement and cannot be considered here. In Ex. YYYY the Collector acting as agent to the Court of Wards on behalf of the 3rd defendant's estate described the duties of the Annadana Katlai in paragraph 3 as consisting of, (1) shelter to pilgrims (2) distribution of food, (3) water pandal, (4) lights and (5) pagoda service. The details of the last have to be ascertained from the '*Dittam*' or customary list of contributions. In the face of paragraph 3, no weight can be attached to the general and sweeping statement in paragraph 2 that the Annadana Katlai chatram is a minor branch of the great temple of Thyagarajaswami. It must be remembered that there was always a tendency on the part of the Ulthurai Katlaidars to claim power of supervision over the Katlais. The judgment of 1866 (Ex. LIII), this document (Ex. YYYY) and now the present suit illustrate this. We are of opinion that the surplus income of Annadana Katlai cannot be utilised for the repairs, or other expenses in connection with the temple. The income of the Katlai can only be spent for the purposes mentioned in Ex. YYYY—all of them being carried on in the name of Thiyagarajaswami and in this way exalting the glory of the idol. The solitary instance appearing from Ex. KKKKKK-5 of a portion of the expenses of raising the image of the Goddess from the river being debited to the Annadana Katlai cannot be taken as establishing a usage. Similar conclusions apply to Ardhajama Katlai. It may be that only the temple of Thiyagaraja and subordinate shrines are the temples indirectly (or directly) intended to be benefited by the Mosakulam lands of the said katlai *vide* Exs. MMMMM and MMMMM-1). At the same time too much weight ought not to be given to the muchilikas (as already pointed out) and the income cannot be appropriated for the purpose of the temple indiscriminately. Only the customary services have to be met out of it. Ex. JJJJJJ refers to the *dittam* of the Katlai. The same remarks also apply to Palayee Katlai (7th) the subject of Appeal No. 167 of 1920.

A scheme has now to be framed which will ensure the harmonious working of the Katlais, when they have to co operate in the Pagoda service. and prevent the embezzlement of the funds of the Katlais or their diversion by the trustees contracting debts—as has happened in the case of the Ulthurai and other Katlais. The scheme as framed by the Lower Court obliterates the individuality of the various Katlais, pools their resources in one large fund, and makes the Board of Trustees practically a hand of the Court by the direction in paragraphs 4 and 11 that it shall exercise its powers of administration subject to the directions of the Court. As the Katlaidars are themselves the trustees of the various trusts, it is inappropriate that supervising body should be described as a

Board of Trustees, although the trustees are by the scheme eligible for the appointment on the Board.

It is very necessary that the scheme should contain stringent prohibitions against the borrowing or lending of money by the trustees from or to the trust funds, or from one Katlai to another Katlai, seeing that the 12th defendant in paragraph 12 of his written statement treats borrowing as a necessary incident to the management of the trust and claims a right to do what he pleases with any surplus that may remain over. The preparation of a budget, the proper keeping of accounts in which the income and expenditure of each of the Katlais may be separately shown and the periodical audit of these accounts are matters most essentially to be provided for in the regulations in order to fix the trustees with responsibility for the due performance of their trusts and to avoid waste and indebtedness. The need for supervision and co-ordination by a controlling and inspecting body is also apparent. The past history of the suit Katlais shows that a panchayat, or a panchayatdar once existed for the purpose, during the period of Government management. In *Ramiengar alias Ramanuja Chariar* v. *Gnanasambanda Pandara-Sannidi* (1), the appointment of panchayatdars is stated to have been simply a coercive act for more effectual supervision, Ex A shows that there were 5 panchayatdars in 1842 and Ex. QQQQQQ shows that in 1882 the District Judge appointed 3 panchayatdars to supervise the Ulthurai Katlai. It is argued that defendants 2 and 3 and defendants 12 and 14 should not have a seat on the Board of Supervision, the former as they have already an interest as trustees of the Uithurai Katlai and the latter as they are trustees of the Abhisheka, Annadana and Rajan Katlais and on account of the misconduct of their predecessors We think that the Subordinate Judge was right in including them. The 2nd and 3rd defendants are well-to-do mirasidars, living in the locality who have always shown, as interested in the due performance of the religious worship in the temple and re descendants of two of the former panchayatdars. The 12th and 14th defendants have succeeded to their offices during the pendency of the suit and have had no opportunity of showing whether they are personally fitted or unfitted for the conduct of a religious trust. As remarked by the learned Judge, there is always the probability that persons residing in other parts of the district may not take sufficient interest to attend the meetings of the Board. The proposals made in the course of the arguments (1) that there should be two treasurers, (2) that we should appoint a "visitor" to inspect the temple from time to time to make recommendations regarding the Katlais do not commend themselves to us, as it is not shown that there will be more work for the treasurer than one man can manage to do and as a splitting of the post would probably imply a division of responsibility fatal to good management; and secondly we do not consider that a visitor acting singly would, however well intentioned, exercise an effectual authority in the prevention and cure of abuses of the trust.

We have modified the scheme as drawn up by the Lower Court in such a manner as in our opinion will have the effect of maintaining the individuality of the Katlais and not interfering with the essential characters of the Adinam (independent) trusts, while at the same time providing that the time of the Court shall not be taken up by constant references to it on minor matters of administration and management. The plaintiffs will get their costs in appeal from the funds of the Devasthanam. All the other parties will bear their own costs in these appeals. The Lower Court's order as to costs will stand. This judgment disposes of the memorandum of objections in Appeal No. 167.

Scheme modified.

1924 MADRAS 174

OLDFIELD AND DEVADOSS, JJ.

Meenakshi Nethiar Amma— Defendant—Appellant.

v

Cheriya Parvati Nethiar and others— Plaintiffs and Defendants—Respondents.

S. A. No. 287 of 1920, Decided on the 19th March, 1923, against the decree of the Dt. Court, Calicut, in A. S. No. 24 of 1918.

(a) *Pleadings—Where general ownership is alleged, but the specific grounds are not given, but defendant could lead but the sams evidence, no surprise arises and no remand is necessary.*

Where the plaint alleged tarwad ownership of the money, but it did not say distinctly whether a certain deed was taken in the defendant's name benami or the money was given to her.

Held: it submitted the general facts to the Court without specification of their exact legal implications, and whether the plaintiff proved the narrower case of gift by the first defendant of what was found to be trust money or the wider case of benami, the evidence required would be the same, and therefore no surprise or misapprehension had been established on defendant's behalf. [P. 175 C. 1]

(b) *Malabar Law—Tarwad—Karnawan is not trustee but is like manager of a Hindu joint family.*

The karnavan is not a mere trustee like the officer of a corporation, but his position is fully recognised as that of a managor of an undivided Hindu family. [P. 175 C. 2]

(c) *Trusts Act, Ss, 64 and 63—Circulation means in ordinary course and not transfer by specific act.*

The reference of money passing in circulation in S. 64 means and includes the passing of money in the ordinary course of business and not transfer by a specific act. [P. 176 C. 1]

K. P. M. Menon, C. V. Anantha-krishna Aiyar and *M. E. Menon*—for Appellant.

C. Madhavan Nair and *K. P. Kesava Menon*—for Respondents.

Oldfield, J.—In accordance with the opinion of the Full Bench we proceed to deal with the merits. The first ground on which the appeal has been argued is that the case, which the District Munsif and the lower appellate Court eventually considered and on which they decided against the 14th defendant, appellant was not that relied on by the plaintiff in the plaint and that on this account the 14th defendant was greatly prejudiced and refrained from giving evidence on facts which weighed materially with the lower appellate Court.

The plaintiff's case as set out among the charges in paragraph 11 (c) of the plaint was that the 1st defendant joined a Kuri on behalf of the tavali, gave the amount of his prize to and got executed a panayam deed Ex-XVI by defendants 11 to 13 in favour of the 14th defendant, his daughter, instead of geting it in his own name, and that the tavali has a right to recover this amount thus lent, the 14th defendant having no right to it. The relief asked for in this connection in paragraph 18 was to declare that the amount regarding Exhibit XVI belongs to the tavali of the plaintiffs and the 1st defendant and to direct the 14th defendant to deliver up the said document and other documents relating to it, to the 2nd plaintiff or to any other plaintiff whom the Court thinks proper." That case was met by the 14th defendant in paragraph 7 of her written statement. The lower courts regarded her as putting forward alternative cases therein. That may have been the case, though it was not clear that it is so for it is possible to read the plaint as alleging that she had private money in Pangi Achan's and Achuta Menon's Kuri, that she left it in the 1st defendant's hands and he spent it on the tarwad, that he had replaced what he spent by his prize money in Raman Nair's Kuri, the Kuri referred to by the plaintiff and that on his repaying it, she invested the amount in Exhibit XVI. On these pleadings the argument is that the plaintiff's case in the plaint was put forwad as being that the money was invested by Exhibit XVI as the 1st defendant's money throughout, the document being taken in the name of 14th defendant *benami*. This differs materially from the case, which the second of the District Munsifs concerned and the lower appellate Court found established; that the money lent under Exhibit XVI was tarwad money misappropriated by the 1st defendant as the Karnavan and given by him to the 14th defendant, his connection with the money ceasing when it came into her hands

and was used by her. As the money being thus trust money in her hands with notice of its character she is bound to restore it. It is we think clear that there was very little attempt by the parties or their advisers in the lower Courts to put forward and adhere to any very accurate contentions. The issue framed on this part of the case was general in the extreme. It was: "Are the plaintiffs entitled to get any declaration in regard to B. schedule properties." On that issue a considerable amount of evidence was adduced on both sides. The first District Munsif concerned no doubt found on the material point that the money was the property of the tarwad. But we have not been able to follow the remainder of his judgment on this part of the case. The second District Munsif and the lower appellate Court have as already stated found that the money belonged to the tavali and it was misappropriated by the 1st defendant and was given to the 14th defendant. Having given the matter the best consideration we can, we do not think that any surprise or misapprehension has been established on the 14th defendant's behalf. The plaint alleged tarwad ownership of the money; but it did not say distinctly whether Exhibit XVI was taken in the 14th defendant's name benami or the money was given to her. It submitted the general facts to the Court without specification of their exact legal implications. We observe that whether the plaintiff proved the narrower case of gift by the first defendant of what was found to be trust money or the wider case of benami, the evidence required would be the same and the conclusions from it would differ, only because in the second case referred to a further and different inference from the evidence would be necessary. In either case the duty of the 14th defendant to give evidence as to the manner in which the money was in her hands, and as to her knowledge of its character must have been equally clear; and we cannot hold that she has been in any way prejudiced in this respect. There is further the fact that although the case before the second District Munsif and the lower appellate Court was argued fully the second District Munsif in his judgment said explicitly that no allegation or argument relating to benami was addressed to him and there is nothing in the lower appellate Court's judgment to suggest that the case of benami was ever mentioned or that objection was taken to the case of gift of trust money. There is further no ground of appeal relating to this matter in this Court. In these circumstances, we disallow this objection and pass to the merits.

On the merits the first point taken is that the 1st defendant as karnavan was not a trustee and that any application of trust law to his conduct is inadmissible. To support this *Eravanni Revivaram* v. *Ittapu Revivarman* (1) and *Mankoothi Chattukutti Nair* v. *Kommappan Nair* (2) have been relied on. Those decisions no doubt say that the Karnavan is not a mere trustee. But in the first that was said in connection with the principles on which the Court would deal with him when his removal was asked for, and in the second, the question was as to the power of a person who gave a mortgage in order to pay a barred debt. The point was that the Karnavan was not a mere trustee like the officer of a corporation but his position was fully recognised as that of a manager of an undivided Hindu family. That the Karnavan in the present case has that position is sufficient and justifies the lower appellate Court's conclusion.

Next it is said that S. 63 of the Trust Act on which the lower appellate Court has relied is not applicable to the 14th defendant. There is first the explicit finding of the lower appellate Court that she knew the money was the property of the tavali. Next it is said that the last clause of S. 64 excludes the case from S. 63, but the answer is that the money did not come to her in circulation, but reached her by means of payment made ostensibly on her behalf to the 11th to 13th defendants under Exhibit 16. The reference to money passing

(1) [1876] 1 Mad. 153.
(2) [1918] M.W.N. 144—35 M.L.J. 380—44 I.C. 572.

in circulation, in the section means and includes in our opinion, the passing of money in the ordinary course of business by which it might have reached either the defendants or any other stranger and not the transfer to the 14th defendant by a specific act such as is now in question.

The remaining argument is against the finding that the money was the property of the tavali. The lower appellate Court reached that finding because it held that the money could be traced to tavali funds, and there was evidence to support its conclusion. That finding relates to a question of fact and is therefore binding on us. It is urged that the lower Court disregarded the fact that the 1st defendant has private funds and that even if he took the money in the first instance from tavali funds he might have restored it from his own funds, the suggestion being that no conclusion against his private ownership of the money could be valid, until a full account of the tavali funds is taken and the fact has been ascertained. We cannot accept that. As already stated there was evidence on which the lower appellate Court could reach this conclusion. It was for the 14th defendant, if she desired to rebut the evidence by taking an account or in any other manner to do so. We cannot find that she made any attempt to submit an account of the funds in her father's possession. In fact, the contention that an account was essential was never put forward until now.

The result therefore is that the appeal is dismissed with costs.

Appeal dismissed.

1924 MADRAS 176

KRISHNAN, J.

Deenabandu Rajaguru—Complainant—Petitioner.

v

Visvasaray: Lachanna Dora and others—Accused, Nos. 1 to 8—Respondents.

Criminal Revision No. 575 of 1922 and Criminal Revision Petition No. 495 of 1922, Decided on 5th April 1923, to revise the order D/- 23-5-1922, of Sub-Divisional Mag. Chicacole.

Penal Code, S. 430—Intentionally obstructing a channel for supply of water is within the section.

If a supply channel is filled up or is obstructed by a dam put up or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility and which, if it was done with intention to cause or with knowledge that it was likely to cause and if it does cause, wrongful loss to any person, would constitute the offence of mischief. (P 176 C 2)

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar*—for Petitioner.

B. Jagannadha Das—for Respondents.

V. L. Ethiraj—for the Crown.

Order.—The Sub-Divisional Magistrate purports to follow the ruling in 4 H. C. R. P. 15 (Appeal). But the view expressed in that ruling has been departed from; see the ruling in *Ramakrishna Chetti* v. *Palaniyandi Kalambar* F. B. (1), which expressly over-ruled the case in 7 M. H. C. R. 9 (appeal) which followed the view in the 4 M. H. C. R. Case. See also the rulings reported in Weir Vol, 1 P. 503 and 504. The case in 4 M. H. C. R. can no longer be considered to be good law. It seems manifest that if a supply channel is filled up or is obstructed by a dam put up or by raising a dam already existing, there is a change made in the Channel which diminishes its value or utility and which if it was done with intention to cause or with knowledge that it was likely to cause wrongful loss to any person would constitute the offence of mischief. If the act so done causes a diminution of supply of water as mentioned in S. 430 I. P. C. an offence under that section is committed.

In this case the charge framed is however not for mischief by raising the bund but by preventing the Tahsildar from cutting it down. That cannot constitute mischief and so I think it will not be right to set aside the acquittal and order a retrial in this case. The petition is dismissed.

Petition dismissed.

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(1) [1876] 1 Mad. 262.

✱ 1924 MADRAS 177

AYLING AND ODGERS, JJ.

K. Kotayya (*dead*) *and another*—Defendants—Appellants.

v.

Peddi Veeraya and others—Defendants 4 to 6 & Plaintiffs—Respondents.

S. A. Nos. 2125 and 2126 of 1920, Decided on the 23rd March, 1923, against the decree of the Dt. Court, Guntur, in A. S. Nos. 158 and 201 of 1920.

Hindu Law — Widow — Gift of estate with reversioner's consent procured for consideration is divested.

Where a widow gifted all the immoveable properties left by her husband in equal shares to her own sister's son and the son of one of her husband's brothers keeping for herself a right to enjoy-a small portion for her maintenance, and got a deed from her husband's brothers releasing their reversionary right in favour of the donees and gave in consideration therefor a pronote for Rs. 1,200.

Held that it was clearly a device to divide the estate between the reversioners and widow and as such it was an arrangement which cannot be held to be a *bona fide* surrender with the assent of the reversioners, to which effect can be given. The donees having prevented the reversioners from recovering a sum of Rs. 1,200 the reversioners were held to be not estopped from impeaching the gift and claiming the reversionary right. [P. 177, C 2 P. 178 C. 1]

T. V. Venkatrama Iyer and *T. V. Ramanadha Iyer*—for Appellants.

P. Narayanamurthy — for Respondents.

Judgment.—We have had the benefit of a long argument by the Bar, but when the facts are properly appreciated we think the case presents no difficulty at all. The facts are these. The plaint property is the estate of one Ankayaya. He died leaving a son, who also died shortly after, and a widow, named Mangamma. He also left two divided brothers, plaintiff and Appayya; since deceased. The third defendant is the son of Appayya: the first defendant is the son of Mangamma's sister and the second defendant is the son of the first defendant. In 1903, the members of this family entered into an agreement which is set forth in two documents, Exs. I and V. In Ex. V. Mangamma made a gift of all the immoveable property left by her husband in equal shares to her for her own sister's son, the first defendant and to the third defendant, the son of her husband's brother. Out of the properties so gifted, it was provided that a small portion should be kept and enjoyed by her for maintenance during her life. At the same time, plaintiff and Appayya executed a deed of release of their reversionary right in favour of the first and third defendants. This is Ex. 1. One day earlier than this, Mangamma executed a promissory note in favour of the plaintiff for Rs. 1,200. Under Ex. 1 plaintiff and Appayya were to receive a payment of Rs. 300 between them. Whether this was actually paid or not was not found by the lower Courts; but it has been found, and we must accept the finding, that the consideration for the plaintiff's executing the deed of release by Ex. 1, was the sum of Rs. 1,200, payment of which Mangamma undertook by the promissory note, to which we have referred. A little consideration will show the nature of these transactions. Ankayya's estate was divided up. Half of it went to the son of one of his surviving brothers the third defendant and the other half went to Mangamma's nephew who had no right to it at all. The plaintiff his other brother was to receive compensation by payment of Rs. 1,200 which was to be met, as the lower Courts found, out of the income of the estate. In other words, it was clearly a device to divide the estate between the reversioners and widow and as such it is an arrangement which cannot be held to be a *bona fide* surrender with the assent of the reversioners, to which effect can be given. (vide the remarks of Their Lordships of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (1). That is to say gift by Ex. V is absolutely invalid and can be given no effect at all. It has been argued before us that although Ex. V. is void and has no effect, yet the plaintiff who has consented to it in

(1) [1919] 42 Mad. 523—46 I. A. 72—26 M. L. T. 5—36 M. L. J. 493—17 A.L.J. 506—29 C. L. J. 539—21 Bom. L. R. 640—23 C. W. N. 777—(1919) M. W. N. 262—10 L. W. 105—50 I. C. 498 (P. C.

Ex. 1 should be held to be estopped from preferring the present claim. We do not think this is so. Estoppel is an equitable relief and in the present case, it is clear that the defendants are entitled to it. As we have already said, under this scheme, the plaintiff was to receive compensation in the shape of payment of Rs. 1200 guaranteed by the promissory note. But as a matter of fact, when the plaintiff sued on that promissory note and got a decree he was prevented from recovering anything under his decree by the action of the defendants who promptly laid claim to the property which he attached in execution alleging that it was theirs and not that of the widow, the promissor under the note. That is to say, the plaintiff was, by the action of the defendants, practically cheated of his share of the spoil and in these circumstances it would be most inequitable to allow the plea of estoppel which they now seek to set up against him. We think that the decree of the lower Court is correct and the present second appeal is dismissed with costs.

S. A. 2126 of 1920 follows the decision of S, A. 2125 and this also is dismissed with costs.

Appeals dismissed.

1924 MADRAS 178

OLDFIELD AND DEVADOSS, JJ.

Ayissa Umma and others—Defendants—Appellants.

v.

Puthiyapurayil Kannachamkandi Abdulla and others — Decree-holder and Defendants—Respondents.

A. A. A. O. No. 15 of 1921, Decided on the 28th March, 1923, against the order of the Sub. J., Calicut, in A. S. No. 75 of 1919.

(a) Limitation Act, Art, 182—Termination of proceedings may be administrative or final and that depends on intention of Court.

Disposal of a petition is not always to be taken literally and absolutely terminating the proceedings. It can be taken in the wide sense, which has received general recognition, tsf mere termination for administrative and oatistical purposes amounting only to a suspension of proceedings until some obstacle has been removed or stage, fixed by the Court and parties, has been reached. Court's intention is to be found out. [P. 179 C. 1. P. 180C. 1]

(b) Civil P. C., O. 39, R. 1—Injunction pendente lite ends with suit.

An injunction granted *pendente lite* until the disposal of the suit or further orders will end in any case on the disposal of the suit or on any earlier date on which further orders may be passed, the reference to further orders not applying to anything after the disposal.

[P. 179 C. 1]

C. V. Ananthakrishna Iyer — for Appellants.

Madava Nair and *A. Vasudeva Menon*—for Respondents.

Judgment.—We first simply state the facts as the lower appellate Court dealt with them. They are that the decree-holder, here respondent, holds a preliminary decree for redemption dated 5-4-1913, he being a purchaser at a Court sale from the original mortgagor. The appellant is the mortgagee, against whom redemption is asked for. On 18-8-13 the respondent made an application for a final decree. There was some discussion in the lower appellate Court as to the nature of that application ; but before us it has been treated without dispute a one in execution. Whilst that application was pending, the mortgagee respondent sued to enforce his alleged right of pre-emption ; and he obtained a decree recognising that right in the Court of first instance on 4-9-14, the proceedings in the appellate Courts, by which that decree was substantially confirmed, ending on 19-1-1916. Whilst this pre-emption suit was pending before the District Munsif, an injunction *pendente lite* was granted to restrain the further proceedings in the redemption suit and the passing of the final decree. The lower appellate Court has dealt with the case allowing execution to proceed on the footing that this injunction remained in force until the end of the pre-emption suit on 19-1-1916 in the High Court and that the right to proceed with the application for a final decree revived on that date and the present application for final decree whatever exact discription be applied to it, was in time since it was made on 18-2-18 within three years from the time when the right to apply accrued, the exclusion

of the period covered by the injunction being legitimate.

That ground alone cannot justify the lower Court's decision. For it is clear with reference to *Bulton* v. *London School Board* (1), and *Chalavadi Kottiah* v. *Pioloni Alamelammah* (2), that an injunction granted *pendente lite* until the disposal of the suit or further orders will end in any case on the disposal of the suit or on any earlier date on which further orders may be passed, the reference to further orders not applying to anything after the disposal. Something was said before us on behalf of the respondent, doubtless on instructions and also with reference to the respondent's affidavit, regarding the wordings of the injunction, the suggestion being that the date of the disposal of the suit " And any further orders ", not " or further order ", was the limit specified. We are not prepared to accept this on the materials before us, when no admission has been made by the appellant and the normal form of injunction was departed from in this case. The lower appellate Court's decision must therefore be supported, if at all, on other grounds.

In order to deal with those grounds a further reference to the circumstances is necessary. We may observe that we have found considerable difficulty in arriving at them. But we have endevoured to do so because the whole discussion turns on the meaning of the order of dismissal passed on 20-10-13. Is the dismissal, which is undoubtedly ordered, to be taken literally and absolutely terminating the proceedings; or is it, as the respondent says, to be taken in the wide sense, which unfortunately in our opinion, has received general recognition, of mere termination for administrative or statistical purposes amounting only to a suspension of proceedings until some obstacle has been removed or some stage contemplated by the Court and parties has been reached? The respondent, of course, contends that the stage contemplated was the final disposal of the pre-emption suit. We have on the materials before us to decide, as best we may, what was the intention of the Court in its order? The difficulty arises from the fact, not only that certain further materials have been placed before us, which were not before the lower Court, but that we have felt considerable doubt regarding one incident, which the lower Court took for granted. The lower Court took for granted that there was an injunction restraining the redemption proceedings. There is no doubt that the existence of such an injunction was admitted in the affidavit, of the respondent dated 18-2-18, the number of the application for injunction being actually specified. We can only say that it is a pity that the actual record connected with that application has not been placed before us, and that in spite of our endeavours we have not been able to obtain it. The remarkable thing is, as the numbers show, that after that application has been made, another application was made by the present appellant, No. 2561/13 asking for a suspension of the redemption proceedings pending the conclusion of the pre-emption suit, in which no reference whatever is made to the fact that an injunction had been asked for or had been granted. In M. P. No. 2561 the appellant moved the Court to postpone the disposal of the petition for a final decree until after the pre-emption suit had been decided. The Court passed an order " I think it is only fair to allow this petition. Allowed on petitioner furnishing security for mesne profits for two years for Rs 200 " and the order finally accepting the security and allowing the petition was passed on 20-10-13, on which date what has been referred to as the order of dismissal on the execution petition now under disposal was also passed. The order of dismissal is in the following terms. " Security is furnished on the petition of the counter-petitioner in M. P. No. 2561/13. Petition is dismissed. " There are two alternative interpretations of the word " dismissed ! " in that order already referred to. With

(1) [1878] 7 Ch.D. 766–47 L.J.Ch. 461–26 W. R. 549—38 L. T. 277.
(2) [1909] 31 Mad. 71—18 M.L.J. 46—3 M. L. T. 329.

considerable hesitation we do not see our way to adopt the literal interpretation. We are led to read the order on the petition as one merely suspending the proceedings pending termination of the pre-emption litigation with reference to the fact; first that the injunction, as is alleged in the affidavit already referred to not being granted; next that the order itself was passed in connection with the order on petition No. 2561, which petition clearly contemplated a temporary suspension pending the disposal of the pre-emption suit; and last that the amount already paid into Court as the redemption money was not withdrawn and, as the affidavit in the lower appellate Court shows, has been retained in Court throughout consistently with the pendency of proceedings for the completion of the redemption, which has in no way been affected. Taking this view, we are constrained to hold that the application of 18-2-18 was merely to revive the application of 18-8-13 which was pending throughout and that the present proceedings are accordingly in time.

The lower appellate Court's order must therefore be confirmed on this ground, the appeal against appellate order being dismissed. There will be no order as to costs.

Appeal dismissed.

1924 MADRAS 108

SCHWABE, C. J. AND WALLACE, J.

E. N. A. Samu Pattar—Garnishee—Appellant.

v.

The Official Assignee of the Property of "Appachi Chetty and Sons," Insolvents—Petitioner—Respondent.

O. S. A. No. 46 of 1921, Decided on the 7th September, 1923, from the judgment of Phillips, J., D/- 18th February, 1921.

Presidency Towns Insolvency Act, S. 56—Onus is on Assignee—He must begin the case—Motion should be filed as an action—Without dominant motive to prefer one creditor to others there is no fraudulent preference—Prefering one for avoiding insolvency is not.

The Onus is originally on the Official Assignee. A motion for declaring that a transaction by the insolvent was void as being fraudulent preference or as a *mala fide* transaction in contravention of Bankruptcy Law, should be tried practically as if it were an action. The case should be opened on behalf of the Official Assignee, and his report read, at any rate as if it were a pleading. The insolvent can be called as a witness by either party; if called, although usually considerable latitude is given, he must be examined by the party calling him and not cross-examined, unless he has shown himself hostile & permission is given to cross-examine. The other side can of course cross-examine him. [P. 181 C. 1,2]

Where Garnishee obtained security, by promising to advance money to the insolvent and then did not carry out that promise properly:

Held: the transaction is not fraud on the Bankruptcy Law. [P. 181 C. 2]

Where the insolvent was undoubtedly unable to pay his debts, as they became due, from his own money and in giving the security in question he preferred the Garnishee to the other creditors,

Held: the question remains whether he did so, with a veiw of giving him preference, This has been explained to mean, looking at the mind of the bankrupt at the time, was there dominant view to give a preference to a particular creditor, If his real object was to continue trading, or to save himself from serious consequences, or if he was really induced to make the payment, or give the security, by the pressure of the creditor, and those were the dominant factors in his mind and the desire to prefer and the giving of the preference were incidental only, the preference is not a fraudulent preference, within the meaning of the section. [P. 182 C. 1]

If there is a request for a preference, and a promise that if a preference is given, help will be forthcoming, not to enable the insolvent to continue his business but either assist merely to stave off the bankruptcy for a short while, or to assist in reinstating him after the bankruptcy, it would be right to say that the dominant view was to prefer; and further, that such a transaction might probably be set aside as a fraud on the Bankruptcy Law. But if the real intention and hope was to avoid bankruptcy altogether, then hat was the dominant view, and the preference merely incidental. [P. 182 C. 1]

S. Soundaraja Aiyangar and A. Krishnawami Aiyar—for Appellant.

L. A. Govindaraghava Aiyar and A. Ramachandra Aiyar—for Respondents.

Schwabe, C. J.—This is a motion by the Official Assignee, in the Insolvency of V. M. Appachi Chetti and Sons, that a transaction of 9th December, 1918, under which security was given to the present appellant, Samu Pattar, called the Garnishee,

for Rs. 43,663-5-11. should be set aside, as a fraudulent preference, or in the alternative on the ground that it was not a *bona fide* transaction, in that it offends against the laws of bankruptcy.

The matter came before Phillips, J., and it was tried in the following manner. The Official Assignee's report was read and the affidavits filed on behalf of the Garnishee were presumably read and then the deponents thereto were put into the witness-box and cross-examined on behalf of the Official Assignee, then the bankrupt was called by the Official Assignee and nominally examined but really cross-examined on his behalf; then two further witnesses were called on behalf of the Official Assignee and a speech was made on behalf of the Garnishee and Counsel for the Official Assignee replied. In my judgment that procedure is not correct, and if it is the usual procedure it should be altered. The *onus* is originally on the Official Assignee. A motion of this kind, with witnesses against the bankrupt, should be tried practically, as if it were an action. The case should be opened on behalf of the Official Assignee, and his report read, at any rate as if it were a pleading. Whether it is admissible as *prima facie* evidence of the facts under R. 117 of the Bankruptcy Rules is a matter, which I should wish to consider when the point arises. The evidence to be called on behalf of the Official Assignee must be called in its proper place. If it is evidence that can be properly reserved to be used to rebut the evidence given on behalf of the Garnishee, it can be so reserved. The Official Assignee can of course, if he so pleases, put in the respondent's affidavits and rely upon them. When he has closed his case, the case for the respondent should be opened, the affidavits, if not already read as the examination-in-chief of the deponents, supplemented with the leave of the Judge by oral evidence. If notice has been given for them to attend, they can then, and not till then, be cross-examined. Further evidence can with permission be given on the Garnishee's behalf, and evidence in proper cases in rebuttal may be then called and the closing speeches made. The insolvent can be called as a witness by either party; if called, although usually considerable latitude is given, he must be examined by the party calling him and not cross-examined, unless he has shown himself hostile and permission is given to cross-examine. The other side can of coure cross-examine him.

The procedure in the present case was, in my judgment, irregular in that the Garnishee and his witnesses were cross-examined, before the completion of the Official Assignee's case. The Garnishee like any other defendant is entitled to hear the case he has to meet, and the Official Assignee like any other plaintiff, has to make out his case before the Garnishee can be called upon to answer it. The Official Assignee has this advantage that he has the Garnishee's case before him on oath, and can, if he wishes, use the Garnishee's affidavit as evidence.

This matter is of considerable importance, as it is the practice—how far this practice is right I do not discuss now—to proceed by motion in practically all cases by the Official Assignee against strangers.

Turning to the questions in dispute in this case, it is to be observed, that the Official Assignee's report was directed mainly to establishing the second point and not to establishing fraudulent preference; and though the two points were kept alive until the end the learned Judge decided both in favour of the Official Assignee, the second point being, as far as I can understand it, that the Garnishee obtained this security, by promising to advance money to the insolvent and then did not carry out that promise properly and that, therefore, the transaction is a fraud on the Bankruptcy Law. I have failed to discover on what principle of law the decree on this point was based and it is enough to say that although he had a decree in his favour on the point, the learned Advocate General refused even to argue in support of it.

This leaves the question of fraudulent preference. S. 56 of the Pre-

sidency Towns Insolvency Act avoids all transfers of property, or payments made, by any person unable to pay his debts, as they become due from his own money, in favour of any creditor, with a view of giving creditor a preference over the other creditor, if such person is adjudged insolvent, on a petition presented within three months after the date thereof. In this case, the insolvent was undoubtedly unable to pay his debts, as they became due, from his own money and in giving the security in question he preferred the Garnishee to the other creditors. But the question remains whether he did so, with a view of giving him that preference. This has been explained to mean, looking at the mind of the bankrupt at the time, was there dominant view to give a preference to a particular creditor—See *Shrap* v. *Jackson* (1) and *The Official Assignee, of Madras* v *T. B. Mehta & Sons* (2). If his real object was to continue trading, or to save himself from serious consequences, or if he was really induced to make the payment, or give the security, by the pressure of the creditor, and those were the dominant factors in his mind and the desire to prefer and the giving of the preference were incidental only the preference is not a fraudulent preference, within the meaning of the section. The insolvent, the Garnishee and his son, the Bills Manager of the Madras Bank, who negotiated the matter on his father's behalf, have all been called as witnesses and all treated by the trial Judge as unreliable. Two agents or managers of the insolvent also gave evidence and their evidence was accepted by him Looking at all the evidence and treating it all, except that of the last two witnesses, as suspicious and to be carefully scrutinised, I think, the real relevant facts are that the insolvent was seriously involved, by reason of the fall in the market price of piece-goods in Madras in September, 1918, such fall being increased on the signing of the Armistice in November and was being pressed by his creditors in Bombay and elsewhere. Two hundies, which he had given to the Garnishee had been dishonoured—a very serious matter for a trader—and there were other pressing claims. He had large quantities of piece-goods, under mortgage to banks and other persons and unless the market recovered, he was hopelessly insolvent. But I am convinced that he believed that the market was going to recover. Whether he had reasonable grounds for that belief is to my mind immaterial. On December the 4th, his brother, who had a similar business, filed his petition. The Garnishee was getting very anxious as he was owed about Rs. 46,000 and was totally unsecured. About December the 3rd, there was an interview at Madras, at which he pressed for payment or security and promised that, if he was secured, he would render further assistance to the insolvent by making further loans. About that date the insolvent left Madras on private affairs The bankruptcy of his brother made the Garnishee still more anxious and he sent his son the Bills Manager of the Madras Bank on a night's journey to Velampalaiyam to interview the insolvent and try to get from him payment or security. I am satisfied at the ensuing interview the son pressed very hard for payment or security and probably also threatened to take action, which would have had the effect of bringing the insolvent down, if he was not satisfied. I have no doubt that the bankrupt was speaking the truth, when he said that the son would not have gone away without a promise of security. I am also satisfied that at that time the bankrupt was doing all that he could to avoid bankruptcy and to carry on his business, until the market righted itself. Further, the son held out great inducement to the insolvent by promises, perhaps somewhat vague, that if his father was satisfied, he would not only induce his father to make further ad-

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(1) [1899] A.C. 419-68 L.J.Q.B. 866-80 L.T. 841--6 Manson. 264—15 T.L R. 413.

(2) [1919] 42 Mad 510-36 M.L.J. 190-25 M.L.T. 265-(1919) M.W.N. 293-49 I.C. 968.

vances, but would also use his influence with the Madras Bank to induce them to render financial assistance to the insolvent.

I agree with the argument of the learned Advocate General that if all this amounts to a request for a preference, and a promise that if a preference is given, help will be forthcoming, not to enable the insolvent to continue his business but either merely to stave off the bankruptcy for a short while, or to assist in reinstating him after the bankruptcy, it would be right to say that the dominant view was to prefer; and further, I think, that such a transaction might probably be set aside as a fraud on the Bankruptcy law But if the real intention and hope was to avoid bankruptcy altogether, then, I think, that was the dominant view, and the preference marely incidental. That pressure also had a considerable bearing on the insolvent's action. I have little doubt, because he must have known that if he did not keep this particular creditor quiet, the fact of the bills being dishonoured had only got to be made public to bring about immediate bankruptcy In my judgment, the true view in this case is that the dominant view was to keep this particular creditor quiet and to get assistance from him and his son, to enable the insolvent to keep going and so avoid bankruptcy altogether; and this is borne out by the fact that the insolvent proceeded to keep other pressing creditors quiet, by payment or security and to carry on business, as far as possible, in the ordinary way for a month, when he called his creditors together and tried to persuade them to allow him to go on still further, a proposal which would have been accepted but for the refusal of certain Bombay creditors. Within two months, the market had righted itself sufficiently to have enabled the business to be carried on and possibly he would have become entirely solvent, but of course it was too late.

I think that on the evidence the Garnishee did not give a liberal interpretation to his promise of further help, and he got payment of Rs. 5,000, his debt, in a manner which does not commend itself to me. But as I find that the dominant motive was not to give a perference to the Garnishee, this notion ought to have been dismissed with costs. It follows that this appeal will be allowed with costs here and below.

Wallace, J.—I agree. In this case I consider the following facts as established by satisfactory evidence, and affording the only reasonable conclusions on that evidence.

(1) That from October, 1918 onwards, the Garnishee Samu Pattar was nervous about his commitments with his debtor Muthukumara Chetty, and was becoming annoyed (see letter of 30th October, 1918) at his continual delay in meeting his obligations to him, amounting to about Rs. 43,000;

(2) that on 3rd December, 1918, he became so anxious that he left Palghat in search of his debtor, and when he did not find him at his place of business at Tirupur, followed him up to Madras, and interviewed him there for some days, probably pressing for payment, but not succeeding in getting any very definite arrangement made;

3) that on 4th December, 1918 his debtors' brother, partner in a separate but similar firm, went insolvent;

(4) that the Garnishee probably then became more importunate, and insisted, as he says, on cash payments, or, if that was not possible, on some security for his debt;

(5) that when the debtor left on 7th December, 1918, for Tirupur, the Garnishee sent his son, Narayana Aiyar, to continue the pressure on him and that his son then, clearly, as stated by the debtor himself, got him to agree to give security for his father's debt, made him understand that unless he got a letter to the debtor's agent in Madras, arranging for the security, he would not let him, and himself made some promise that he would get his father, in consideration of his security, to advance the debtor some cash to enable him to stave off the more pressing of his creditors in Bombay;

(6) that while no definite figure of advance was then fixed upon, the debtor in his letter (now lost) to his Madras Agent, must have mentioned

such a promise of advance and probably suggested to his agent to stand out for Rs, 25 000 ;

(7) that his agent Vijayaraghavachari, when he received his letter, accordingly did so, demanding from Samu Pattar an advance of Rs. 25,000 for the Bombay creditors, but was put off by Samu Pattar, who said, not that there was no undertaking by him to advance money, but that he would pay some advance, after the business of the pledge was carried through :

(8) that in order to get his security on 10th December, 1918, the Garnishee had to take over from the Indian Bank a loan of one lakh on pledged goods ;

(9) that when Vijayaraghavachari found out that in Maya Nadar's deal on 9th December, 1918, the Garnishee, himself had benefitted to the extent of Rs. 5,000 by having a hundi to that amount, drawn by him on his debtor, honoured ; he indignantly called on the Garnishee to make good his promised advance ;

(10) that the Garnishee finally, in pursuance of the undertaking given by his son, on 13th December, 1918 did advance Rs. 15,000 on a promissory note, signed by the debtor and another, a substantial merchant, which money was remitted by the debtor to the Bombay creditors ;

(11) that the debtor was able to carry on his business till 8th January, 1919, when his Bombay creditors put him into the Insolvency Court, though his Madras creditors were willing to wait :

(12) that there is, until we come to the matter of this pledge, no suggestion that the debtor's methods of business were underhand or that his failure was due to any unscrupulous or fraudulent methods, but solely to the slump in piece goods prices at the time, and that the failure might have been avoided if prices had recovered ;

(13) that it was then difficult for any one to decide whether prices would or would not recover, while the Madras creditors were willing to give the debtor time to allow them to recover ; and it is apparent that the piece-goods were not considered valueless, or the Garnishee would not have incurred a further debt of one lakh on them.

On these facts, I have to decide whether the Official Assignee has established a proof that the security given by the debtor to the Garnishee, one month before his insolvency, was a fraudulent preference under S. 56 of the Presidency Towns Insolvency Act,

It appears to me clear on these facts that the debtor's firm on 10th December, 1918, was not hopelessly insolvent, that the debtor was genuinely endeavouring to carry on, was trying to raise money to satisfy the more importunate creditors in Bombay, and that the Madras creditors were willing that he should so carry on. It appears to me further that the security secured by the Garnishee was definitely in consideration of a promise by the Garnishee's son to persuade his father to advance the debtor money, not for himself, but for his Bombay creditors, *i. e.*, to assist in tiding him over the crisis, and that as a matter of fact that promise was carried out later by the Garnishee.

I cannot accept the learned Advocate General's contention, that the advances of Rs. 15,000 had nothing to do with the security given to the Garnishee. The fact that he was amply secured for that advance cannot affect the view that the debtor already had a promise of an advance, when he agreed to the Garnishee's previous debt being secured ; and I do not think that the Garnishee would have advanced a further sum even on adequate security, to a man *ex hypothesi* hopelessly insolvent, unless he had some previous consideration there-

Nor can I agree that the debtor was then hopelessly insolvent, and therefore the preference given to Samu Pattar must have been actuated by some ulterior motive to prefer him and oblige him, at the expense of other creditors, though no doubt he was unable to pay from his own money his debts as they fell due. I have shown that even a month later than the date of the giving of the security, the Madras creditors were willing to give the debtor a chance of recovery. This fact, *viz.*, that the

debtor was trying to keep his feet, coupled with the following, that the propelling force towards this arrangement came from the Garnishee that the debtor had given the security in return for some definite promise of advance to enable him to stave off the Bombay creditors and that he used the advance for that very purpose, and not for himself, that no close connection or friendship or anything but a long business relationship is found as between the debtor and Garnishee, people of wholly different castes, lead me to conclude that the giving of the security was induced from the Garnishee, and by a promise that if he gave it, he would obtain some money to enable him to stave off the threatened insolvency. These, to my mind, were the dominant motives in the debtor's mind, not any idea of conferring a favour on the Garnishee at the expense, of his other creditors, but rather a real and genuine hope that in the outcome the giving of the security to this Garnishee would result in the recovery of his business to the benefit of all his creditors.

The law on the point is clear; see *Sharp* v. *Jackson* (1) and *The Official Assignee, Madras* v. *T. B. Mehta and Sons* (2). Where the dominant motive is not to prefer one creditor at the expense of the rest, S, 56 has no application, and the obligation incurred by the debtor is lawful and must be upheld in a Court of law, since he had no intention to act in fraud of the law.

I, therefore, agree that the appeal must be allowed with costs here and below, costs in the Original Court to be on the higher scale.

Appeal allowed.

✱ 1924 MADRAS 185

SPENCER AND DEVADOSS, JJ.

K. P. S. Karuthan Chettiar—Petitioner—Appellant.

▼

R. M. M. Raman Chetti—Insolvent-debtor—Respondent.

A. A. O. No. 69 of 1921, Decided on the 7th August, 1923, against the order of the Dt. Court, Ramnad, D/-7th September, 1920.

Provincial Insolvency Act (III of 1907) (Act V of 1920) Ss. 43 and 46—Petition by creditor complaining of fraud by the insolvent must be inquired into otherwise creditor is entitled to appeal.

A creditor is entitled to have his petition under S. 43, enquired into otherwise he would be 'a person aggrieved' by the order, within the meaning of the term in S. 46 of the Act and therefore entitled to appeal. But a creditor is not a "person aggrieved" by the final order passed after enquiry by the Court under S. 43. [P 185 C 3]

C. S. Venkatachariar—for Appellant.

L. A. Govindaraghava Aiyar—for Respondent.

Judgment.—All that the creditor did in this case was to move the Court to take action under S. 43 Provincial Insolvency Act (III of 1907). The District Judge might very well have asked the Receiver to investigate the allegations of fraud but there was no occasion for him to dismiss the creditor's petition without stating any reason except that the creditor was not interested in making the application, and without any enquiry and before receiving a report from the Receiver.

In *Iyyappa Nainar* v. *Manicka Asari* (1) the Court took cognisance of the complaint, held an enquiry and refused to frame a charge. We do not question the authority of this decision for the proposition that a creditor is not a "person aggrieved" by the final order passed after enquiry by the Court under S. 43.

In *Gujar Shah* v. *Barkat Ali Shah* (2) and in *Palaniappa Chetty* v. *Subramanya Chetty* (3) the omission in S. 43 to give creditors a right to move the Court by application similar to that provided by S. 43 is made a ground for holding that a creditor has no 'legal grievance' if the Court declines to entertain his petition. With due respect, we think that no words are required to enable a creditor to move the Court under S. 43, and that if Courts were not so moved either by the Receiver or by

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(1) [1917] 40 Mad., 630—27 I. C. 241.
(2) [1920] 1 Lah. 213—56 I C. 744.
(3) [1920] 11 L. W. 145—(1920) M W.N. 135—38 M.L.J. 338—54 I. C. 740.

one of the creditors, cases of their taking disciplinary action against debtors in the exercise of their insolvency jurisdiction would be very few. As the petitioner was in our opinion 'aggrieved' by the lower Court's order dismissing his petition without enquiry, an appeal lies to this Court.

We set aside the District Judge's order dismissing the appellant's petition and we direct him to keep it pending until the enquiry is complete and till final orders have been passed as to the action to be taken by the Court under S. 43.

The appellant's costs in this appeal and in the lower Court will be borne by the respondent.

Appeal allowed.

✱ 1924 MADRAS 186

OLDFIELD AND DEVADOSS, JJ.

D. Lakshmi Narasa Raju—Appellant.

v.

Y. Ganganna and others—Respondents.

A. A. A. O. No 102 of 1921, Decided on 11th April 1923, against the order of Dt. Court. Kistna, in Appeal No. 512 of 1919.

Limitation Act, Art. 182—Order for attachment on date fixed for showing cause is not Step-in-aid.

Order by Court to attach on the date fixed for the showing of cause by J. D. in absence of J. D. is no step in aid by defendant. No oral application to attach should be presented where it is superfluous in view of the written application. (P. 186 C. 2)

B. Satyanarayana—for Appellant.

P. Bapiraju—for Respondents.

Judgment.—The question in this appeal is whether the appellant's application for execution presented on 5-9-1919 is in time. It is not disputed here that it can be in time, only if something happened on 15-9-15, which can be regarded as a step-in-aid of execution within the meaning of Article 182. Schedule 1. Limitation Act, 15-9-15 was the day, on which the previous execution application of the appellant, No. 55/15, came on for hearing after notice to the Judgment-debtors. All we know of what happened on that day is that the Judgment-debtors were absent and the attachment was ordered. So far there is nothing, which can be regarded as a step in-aid. We, however, are asked to presume that the attachment was ordered in consequence of some oral application having on that day been made by the petitioner. We need not consider whethar we are entitled or bound to make that presumption. We observe only that there is nothing whatever on the record to support it. It is sufficient for us to say that, if such presumption must be made, there is still in the case before us the objection taken in *Masilamani Mudaliar* v. *Sethuswamy Iyer*, (1). regarding it as a step-in-aid, that it can only have been an entirely superfluous repetition of an application, which had already been made in writing and which was pending orders of the Court. We have been asked to dissent from *Masilamani Mudaliar* v. *Sethuswami Iyer* (1) with reference to *Abdul Khadar Rowther* v. *Krishnan Malval Nair* (2) or in any case to refer the correctness of the former decision on account of the alleged conflict between the two. We are unable to see that there is any conflict between the two; and we see no reason for doubting the correctness of *Masilamani Mudaliar* v. *Sethuswamy Aiyar* (1). We add only to the consideration referred to therein that at the stage in question in the disposal of the execution application with reference to Order 21 Rule 23 that there was nothing for the petitioner to do. The course of the proceedings as prescribed in that rule was that the person, to whom, notice had been issued had to show cause to the satisfaction of the Courts that the decree could not be executed, and

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(1) [1917] 41 Mad 251—(1917) M. W. N. 532—33 M. L J. 219—22 M. L. T. 115—41 I. C. 701.

(2) [1914] 38 Mad. 695—(1914) M.W. N. 563—1 L. W.271—26 M. L. J. 433—15 M. L. T. 305—23 I. C. 533.

that, in case of his absence or of his failing to show such cause, it was the duty of the Court as a matter of course to order the execution applied for.

Taking this view we agree with the lower appellate Court and dismiss the appeal against the appellate Court with costs.

Appeal dismissed.

✱ 1924 MADRAS 187

KUMARASWAMI SASTRIAR, J.

A. D. Narayana Sa—Plaintiff.

v.

Balaguruswami Nadar and others—Defendants.

App. in O. S. No. 234 of 1921, Decided on 18th April 1923.

T. P. Act, S. 8—Fixtures—On sale of distillery buildings, vats, pipes and stills do not pass as fixtures—English Law of fixtures does not apply to India—Intention to treat them as such is the real test,

In cases where business is carried on in the premises and the sale is only of the premises together with the fixtures or the machinery, *prima facie* all that the purchaser is entitled to are the buildings. It can hardly be the intention of the parties when they sell the building alone without reference to the machinery or the business, that the purchaser should get the valuable machinery in the buildings by calling them fixtures and claiming to get them under that head. The vats and the pipes of distillery buildings cannot be fixtures in any sense of the term.

The technical English Law of Fixtures is not applicable to India. In cases of houses the primary considerations in determining whether the items claimed are fixtures under S. 8, of the Transfer of Property Act should be whether the articles are provided for the permanent use of the house, and whether they can be said to be articles which are necessary or which are provided for the more beneficial enjoyment of the property and under that term machinery brought into the house for the purpose of carrying on business cannot be included. One important test in these cases is with what intention were the articles put into the house? Were they put in for the more beneficial enjoyment of the house or with the object of improving the value of the house by making it more artistic or were they put in with a collateral purpose. In dealing with fixtures attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served and last, but not the least, to the position of the rival claimants to the things in dispute. It will be a dangerous doctrine to hold in this country that plant and machinery brought into a building for the purpose of trade being carried on whether by the owner or by the mortgagee were so annexed to the building as to pass for fixtures merely because the building is sold either by the owner or by the Court in execution, 37 Cal. 815, Foll.

Held **in this particular case that, the copper stills which were 8ft. in horizontal diameter and 7ft. in vertical diameter placed upon two iron rails and which could be removed by pulling down the brick and the mud wall put up on one side for the purpose of keeping them in position were not fixtures.** (P 188, C. 1, 2)

R. N. Ayyangar—for Plaintiff.

P. Venkataramana Rao—for Defendants.

Judgment.—This is an application by the Receivers for an order that they may be permitted to remove from the Vyasarpady Buildings, copper stills, vats, copper pipes and other old furniture and documents and papers belonging to the Madras Estate and now lying in the Vyasarpady Distillery Buildings which were sold in auction on the 21st of December, 1922 in execution of the decree in the suit.

The plaintiff in this suit A. D. Narayana Sa obtained a simple money decree against the defendants to whose estate the petitioners Messrs. Fraser & Ross have been appointed Receivers. The decree was for over Rs. 2,63,000 and in execution the property known as the Distillery Buildings at Vyasarpady was attached and sold. What was sold was only the Distillery Buildings and the proclamation describes the property to be sold as follows. "Distillery Buildings, Door No. 3, Brighton Road, Barracks, Perambhoor, Madras, bearing Re-survey Number etc." These buildings were originally used as a distillery by the Nadars but sometime before the sale the business ceased to be carried on there. One of the stills had been removed by the Nadars themselves and the property which the Receivers want to remove consist of pipes, stills and a number of vats.

The application of the Receivers is opposed on the ground that what they want to remove are fixtures which in law go with the property and which have passed to the auction purchaser.

The contention for the Receivers is that what was sold was only the building and nothing more and that apart from any question of law about fixtures they are entitled to remove whatever was put in there for the purpose of the business by the Nadars. It is also contended that the law of fixtures does not apply to India and that even if it did, the articles sought to be removed are not fixtures which in law could pass to the purchaser.

I am of opinion that both these contentions are sound. So far as the purchase is concerned, it seems to me to be clear that what was sold was only the Distillery Buildings. In cases where business is carried on in the premises and the sale is only of the premises and not of the business as a going concern or the premises together with the fixtures or machinery, *prima facie* all that the purchaser is entitled to are the buildings. It can hardly be the intention of the parties when they sell the building alone without reference to the machinery or the business that the purchaser should get the valuable machinery in the buildings by calling them fixtures and by claiming to get them under that head. Even assuming that the plaintiff is entitled to all the fixtures properly so called, I think it is clear from the evidence of Mr. Barker who was examined as an expert in this case that the vats and the pipes cannot be fixtures in any sense of the term. As regards the copper stills, they are 8 ft. in horizontal diameter and 7 ft. in vertical diameter. They are placed upon two iron rails and they can be removed by pulling down the brick and mud wall which is put up on one side for the purpose of keeping them in position. As pointed out in *Mofix Sheik* v. *Rasik Lal Ghose* (1), the technical English Law of Fixtures is not applicable to India. The provisions as to fixtures are contained in the Transfer of Property Act. S. 8 of the Transfer of Property Act runs as follows :— 'Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. * * * * "

And where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith. S. 3, clause 25 of the General Clauses Act defines "immoveable property" as including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. It seems to me that in cases of houses the primary considerations in determining whether the items claimed are fixtures under S. 8 of the Transfer of Property Act should be whether the articles are provided for the permanent use of the house, and whether they can be said to be articles which are necessary or which are provided for the more beneficial enjoyment of the property and I do not think that under that term machinery brought into the house for the purpose of carrying on business can be included. One important test in these cases is with what intention were the articles put into the house ? Were they put in for the more beneficial enjoyment of the house or with the object of improving the value of the house by making it more artistic or were they put in with a collateral purpose ?

Numerous cases were referred to by Mr. Venkataramana Rao in the course of his able argument but I do not think that the facts of the present case would render those cases applicable. *Hobson* v. *Gorringe* (2) was a case where the deed of transfer conveyed the land in question "together with the saw mill, engine-house, warehouses and other buildings erected thereon and the fixed machinery and fixtures" to secure a loan and the contest was between the mortgagee on the one hand and the vendors of an engine fixed to the freehold which was sold on the hire purchase system.

(1) [1910] 37 Cal. 815—14 C.W.N. 952—12 C.L.J. 246—6 I.C. 796.

(2) [1897] 1 Ch. 182—66 L.J., Ch. 114—75 L.T. 610—45 W.R. 346.

In the present case the sale proclamation is clear and only sells the Distillery Buildings no reference being made to any machinery in the premises. *Reynold* v. *Ashley and Son* (3) is similarly a case of conflict between the owner of a machinery sold on the hire purchase system and the mortgagee who had taken possession. Lord Lindley in giving judgment observed, "My Lords, I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute." *Monti* v. *Barnes* (4), was a case where the mortgagor subsequent to the mortgage removed the fixed grates from various rooms and substituted for them "dog grates," which were of considerable weight and it was held that having regard to all the circumstances of the case the true inference was that the "dog grates" were substituted with the object of improving the inheritance and that they were therefore fixtures which passed to the mortgagee. A. L. Smith, M. R. referred with approval to the observations of Blackburn, J. in *Holland* v. *Hodson* (5) where the learned Judge observes "There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, namely the degree of annexation and the object of the annexation. The Master of the Rolls was of opinion that "the question which has to be considered in such a case is whether, having regard to the character and the circumstances of the particular case. the article in question was intended to be annexed to the inheritance or to continue a mere chattel, and not to become part of the freehold."

Applying these tests, it seems to me to be clear that the object of the Nadars in placing what are known as fixtures in the building was simply to carry on the business of distillery there. It will be a dangerous doctrine to hold in this country that plant and machinery brought into a building for the purpose of trade being carried on whether by the owner or by the mortgagee were so annexed to the building as to make them pass for fixtures merely because the building is sold either by the owner or by the Court in execution.

I direct that the Receivers do remove the articles referred to in the Judge's Summons. As regards costs, I direct that the Receivers' taxed costs as between Attorney and client do come out of the estate and that the purchaser do bear his own costs. Certified. I fix the fee of the expert at Rs. 150.

Application granted.

(3) [1904] A.C. 466—73 L.J., K.B. 946—91 L.T. 607—53 W.R. 129—20 T.L.R. 766.
(4) [1901] 1 Q.B. 205—70 L.J., K.B. 225—83 L.T. 619—49 W.R. 147—17 T.L.R. 88.
(5) L.R. 7 C.P. 328—41 L.J. C.P. 146—26 L.T. 609—20 W.R. 990.

1924 MADRAS 189

SPENCER AND VENKATASUBBA RAO, JJ.

K. Shrirama Row and *another*—Counter-Petitioner and Official Receiver—Appellants.

v.

K. Bapayya — Petitioner — Respondent.

A. A. O. No. 138 of 1921, Decided on 1st December 1922, against the order of the Sub. J., Kistna, in E. P. No. 66 of 1918.

(a) *Fraud—Carried out—Court will refuse relief to applicant.*

Where it was a part of the agreement that the parties should procure an order recognising the transfer, withholding from the Court the

fact that it was not intended by them to be operative but the real intention was merely to mislead third parties.

Held, it is a discreditable conspiracy to cheat the creditors. In such a case, when the facts come to the notice of the Court, the doctrine of *pari delicto* will be given effect to; and the Court will refuse aid to the party who has participated in the fraud and who asks for relief. 2. Q. B. D. 731. (C. A. Foll. [P. 191 C. 2]

(b) *Civil P. C., O. 21 R. 2—Adjustment not certified could be proved by J. D. for proving that assignee of D. H. is benamidar for J. D.* [P. 192 C. 2]

(c) *C. P. C., S. 11—Execution proceeding.* J. D. can plead at a later stage inexecutability though not previously pleaded where assignee of D. H. was benamidar of J. D.

P. Venkatramana Rao—for Appellant.

V. Suryanarayana—for Respondent.

Venkatasubba Rao, J.—This is an appeal against an order of the Subordinate Judge allowing at the instance of one K. Bapayya execution of the decree in O. S. No. 36 of 1909. The appellant before us is the 4th judgment-debtor, Sreerama Rao. The decree was obtained by the plaintiff Bangaru Subba Rao in August 1909. The 1st defendant is the father-in-law of the 4th defendant, Sreerama Rao, the appellant, and the 2nd and 3rd defendants are the sons of 1st defendant. The first defendant became indebted to the decree-holder and Sreerama Rao was a surety for payment of the debt. Subsequent to the passing of the decree, the 1st defendant was adjudicated an insolvent, and the 4th defendant became in consequence mainly responsible for the payment of the decree-amount. There were other decrees passed against Sreerama Rao in similar circumstances; that is to say, in respect of debts borrowed by his father-in-law for the payment of which he made himself liable as surety. In 1911, with a desire to enter into some arrangements with the various decree-holders, he borrowed moneys from one Badhrayya whose sister he had married. He appears to have paid some of the creditor's amounts which represented 4 annas in the rupee. But for some reason, Sreerama Rao's attempts to get the decrees treated as discharged were unsuccessful; and since then, there were other negotiations, and in 1916 there was correspondence between the decree-holder Subba Rao and Sreerama Rao, in regard to the settlement of this decree.

Ex. V is a telegram dated 20th April, 1916 from the decree-holder to the appellant. Ex. V (a) is a similar telegram dated 11th May, 1916. Exs. V (b), V (c) and V (d) are respectively dated 19th May, 20th May and 9th October of 1916. Ex. VI is a letter dated 15th May, 1916, written by Bangaru Sobanadri, partner of the decree-holder, to the appellant. Ex. IX is a letter dated 28th June, 1916, from Sreerama Rao, to the decree-holder. These exhibits show very clearly that the appellant was anxious to enter into some settlement with the decree-holder. On the 23rd June, 1917, the decree was transferred by a deed of that date by the decree-holder in favour of Bapayya, who filed an execution application, the order passed on which is the subject of the present appeal. The appellant contends that he borrowed Rs. 3,000 from his brother-in-law, the aforesaid Bhadrayya, and paid the amount to the decree-holder, Bangaru Subba Rao, in full satisfaction of the decree; but for certain reasons, which I shall presently notice, got the decree transferred in favour of Bapayya who, I may mention, is the father-in-law of Badhrayya. The appellant's case is that the decree was actually discharged, that the transfer in favour of Bapayya was nominal and taken for his own benefit, and that, in the circumstances, execution should not issue in favour of Bapayya. The reason assigned for this benami transaction is this. The appellant was largely indebted, and his creditors were likely to enforce payment. He had property, but the debts he incurred to oblige his father-in-law were very large. He tried in 1911 to enter into a composition with his creditors by inducing them to take 4 annas in the rupee. His attempts failed. Now he was able to induce this decree-holder Bangaru Subba Rao, to receive Rs. 3,000 in full satisfaction of the decree under which about Rs. 15,000 was due. But to

prevail upon other creditors to give up large sums, it was necessary that they should continue to be under the impression that the decree in favour of Subba Rao was in full force. Should the other creditors become aware of the real facts, the chances of settlement were less. The appellant entered into secret transactions with a few other decree-holders, got them to accept small sums, and, as in the present case, got the decrees assigned in favour of this very Bapapya. It was desirable that the rest of the creditors should remain under the impression that all the decrees were still alive, because they would then, fearing that the property of the appellant would not be sufficient to discharge all the debts in full, be willing to enter into favourable settlement with Sreerama Rao. The appellant's case is that with this object he made it appear that the decree though discharged, was yet alive and got an assignment of the decree in favour of a near relation in whom he had confidence. It is admitted that about this period three other decrees were also transferred to Bapayya. Sreerama Rao urges that all the assignments were benami and made with the same object. The question to be determined is 'has the appellant made out his case.?'

[His Lordship held on evidence and the probabilities that the appellant had made out his case and proceeded as follows:—]

I shall now deal with the questions of law that have been raised in this case. It has been argued on behalf of the respondent that the Court, having recognised the assignment and ordered execution to issue, it is not now open to the appellant to raise the question of the executability of the decree. The argument is that the judgment-debtor should have put forward his objections, before the assignment was recognised and execution ordered. He having failed to do so, he is barred by *res judicata*, from now putting forward the objection. I do not think the question of *res judicata* arises at all. The agreement, spoken to by Sreerama Rao and his witnesses including Mr. Madhava Rao, is fraudulent and is opposed to public policy and clearly comes within the purview of S. 23 of the Indian Contract Act. It is a part of that agreement that the parties should procure an order recognising the transfer, withholding from the Court the fact that it was not intended by them to be operative but that the real intention was merely to mislead third parties. It was a discreditable conspiracy to cheat the creditors of Sreerama Rao. In such a case, when the facts come to the notice of the Court, the doctrine of *pari delicto* will be given effect to; and the Court will refuse aid to the party who has participated in the fraud and asks for relief. The principle is well settled and I need only refer to *Scott* v. *Brown, Doesing Mc Nab & Co* (1), where the facts were very similar to the facts of the present case. An agreement was made to purchase shares in a company, in order to induce persons, who might thereafter purchase shares in such company, to believe, contrary to the fact that there was a *bona fide* market for the company's shares, and that the shares were at a real premium. It was held that no action could be maintained in respect of such agreement of purchase of shares. Lindley, L. J., observes:

Ex turpi causa non oritur actio This old and well-known legal maxim is founded on good sense, and expresses a clear and well recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations, alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality, or whether he has not."

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(1) [1892] 2 Q. B. D. 724—61 L. J. Q. B. 738—4 R. 42—67 L. T. 782—41 W. R. 116—57 J. P. 213

I may observe that the case of the plaintiffs was that they were entitled to rescission upon the ground that the defendants instead of purchasing the shares from them in the ordinary way had transferred to the plaintiffs the defendant's own shares, and the learned trial Judge non-suited plaintiffs on the ground that there was no evidence to go to the jury in respect of their case. Lopes, L. J. makes the following observations;—

"In my judgment, it is unnecessary to determine whether the finding of the learned Judge is right in this respect. There is a preliminary matter to be considered of which the learned Judge might have taken, and this Court can and ought to take, judicial notice. In my judgment, it was an agreement between the plaintiffs and defendants to induce would-be-buyers of shares in this company, contrary to the fact, to believe there was a market for its shares, and that the shares, were of greater value, than they really were. Putting it shortly, an agreement to cheat the public by leading them to believe the shares had a value, which the plaintiffs and defendants knew they had not, and thus inducing them to become purchasers. Is such a transaction illegal? I am of opinion that it is."

Lastly, I may notice another objection urged by the respondent. He argued that the adjustment was not certified under O. 21, R. 2 and that the judgment-debtor could not therefore avail himself of it. It is sufficient to say that this point is concluded by authority: see *Ramayya* v. *Krishnamurthi* (2) and *Sadagopa Ayyangar* v. *Sellammal* (3). These decisions are against the respondent's contention.

In the result all the contentions raised on behalf of the respondent fail, and the appeal must be allowed.

Spencer J.—I entirely agree. As the appellant engaged in a conspiracy to defraud his creditors, I do not think his conduct in the transaction was such, as to entitle him to recover his costs in these proceedings. All parties will bear their own costs throughout.

Appeal allowed.

(2) [1917] 40 Mad. 296—19 M. L. T. 124—(1916) 1 M. W. N. 133—3 L. W. 186—32 I. C. 952.

(3) 1922 Mad 510—16 L. W. 758—43 M. L. J. 761—31 M. L. T. 463—72 I. C. 861.

☆ 1924 MADRAS 192

WALLACE, J.

Manikonda Lingayya and another—Accused.

v.

King Emperor

Cr. R. C. No. 170 of 1922, Decided on 13th October 1922, referred for the orders of the High Court under S, 438 of the Cr. P. C. by the Sess. J. of Nellore in his letter D/- 11th February 1922.

Madras Criminal Rules of Practice,—Rule 161—Memo of appearance—Vakalat need not be filed.

A vakalat need not be filed in a Criminal appeal for a proper presentation. A memo. of appearance is sufficient.

T. R. Arunachalla Iyer for B. Somayya—for the Accused.

The Public Prosecutor — for the Crown.

Order.—The refusal of the Sub Divisional Magistrate to entertain the appeal unless a Vakalat was filed, although a memo. of appearance was put in was clearly wrong, *See In re Muni Reddi* (1) and contrary to rule 161 of Criminal Rules of Practice. In any case the appeal had been already entertained by a proper Court and was then transferred to him for disposal.

The order of the Sub Divisional Magistrate is set aside. He is directed to admit and hear the appeal and dispose of it according to law.

Order set aside.

(1) [1909] 5 M. L. T. 290—9 Cr. L. J. 305—1 I. C. 546.

✱ 1924 MADRAS 193

SPENCER AND VENKATASUBBA RAO, JJ.

P. Sami Gurukal—Appellant.

v.

Thirupathiya Pillai and another—Respondents.

Appeal against Order No. 225 of 1921, Decided on 14th November 1922 against the order of the S. J. Tanjore D/-17th January 1921.

Decree—Construction—Issue wrongly framed and decided is binding.

Where the third mortgagee sued second mortgagee and claimed priority by subrogation due to discharging first mortgage and second mortgagee simply asserted his mortgagee rights and pleaded for discharge but an issue as to second mortgage being genuine was wrongly framed and decided against him while the decree exempted expressly only the rights of other defendants.

Held, the decree destroyed the rights of the second mortgagee though plaintiff failed to prove priority by subrogation and the decree only purported to pass the right of the mortgagor on date of third mortgage but this destruction of rights applied only to property with respect to which second mortgagee specifically asserted his rights and not other property though covered by the same second mortgage.

[P 196 C. 1.]

G. Krishnaswami Ayyar—for Appellant

T. M. Keishnaswami Ayyar and N. Sivaramakrishna Aiyar—for Respondents.

Venkatasubba Rao, J.—The question argued in this appeal relates to the effect to be given to the decree in O. S. No. 43 of 1911, on the file of the Court of the Subordinate Judge of Tanjore, in so far as the 14th defendant, the appellant before us, is concerned. The plaintiff in the suit claimed under a deed of mortgage dated the 15th November, 1907 executed by the 1st defendant's father Suryanarayana Pandithar in his favour, in the following circumstanser. One Sena Yena Nagappa Chetti obtained a mortgage decree against the said Suryanarayana, in O. S. No. 54 of 1903 on the file of the Sub-Court, Tanjore. When the decree-holder brought the mortgaged property, the village of Kovilur, to sale, it was arranged that the judgment-debtor should deposit in Court a sum of Rs. 35,000, towards the said decree; and he, for the purpose of raising funds, disposed of the Kudiwaram right in various plots in the village and realised a sum of Rs. 20,000 and deposited the same in Court; and he borrowed the balance of Rs. 15,000 from the plaintiff executing in his favour the mortgage deed referred to above. The 14th defendant was the alienee of the Kudiwaram right of items 123, 118, 126 in the village of Kovilur. The right was conveyed by a deed bearing the date 13th November 1907, that is, two days previous to the mortgage in favour of the plaintiff. The deed of mortgage recites the facts relating to the decree of Nagappa Chetty, the realization of Rs. 20,000 by sale to tenants of the Kudivaram right belonging to the Zamindar in several plots and the deposit of the said amount in Court. The deed further mentions that the balance of Rs. 15,000 was borrowed from the plaintiff on the security of the village of Kovilur. In regard to the extent of the right conveyed to the mortgagee, the following passage in the document is very material:

"Not only shall the sale of Kudikaniachi (occupancy rights) and the grant of permanent lease for the fixed assessment for melwaram already made by us, until now in Kovilur village, which is mortgaged under this document, in order to discharge the said Nagappa Chettiar's debts, be binding on you, but any sale of Kudikaniachi and the rights of Melwaram thirwa, not less than those now fixed in the said village and the grant of permanent lease made by us i future, for payment of this mortgage amount, shall be binding on you."

The rights of the mortgagee are therefore expressly made subject to the alienations of the Kudiwaram right effected previous to the date of the mortgage, namely, 15th November, 1907. The 14th defendant claims that both under the general law as well as under the special terms of the mortgage deed his rights in virtue of the alienations in his favour are paramount to the claim of the mortgagee in the suit. So far, the case presents no difficulty, and the rights of the plaintiff would be undoubtedly

subject to those of the 14th defendant, and the claim of the plaintiff to priority would be clearly untenable. But some complication is introduced by the manner in which the pleadings were prepared and the trial was allowed to proceed.

Paragraph 4 of the plaint refers to the mortgage in favour of Sena Yena Nagappa Chettiar, dated 7th May, 1898, the decree obtained by him in O. S. No. 54 of 1903 and the bringing to sale of the village of Kovilur in execution of the decree.

Paragraph 5 states that the 1st defendant's father applied to the plaintiff for a loan of Rs. 15,000 for payment to the decree holder in O S. No. 54 of 1903 and that the plaintiff paid the amount into Court on 4th November 1907, on the understanding that a mortgage should be executed in his favour, in respect of the village of Kovilur.

Paragraph 6 refers to the execution of the deed of mortgage and paragraph 7 contains the usual statement that in spite of demands no amount was repaid towards the debt and that the amount claimed in the suit was due.

Paragraph 8 is important and may be reproduced:

"As the whole of the consideration of the mortgage sued on was paid towards the decree in O. S. No. 54 of 1903, the plaintiff is entitled to step into the shoes of the decree-holders and enforce his mortgagee right, even as against any encumbrancers that may have acquired any interest on the mortgaged properties subsequently."

Then the plaintiff proceeds to say that the 2nd defendant holds a prior charge on the suit properties for her maintenance, that the 3rd defendant obtained a hypothecation bond dated 26th April, 1909, from the father of the 1st defendant *inter alia* to pay the debt due to the plaintiff, and that he, in spite of demands, failed to make any payment and is consequently personally liable to pay the same to the plaintiff.

The latter portion of paragraph 11 is again very material and it runs as follows:

"The other defendants 4 to 48 are setting up some subsequently acquired rights over the mortgaged property that cannot prevail against the superior rights of this plaintiff and they have therefore been made party defendants herein."

The cause of action is stated to have arisen on 13th October, 1908, and 13th October, 1909, the dates fixed for payment of principal and interest respectively.

The reliefs asked for in the suit are of the usual nature and comprise a prayer to direct the 1st defendant to pay the amount due, in default the property mortgaged to be sold, subject to the maintenance charge of the 2nd defendant, and to direct the 3rd defendant to be personally liable for the suit amount

It is now represented to us that most of the defendants 4, to 48, are some of the alienees to whom the Kudiwaram right in various plots had been transferred previous to the date of the mortgage. In this respect, the 14th defendant and many of the others included in this group, denominated defendants 4 to 48, are in precisely the same position. Though the plaintiff, on the basis of subrogation, stated in the body of the plaint that the rights of the defendants 4 to 48 should be postponed to his mortgage, he did not, in express terms, claim any relief on that basis.

It is important to bear in mind that the plaintiff asked in the suit that the sale should be of *the property mortgaged to him*. The property is described in the schedule to the plaint and while the description does not contain any reference to the fact that under the mortgage deed the rights alienated previously were expressly excluded from the mortgage security, there is the inconsistent addition at the foot of the description, "the right, title and interest of the 1st defendant in these lands." The plaint is thus indeed very confusing and the matter is made worse by what subsequently follows.

The 14th defendant put in a written statement wherein he alleged that on 13th November, 1907, the 1st defendant's father sold him the occupancy right, in respect of two *mahs* of land

(now identified with item 123) for Rs. 250 and the said amount was paid for discharging a portion of the liability, under O. S. No. 54 of 1903. He further pleaded that he was an unnecessary party. The issue in regard to this matter is issue 11 which runs as follows:—

"Whether the document dated 13th November, 1907, mentioned in paragraph 3 of the 14th defendant's written statement, is true, valid and binds the plaintiff."

It is difficult to understand how this issue came to be framed. The alienation in favour of the 14th defendant was prior in date to the mortgage in favour of the plaintiff: If the plaintiff had challenged the genuineness of the alienation in favour of the 14th defendant and claimed priority on the footing that the document dated 13th November, 1907 was either not genuine or antedated, the issue would be perfectly intelligible. But the plaintiff did nothing of the kind. He set up a right of priority only on the footing that he had discharged the previous mortgage dated 7th May, 1898, and that he was therefore subrogated to the rights of the previous mortgagee, and he alleged that, by reason of the right of subrogation, which he thus acquired, his claim had precedence over that of the 14th defendant. In that view, it would be unnecessary to determine whether the alienation in favour of the 14th defendant was true. If the plaintiff proved that he stepped into the shoes of the previous mortgagee, he would establish his priority, independent of the fact whether the document in favour of the 14th defendant was or was not genuine. The right of subrogation set up was patently false, because the mortgage deed itself excludes in express terms the right created in favour of the alienees, previous to the date of the mortgage, and having regard to the pleadings, the issue framed did not arise at all. In the judgment, reference to this issue is contained in the following short paragraph: "11th and 12th issues: There is no evidence on these issues —I find them against 14th and 15th defendants," The decree drawn up directed the sale "of the hypotheca mentioned in the plaint schedule hereunder described". The schedule to the decree contained the description as given in the plaint with the words "the right, title and interest of the 1st defendant". The decree proceeds to say "subject to the rights of the 9th defendant under Ex. 12, of the 10th defendant under Exs. 4 and 5, of the 16th defendant under Ex. 6, of the 32nd defendant under Ex. 7, of the 35th defendant under Ex. 8, of the 43rd and 44th defendants under Exs. 10 and 11, and of the 49th and 50th defendants under Ex. 9". It will be seen that the decree did not direct the sale of the properties subject to the right of the 4th defendant over the two *mahs* referred to in the written statement (item No. 123).

The first question to be determined has reference to this item No. 123. Is it to be supposed that it is included in the property directed to be sold under the decree or that it is not? The 14th defendant as a prior alienee was not a necessary party to the suit. But nevertheless he was impleaded as a party. Though the alienation in favour of the 14th defendant was not impeached in the plaint, on the ground that it was either not genuine, or the document was antedated, still there was an assertion in the plaint that the plaintiff, by reason of the right of subrogation which he alleged, was entitled to priority over the 14th defendant, and the issue strangely enough raised the question as to the genuineness and the validity of the sale in favour of the 14th defendant. The issue was found against him.

Mr. G. Krishnaswami Aiyar, the learned vakil for the appellant, strongly relied on *Rahda Kishun* v. *Khurshed Hossein* (1); but this hardly assists him, because it proceeded upon the footing that the Sahoos did not in the former suit seek to displace Bakhtar Mull's prior title and postpone it to their own. So their

(1) [1920] 47 Cal. 662—47 I. A. 11—1920 M. W. N. 308—38 M. L. J. 424—11 L. W. 518—25 C. W. N. 417—22 Bom. L. R. 557—55 I. C. 959 (P. C.)

Lordships of the Judicial Committee observed :

"Bakhtar Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned."

Sri Gopal v. *Pirthi Singh* (2) is a more direct authority. In that case as in this, the paramount right based on subrogation was claimed. It was held that "the prior mortgagee, who was impleaded and whose mortgage was impeached, was under a duty to set up an earliar mortgage." The facts of the present case bear a very strong resemblance to those of *Sri Gopal* v. *Pirthi Singh* (2) quoted above. If the 14th defendant had failed to set up his right in the suit, he would be barred by *res judicata* from asserting those rights subsequently. He however, did set up his rights and there was an adjudication against him. The decree that was passed in the suit did not save his rights and it must be taken that there was a final adjudication, in regard to the claim set up by him. The difficulty, however, is in reconciling the judgment which contains a finding against the 14th defendant with the decree which directs the sale merely of the "right, title and interest of the 1st defendant". But having regard to the claim, the defence, the issue framed and the decision embodied in the judgment and having also regard to the further fact that the decree expressly excludes from its operation the rights claimed by certain other defendants, I am constrained to come to the conclusion that notwithstanding the words in the decree "the right, title and interest of the 1st defendant" the interest of the 14th defendant in the two *mahs* referred to in the written statement (item No. 123) is included in the property directed to be sold by the decree. I am therefore of the opinion that the learned Subordinate Judge is right, in having decided that the 14th defendant is not entitled to claim that item 123 should be excluded from the proclamation of sale.

With regard however to items 118 and 126, the case is different. No plea was put forward regarding them by the 14th defendant similar to the plea he raised in respect of item 123. It seems strange that he did not set up his paramount title to these items, because his claim to all the three plots arose from a transaction or transactions of the same date and was based on one and the same footing. But, however, the fact remains that he did not claim any right in the written statement to the two plots, under consideration. In these circumstances, if nevertheless, a decree had been passed directing the entire village of Kovilur to be sold, under the ruling quoted above in *Sri Gopal* v. *Pirthi Singh* (2), the 14th defendant's rights would have become subject to the right of the plaintiff and he could not contend that he was not bound by the decree. But fortunately for him the decree directed only the right, title and interest of the mortgagor to be sold, and inasmuch, as there is no adjudication negativing the 14th defendant's admitted right of priority in respect of these two items, we must construe the decree strictly and hold that the interest of the 14th defendant in these two plots is not included in the property directed to be sold under the decree. The respondent's learned vakil tried to show that the words "right, title and interest of the 1st defendant" should be read as having reference not to the date of the suit, nor to the date of the mortgage in the plaintiff's favour but to the date of the previous mortgage which the plaintiff claimed he had discharged. But he was obliged to admit that the judgment in the case does not support this contention. As a matter of fact the judgment nowhere recognises the right to priority, by reason of subrogation claimed by the plaintiff. There is no discussion regarding it in the judgment. Presumably there was no evidence given or argument directed in order to support the claim alleged in the plaint. No doubt the judgment saves in express word the

(2) [1902] 24 All.429—29 I. A. 118—4 Bom. L. R. 827—6 C. W. N. 889—8 Sar. 293 (P. C.)

rights of some of the defendants, alienations in whose favour were prior to the date of the mortgage. But this was not done as a result of any judicial determination of the question. These defendants were excluded from the operation of the decree merely because the plaintiff admitted in each case that the claim of the defendant might be treated as paramount. I find no indication whatever in the judgment that the right of priority claimed by the plaintiff was adjudicated upon, and it, therefore, follows that the words "the right, title and interest of the 1st defendant" must have reference only to the date of the mortgage deed in favour of the plaintiff.

In the result I hold that the kudivaram rights acquired by the appellant in virtue of the sale in his favour in plots 118 and 126 are not covered by the decree and that the Subordinate Judge is wrong in having refused to give effect to these rights. The appeal in so far as it relates to item No. 123 is dismissed, and in so far as it relates to items Nos. 118 and 126 is allowed.

Spencer, J.—I agree. The parties will pay and receive proportionate costs to the extent to which they have succeeded in appeal.

Decree varied.

✱ 1924 MADRAS 197

AYLING AND ODGERS JJ.

The Taluk Board, Dindigul—1st Defendant—Appellant.

v.

Venkatarama Aiyar (died) T. E. and others—Plaintiffs—Respondents.

S. A. No. 289 of 1921, Decided on 23rd April 1923 against, the decree of the Add. D.J. Madura, D/-4th October 1920.

Adverse possession—Gramanattam in Madras villages—Indiscriminate miscellaneous user by villagers does not prove either custom or adverse possession.

Indescriminate miscellaneous user of village waste land cannot establish the fact that such user had become a customary law of the place in respect of the persons and things which it concerned. The enjoyment is of too fugitive and patently permissive a kind to afford any support to it. According to the common law of the country the control of Grama Nattam vests in the Revenue authorities and they are at liberty to grant portions of it at their discretion to the persons who apply for it for building purposes. A Court should not decide that a local custom exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of persons and things concerned. 4 M. L. T 440 Foll.

[P. 199 C. 2, P. 198 C. 1]

T. Narasimha Aiyangar and T. Nallasivan Pillai—for Appellants.

K. Bhashayam Aiyangar—for Respondents.

Ayling, J.—This appeal relates to a plot of land, 14 cents in extent, forming part of S. No. 261. 2 F—4 in Solaikurichi village, Madura Taluq which measures 19-28 acres and is registered as Nattam (building site) poramboke. Most of the S. No. has aleady been built over, but 2.92 acres are still vacant and of this Government has granted the suit plot to the Dindigul Taluq Board (1st defendant) to build a girls' school upon. The plaintiffs are villagers, who claim that they have a right to use the whole of the vacant land (including the suit site) for various agricultural purposes and plead that the grant to the Taluk Board is consequently illegal.

The sole question is as to the legality of the grant and on this two lower Courts have come to opposite conclusions, the Subordinate Judge in first appeal deciding in favour of Plaintiffs.

It is not disputed that Nattam poramboke may properly be granted for the purpose specified; but plaintiffs claim a right vested in the villagers, whom they represent, incompatible with such a grant.

They say in para 5 of the plaint "from time immemorial this kalam poramboke has been in the undisturbed enjoyment of the ryots of the said villages and they have been using it as of right for communal purposes, as detailed hereunder. That

the said site from time out of mind has been used and is now being used as a threshing floor for about 500 acres in times of harvest (kodai and kalam) for storing manure and green leaves, for stocking hay-staks immediately after the harvest, for drying paddy before they are taken to the granaries of the ryots, for allowing their cattle, buffaloes, etc. amounting to 1.000 and more to stray and remain there before they are taken for grazing and for other incidental innumerable purposes connected with agricultural operations."

The lower Appellate Court finds as a fact that the villagers have been using the land for purposes mentioned in the plaint and proceeds: "The question is whether such enjoyment has given them the right asserted by them in the plaint or whether it was only as a matter of grace that the villagers were permitted such acts of enjoyment." He decides in favour of Plaintiffs.

It seems to me that whether the right claimed by the Plaintiffs is based on custom or prescription, the enjoyment alleged is of too fugitive and patently permissive a kind to afford any support to it. There is probably, no village in the Presidency in which the unoccupied village site is not used for the purposes indicated. Such user does no harm to any one, and is unobjectionable until the land is wanted for its legitimate purpose. I do not propose to labour this point as it is sufficient to quote from the Judgment of a Bench of this Court (Benson and Bhashyam Iyengar, JJ,) dealing with an absolutely similar case [*Collector of Godavari* v. *Jannavula P. Rangayya* (1)]. "According to the common law of the country the control of Grama Nattam vests in the Revenue authorities and they are at liberty to grant portions of it at their descretion to persons who apply for it for building purposes."

It is suggested as a ground of distinction that the use of the land as threshing floor, which is not specifically referred to by the learned Judges in that case though probably included, is a ground of distinction. It seems to me to differ in no way from the other uses set out in the plaint. Any flat hard piece of ground can be utilised as a threshing floor—and such user is of just the same character as the others.

Apart from the evidence of user, the only other evidence in plaintiff's favour to which we are referred is Ex. A, copy of an order of the Madura Tahsildar in 1902. It appears from this that about that time another portion of the same unoccupied nattam porambooke had been set apart for building police lines and that on the ryots petitioning that this would be "an obstruction to the public use" it was ordered that another locality should be selected, and that the place originally chosen should be kept as threshing floor poramboke, etc. for the public use.

I am not prepared to attach much weight to this as evidence of recognition by Government of the rights claimed by plaintiffs: and still less as evidence of a fresh grant for communal purpose other than building site. Ex. A is merely the order of the Tahsildar communicating to the ryots the fact that the Board of Revenue had acceded to their request, and given up the scheme of building police lines on that spot. Neither the petition of the ryots nor the orders or reports of the Deputy Collector and Collector, or the proceedings of the Board (all specifically referred to in Ex. A) are in evidence and I find it impossible to say from Ex. A that Government either recognised plaintiffs' rights, or made a fresh grant of the land. We do not know the extent of the land required for the police lines or except by conjecture the nature of the petitioner's objections, or the extent to which the existence of an equally suitable alternative site may have influenced the Board's decision. I cannot agree with the lower appellate Court that Ex. A evidences' any acknowledgment of plaintiffs' rights, or was more than a concession to their pleas (or those of their predecessors) on the ground of comparative convenience as estimated at the time.

(1) [1903] 4 M.L.T. 440.

I would set aside the decree of the lower appellate Court and restore that of the District Munsif dismissing the suit with costs throughout.

Odgers, J. — My learned brother has set out the facts and it is unnecessary for me to repeat them. The question is — 'have the plaintiffs acquired any and what rights in the suit land?' The question falls under two heads (1) have they acquired such rights, if at all, by long enjoyment (2) or by grant. The land is admittedly building site poramboke and any rights acquired by long enjoyment must have been acquired against Government. The lower appellate Court has apparently found a customary right in favour of plaintiffs founded on long enjoyment from 28-70 years as spoken to by the witnesses. The nature of the enjoyment is very varied; the user most prominently put forward is kalam (threshing floor) but other alleged user includes "strong manure and green leaves, stocking hay-stacks, drying paddy, allowing cattle, buffaloes, etc, to stray and remain there before they are taken for grazing and for other incidental innumerable purposes connected with agricultural operations" (See plaint, para. 5). In the first place it seems clear that no easement in the ordinary sense of term as defined by S. 4 of the Easements Act has been acquired. The right is not set up in respect of a dominant tenement to which the easement is appurtenent over a servient tenement subject to it. *Ashref Ali* v. *Jagan Nath* (2). It is true that S. 18, Easements Act recognises that easements may be acquired by virtue of a local custom and the illustration (*a*) to the section appears to illustrate a customary right rather than an easement though it may be justified by the fact that every cultivator as the owner or possessor of cultivated land has the right to graze his cattle on the common waste. In my opinion the right claimed here must be established if at all as a custom recognised in S. 2 (*b*), Easements Act. The distinction between a customary right and customary easement is seen in *Palaniandi Tevan* v. *Puthirankonda Nalanan* (3). No fixed period is laid down by law as necessary to establish the former. In the Madras case quoted above the law as laid down in *Kuar Sen* v. *Mamman* (4) was approved. The learned Judges there held (para (2) page 92) "In our opinion a Court should not decide that a local custom such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is futher satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned." Apart from reasonableness, I do not think it can be said in the present case, that the alleged custom is certain as to extent or application. The waste land in question was obviously used for any and all purposes or for several purposes at one or different time. Each user was fugitive or intermittent, so much so that as shown by the plaint itself it is extremely difficult if not impossible to say what the customary user sought to be established was. Indiscriminate miscellaneous user of village waste land cannot in my opinion establish the fact that such user had become 'a customary law of the place in respect of the persons and things which it concerned." The user here is much too indefinite to do anything of the kind: I do not think the attempt to establish the primary user of the land as kalam can be supported.

In *The Secretary of State for India in Council* v. *Jannavula Pedda Rengayya* (1) a precisely similar case arose as to the village building site. The learned Judges held that no customary right was established. They said until it (the land) is

(2) [1884] 6 All. 497—(1884) A.W.N. 186.

(3) [1897] 20 Mad. 389.

(4) [1895] 17 All. 87—(1895) A.W.N. 10.

appropriated in this way to the use of some definite person it is usual for the villagers to make use of it in any way that suits them best. They throw rubbish on it, graze their cattle on it, use it as a latrine, and the like and they are rarely interfered with. But it is always understood that this use is permissive on the part of Government and that Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes." There is therefore no sufficient evidence from which I can say that a custom has been established.

There is no direct evidence of any grant, but the lower appellate Court relies on Ex. A as an acknowledgment of the rights of the plaintiffs in the suit land. The villagers protested some years ago when it was proposed to erect police lines on the site in question. The Collector's order, proceedings of the Board of Revenue and Deputy Collector's disposal though referred to in Ex. A are not before us and Ex. A is an endorsement signed by the Tahsildar on the petitions of the villagers. The endorsement says "the place shall be kept as threshing floor, poramboke, etc. for the public use" It may be that no undertaking is intended or implied in this that the place shall be so kept for ever: in any case I think it impossible to hold that Government by this endorsement of the Tahsildar either intended or must be held in law to recognise the alleged customary rights of the villagers in the waste. If this were so, it would be reasonable to suppose that this would much more clearly appear from the proceedings of the Collector or the Board which the appellants have not laid before us. Under the circumstances I am not prepared to say that Ex. A is an acknowledgment of these rights of the villagers Differing from the lower appellate Court I therefore hold that the appellants must succeed and that no customary right has been established by the respondents.

Appeal allowed.

✱ 1924 MADRAS 200

SPENCER AND VENKATASUBBA, RAO, JJ.

Venkatalakshmi Ammal—Plaintiff—Decree-holder—Appellant.

v

Sadasiva Aiyar and another—Defendants — Judgment-debtors — Respondents,

S. A. No. 41 of 1921, Decided on 16th March 1923, against the order of the Dt. Court, Madura, D/- 28th October, 1920.

Execution—Possession though got in execution could be claimed again if decree holder is wrongly dispossessed after the final Court confirms decisian of trial Court.

Even where decree-holder has got possession in execution of the original decree if subsequently he was wrongly dispossessed before the final decree of the Appeliate Court restored the orighnal decree of the Dt. Munsif he would be entitled to apply for delivery of possession a second time. 7 M. L, T. 107 Foll. [P 200 C 2]

C. A. Seshagiri Sastri—for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Aiyar*—for Respondents.

Judgment.—The Appellant's case is that at the time of making her present appli ation for execution she was not in possession of the first set of suit properties, and if that case is true and if the appellant's prior application for possession was ineffective, there is no reason why she should not now apply for execution of the decree. Even if she had got possession in execution of the original decree and if subsequently she was wrongly dispossessed before the final decree of the Appellate Court restored the original decree of the District Munsif, she would on the authority of *Theevana Pillai* v. *Kulla Pillai* (1) be entitled to apply for delivery of possession a second time.

The grounds upon which her execution petitions have been dismissed are not sound. The appeal is allowed and the case will go back to the executing Court for enquiry whether on the date of the present application for execution the execution petitioner was in actual possession or not of the first set of properties, and for disposal according to law. As regards the

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(1) [1910] 7 M.L.T. 107—5 I.C. 776.

second set of properties, of which symbolical possession is said to have been obtained, there is no appeal before us and our order will not apply to that set. Costs to abide and follow the result.

Case remanded.

✱ ✱ 1924 MADRAS 201

ODGERS AND HUGHES, JJ.

K. M. Majavath Alli—1st Defendant—Appellant.

v

K. M. Mujafar Alli and another—Plaintiff & 2nd Defendant—Respondents.

S. A. No. 560 of 1921, Decided on 26th August 1923, against the decree of D. J., Kurnool in A. S. No. 31 of 1920.

Adverse possession—Against lifeholder-Inam Lands held adversely against office-holder create prescriptive title against all successors.

Assuming that Khaji inam lands are inalienable and impartible, where inam lands are held adversely to the office holder for more than 12 years, the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors also. 1922 P. C. 96; and 42 Cal. 344; Dist. 38 M.L.J. 320 Foll.

So long as the alienation is good for the lifetime of the alienor, limitation commences to run against the successor not from the date of alienation but from the date of the alienor's death. It is otherwise when possession is adverse from the start. [P 204 C 2]

K. Ramnatha Shenoi—for Appellant.

Imamuddin and *Rafiuddin*—for Respondents.

Odgers, J.—The plaintiff brought the suit to establish his right to half share in the properties of one Joram Bi deceased. As to items 3-6 in the plaint schedule, the defence is raised that they originally formed Khaji inam lands and that such lands were in fact inalienable and impartible. The Munsif found that these items were the properties of Joram Bi and were liable to partition and gave plaintiff a decree. This was confirmed on Appeal by the District Judge. Joram Bi had been in possession for 40 years and the District Munsiff held that 1st defendant had failed to show that her enjoyment was permissive. He also held that the Khaji inams were divided among the several members of the Khaji family long long ago with the result that each member or group of members hold separate and defined shares. The District Judge also held that the several branches of the Khaji family were enjoying portions of the plaint items as their separate property. I am by no means certain that these findings are not sufficient to dispose of the appeal on the short ground that the Khaji inam lands have long ago become disannexed from the office and that the possessors have acquired an absolute right subject to any rights of resumption that Government might have. The case has however been argued before us on the law on the ground that Joram Bi's possession cannot be considered to be adverse as the land in question always appertained to the holder of the office and was resumable by him at any time.

The first case cited for the appellant (1st defendant) is *Vidyavaruthi* v. *Balusami Ayyar* (1).

There the possession sought to be declared adverse was continued by a series of leases each valid for the lifetime of the grantors. The possession was clearly permissive. In *Jalandhar Thakur* v. *Jharula Das* (2), it was decided that a person not qualified for an hereditary office had not taken possession of it by appropriating a share of the daily offerings to which he had acquired no title. Each such taking was a fresh actionable wrong. There was here no question of immoveable property or of adverse possession. In *Kamalathammal* v. *Krishna Pillai* (3) all that was decided was that the 1st defendant

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(1) 1922 P.C. 123--44 Mad. 831—48 I.A 302—41 M.L J 346—30 M. L.T. 66—15 L.W. 78—26 C.W. N. 537—20 A L.J. 497—24 Bom. L.R. 629—(1921, M.W.N. 449—3 P.L.T. 245—65 I.C. 161 (P.C.)

(2) [1914] 42 Cal. 244—27 M L J. 100—18 C.W N. 1029 1 L W. 549—16 M.L.T. 210—(1914) M.W.N. 636—12 A.L.J. 1176—20 C L.J. 360—16 Bom.L R. 845—24 I.C. 501 (P.C.)

(3) [1910] 20 M.L.J. 781—9 M.L.T. 73—8 I.C. 998.

had not acquired a right to the office by possession of the lands for over 12 years. It was also held that *Gnanasambanda Pandra Sannadhi* v. *Velu Pandaram* (4) had not over-ruled *Mahomed* v. *Ganapati* (5).

Further reference will be made to those cases. In *Dhanushkotirayulu* v. *Vankayala Vankatarathnam* (6) it was held that Article 144 applies to a case of this sort and that a person in adverse possession of lands annexed to the office of Karnam for over the statutory period acquires a prescriptive title against the holder of the office and his successors following *Neelachalam* v. *Kamarazu* (7) and the Privy Council ruling in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4). With regard to the latter case, the High Court in *Velu Pandaram* v. *Gnanasambanda Pandara Sannadhi* (8) had held that plaintiff's right was not barred as that suit was brought within 12 years of the accrual of the right. The Privy Council reversed this decision on the ground that the respondent Velu was only entitled as heir to his father Nataraja and the latter's claim was barred as he had alienated to a purchaser whose possession was adverse. In *Mahomed* v *Ganapathi* (5) it was held that (p. 280 subject to the law of limitation . . . . . limitation). In this case the plaintiff sought to eject the defendant as holding under an invalid alienation made by plaintiff's predecessor in office. In *Neelachalam* v. *Kamarazu* (7), it was held that the Privy Council ruling in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4) was applicable to lands alienated by the holder for the time being of the hereditary office of Karnam and that possession adverse to the holder of the Karnam's office is adverse to his successors. The law thus seems perfectly clear. I must hold that this case falls under the rulings in *Neelachalam* v. *Kamarazu* (7), *Dhanushkotirayulu* v. *Venkayalu Venkatarathnam* (6) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4). No question of limitation was raised by the pleadings or issues. It has however become necessary to consider the law in the light of appellants' contention that 1st defendants' possession was permissive as to which the District Munsif found there was no evidence; *prima facie* possession is adverse. One case remains to be considered. In *Dhanushkotirayulu* v. *Venkayala Venkatarathnam* (6) reference is made to *Papaya* v. *Ramana* (9) where the decision in the latter case is said to be to the same effect as the decision in *Neelachalam* v. *Kamarazu* (7).

A little difficulty has been caused partly by the brief nature of the report. In *Papaya* v. *Ramana* (9) the 3rd and 4th defendants leased in 1878 land belonging to the Mirasi land of a Karnam's office to the father of plaintiff and this land was alleged to have been wrongfully taken possession of by the defendants 1 and 2. These defendants pleaded that father of defendants 3 and 4 had mortgaged the land to them in 1861 and that the mortgage was still in force. The Munsif found that the mortgage deed dated 1865 was unregistered and lost, not that defendants had acquired a title by adverse possession for 12 years. On appeal it was held that the deed of 1865 was not a mortgage and defendant held under the mortgage of 1861, "admitted by them." The High Court held the alienation (of 1861) by the father of the defendants 3 and 4 though no doubt good for his lifetime could not bind his successor and that no adverse possession had been acquired against his successors as the suit had been brought within 12 years of their accession to office. There the possession did not begin to be adverse till that accession. In the present case the possession is found to have been adverse for a very long time 30 years at least. The decision (Ex. IV) in 1876 can only be applicable in this case as *res judicata* and as such this was not pressed before us.

(4) [1899] 23 Mad. 271—27 I.A 69—10 M.L.J. 29—4 C.W.N. 329—2 Bom.L.R. 597—7 Sar. 671 (P.C.)
(5) [1889] 13 Mad. 277.
(6) [1919] 38 M.L.J. 320—11 L.W. 453—59 I.C. 65.
(7) [1901] 14 M.L.J. 438.
(8) [1895] 19 Mad. 243—6 M.L.J. 39.
(9) [1883] 7 Mad. 85

It is obvious that it cannot operate as such. The only point decided was that the plaintiff in that suit was not entitled to a separate share of the lands, fees etc.. belonging to the office of Khaji. It does not assist us to determine the question in this appeal and is in our opinion irrelevant. The second appeal fails and must be dismissed with costs.

Hughes. J:—This appeal relates only to items 3 to 6 of the plaint schedule. These items form a portion of the Khaji inam. The members of the Khaji family divided the inam lands amongst themselves many years ago and since then the members of the family had been in possession of separate portions of the Khaji inam. Ex. III shows that the inam was divided half a century before 1861 as the result of this division, Akkumesh, husband of Jorambi, was enjoying items 3 to 6 and after his death his widow Jorambi was in possession of them for more than 30 years. Joram Bi died in 1919 without issue and the plaintiffs' case is that plaintiff and respondents 1 and 2 are the heirs but defendants are preventing the plaintiff from getting his share and hence the suit. The defendants do not dispute the right of plaintiff to a half share of the other properties of Joram Bi but they maintain that since the 1st defendant is the Khaji having been appointed to that office after the death of the previous Khaji, the 1st defendant is alone entitled to items 3 to 6 as they are inam lands and only the person who holds the office of Khaji has a right to the lands and patta is issued only in his name. 1st defendant claims that the inam lands are inalienable and impartible and he explains the division that admittedly took place by saying that dayadies enjoyed some portions of the lands with the consent of the persons who were doing Khaji service.

In the present case there is no evidence that the possession of Joram Bi was permissive. Assuming then that Khazi inam lands are inalienable and impartible the real question for decision is whether when inam lands are held adversely to the office holder for more than 12 years, the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors. The District Judge has found that the items 3 to 6 became the property of Joram Bi.

The appellant (1st defendant) relies upon the Privy Council case in *Musti VenkataJaganatha* v. *Veerabhadrayya* (10) but the only point decided in that case was that when karnam service lands have been enfranchised the lands are the separate property of the enfranchisee and not subject to any claim for partition by other members of the family. No question relating to adverse possession was considered therein.

The next case quoted by the appellant is the case *Jhalandar Thakur* v. *Jharulo Das* (2) ; but that is not applicable here. In that case it was decided that a person who adversely appropriated a share of the daily offerings due to a Sheba was not thereby constituted a Shebait and every occasion of such wrongful taking was a fresh actionable wrong and so there was no limitation. In 1 Law Weekly, at page 827 there is another case *Chandrakantan* v. *Subbarayudu*. No doubt it is therein stated that even if the plaintiff's alleged joint possession with the office holders was regarded as adverse, this would not give him a title even to a share of the income of the lands and for that position the learned Judges refer to the case at page 549, quoted *supra*. But they found as a matter of fact that his enjoyment was permissive.

In the Privy Council case *Gnansambanda Pandara Sannadhi* v. *Velu Pandaram* (4), it was decided that the sale of the lands, forming the endowment of a certain religious foundation, by one Nataraja was invalid and Velu, the son of Nataraja could not claim to have been entitled to otherwise than as heir to and from and through his father, in whose lifetime the title had been extinguished by lapse of time and adverse possession of the defendant,

(10) 1922 P. C. 96—44 Mad 463—48 I.A. 244—41 M.L.J. 1-34 C.L.J. 16—14 L W. 59—1921 M.W.N. 401—26 C.W N. 302—30 M.L.T. 14—61 I.C. 667 (P.C.)

and consequently Velu's suit was barred.

This Privy Council case was followed in *Neelachalam* v. *Kamarazu* (7). In that case it was decided that in regard to lands alienated by the holder for the time being of the hereditary office of karnam the case of Velu Pandaram is as much applicable as to lands alienated by the holder of the hereditary office of trustee and limitation runs 'rom such date " not only against the alienor but also against his immediate and other successors."

These principles will also apply to the case of alienation by a Khaji who holds office hereditarily.

The case on which the respondent chiefly relies is very much in point. It is *Dhanushkotirayudu* v. *Venkayala Venkatarathnam* 6) In that case it was held specifically that a person in adverse possession of lands, annexed to the office of karnam, for over the statutory period acquires a prescriptive title to the lands as against the holder of the office and his successors. In arriving at that decision, the learned Judges followed the case in *Neelachalam* v. *Kamarazu* (7) and also *Velu Pandaram's* case (4). But they also referred to the case of *Papayya* v. *Ramana* (9) as being to the same effect. This has occasioned some difficulty because in the case of *Papaya* v. *Ramana* (9) it was laid down that that suit was in time as it had been brought within 12 years from the date when the succession to the office devolved on the plaintiffs. It is argued therefore that every successor in office has the right to sue from the date he becomes entitled to possession. This argument, based on *Papaya* v. *Ramana* (9) was in fact placed before the Privy Council in *Velu Pandaram's* case but the Privy Council did not specifically refer to that case and evidently considered it had no application and the reason is obvious when we examine closely the case *Papaya* v. *Ramana* (9). That case is quite consistent with the theory that Art. 144 of the Limitation Act applies. The point is that one has to ascertain when the possession became adverse. The possession in the case of the defendants in *Papaya* v. *Ramana* (9) was traced to a usufructuary mortgage and would not therefore be adverse to the mortgagor but would become adverse to his successor from the date of the death of the mortgagor, in other words from the date when the succession devolved on him. In *Velu Pandaram's case* the possession was adverse *ab initio.*

A similar explanation accounts for the decision in *Mahomed* v. *Ganapathi* (5) in which case also the possession originally permissive under a lease, became adverse only when the successor became entitled to question the disposition of his predecessor, that is at the date of his predecessor's death. The case of *Mahomed* v. *Ganapathi* (5) was referred to in I. L. R. 23 Madras 439 and was considered to be consistent with the view that adverse possession held during the last office-holder's time bars his successors too. In the same case, reference was made to the decision of the High Court in *Velu Pandaram's case* (8) and it was pointed out that the decision might not be reconcilable with the rule so stated and the Privy Council later on reversed the decision in *Velu Pandaram's case* (8).

In fact so long as the alienation is good for the lifetime of the alienor, limitation commences to run as against the successor not from the date of alienation but from the date of the alienor's death.

It is otherwise when possession is adverse from the start.

There is only one other case to which reference need be made as it has been relied upon by the appellant and that is the Privy Council case in *Vidya Varuthi* v. *Baluswami Aiyar* (1). But the decision is against him. It is clear therefore that a lessee has not adverse possession under Art. 144 during the life of the head of the Mutt who granted the lease and if the lessee's possession is consented to by the succeeding head, that consent can be referrable only to a new tenancy created by him and there is no adverse possession until his death.

Applying the principles which appear to be settled by the cases referred to *supra* and specially by *Dhanushkotirayudu* v. *Venkayala Venkatarathnam*

(6) the present case can be easily disposed of. Joram Bi of course was never Khaji and did not hold the land by virtue of the Khaji office nor did her husband before her. Joram Bi held possession of the land adversely for over 30 years, and the fact that she and her husband were members of the Khaji family makes no difference, since only one member of the family could be Khazi and therefore entitled to the inam lands. Since the partition many years ago the various members have held the various portions allotted to them as separate properties and therefore adversely to each other. By this adverse possession Joram Bi acquired title to the land and on her death plaintiff became entitled to half share. I agree with my learned brother that the appeal must therefore be dismissed with costs.

Appeal dismissed.

✱✱ 1924 MADRAS 205

SCHWABE, C. J. AND COUTTS TROTTER, J.

The Secretary, Board of Revenue, Land Revenue and Settlement (Income-tax)—Referring Officer.

v.

B. Muniswami Chetty and Son—Assessee.

R. C. No. 19 of 1922, Decided on 28th August 1923.

(a) Income-tax Act—Losses of assessee in one branch can be deducted from profits.

Where the subsidiary business engaged in, is connected with the main business, and is a proper employment of the assessee's capital or labour, it is, for the purpose of assessment, to be treated as a part of the business of the firm. If the firm in one branch makes a loss, that loss may be set off against the profits made in its head office or other branches.

[P. 206 C. 1.]

(b) Income-tax Act (1918)—S. 9—Expenses for protecting profits from income-tax and for refund of tax are not for earning profits.

Expenditure incurred in employing accountants and lawyers in the matter of a dispute between assessees and Government as to the amount of excess profits duty payable for the year ending March 1920, the year in which Excess Profits Duty Act applied and similar expenses incurred in arriving at the income on which income-tax assessment was made or was to be made cannot be brought into account in arriving at the proper assessment of the income-tax. These monies are expended not for the purpose of earning profits at all but for the purpose of in one case, protecting profits from Government's claim to income-tax and in the other case of getting back from Government the excess profits duty claimed by or paid to the Government in respect of some past period. The amount paid to the Government in the nature of a fine arising out of a matter connected with the business and costs incurred in resisting the imposition of such fine are not charges that could be deducted. [P. 206 C. 1, 2.]

(c) Excess profits Duty Act (X of 1919) S. 20—Costs to find out duty cannot be deducted.

Though the amount of the excess profits duty is to be allowed as a deduction in respect of profits of a business for the purpose of income-tax, the costs of arriving at the excess profits duty cannot be so allowed. Further this has got to be for a specified year and does not apply to any later year. [P. 206 C. 2.]

R. N. Aiyangar and *P. T. Govinda Nambiar* -for the Assessee.

The Government Pleader—for the Crown.

Schwabe, C. J.—This case is referred under the Income Tax Act by the Board of Revenue for the opinion of the High Court The question relates to the assessment for income tax of the firm known as B. Muniswami Chetty and Son, and there are two distinct points referred.

B. Muniswami Chetty and Son carry on a business in piece-goods, the partners in the firm B Damodaram Chetty and P. V. Ramanujam Chetty, Damodaram Chetty having a much larger share. On the facts as now found it is clear that that firm engaged in business with other partners in two other firms, one called the Carnatic Import Company and the other B. Damodaram Chetty & Co., whose businesses were of an allied character in that they dealt in goods similar to those dealt in by Muniswami Chetty & Son. B. Muniswami Chetty & Son had a much larger share in those other two firms, there being in each case a partner with a small share to encourage him to take a real interest in the management of the business. In the year of assessment B. Muniswami Chetty & Son made a profit and the other two firms made a loss. B. Muniswamy Chetty & Son claim that they are entitled, for the purpose of assessment to set off their share of the loss in the other

two firms against the profits made in their own firm. The Crown contends, on the other hand, that they must be treated separately and must pay income-tax on the profits of their firm, and that the only effect of the loss of the other two firms would be that these firms would not have to pay income-tax. In our judgment, the determination of this question depends upon whether it is a fact that the business of B. Muniswamy Chetty & Son is being carried on in part by engaging with partners in the other firms. Where the subsidiary business engaged in, is connected with the main business, and is a proper employment of the assessee's capital or labour, it is in my judgment for the purpose of assessment to be treated as part of the business of the firm. If the firm in one branch makes a loss, that loss may be set off against the profits made in its head office or other branches. Applying that test to this case, I think it is clear that the contention of the assessee is right and that B. Muniswami Chetty & Son are entitled to have their assessment arrived at by taking into account the loss made by them in the other two firms.

They claim also in arriving at their profits for the tax year, 1921-1922 to deduct certain expenditure incurred by them (*a*) in employing accountants and lawyers in the matter of a dispute between them and Government as to the amount of excess profits duty payable by them for the year ending March 1920, the year in which the Excess Profits Duty Act applied and (*b*) similar expenses incurred by them in arriving at the income on which income-tax assessment was made or was to be made. These expenses are perfectly proper expenditure by the company of the company's money but whether they can be brought into account in arriving at the proper assessment of the income-tax must depend upon the construction of S. 9 (2) (IX) of the Income-tax Act of 1918 which runs as follows: "Such profits shall be computed after making the following allowances in respect of sums paid, namely in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits." In my judgment, these monies were expended not for the purpose of earning profits at all but for the purpose of, in one case, protecting profits from Government's claim to income-tax and in the other case of getting back from Government the excess profits duty claimed by or paid to the Government in respect of some past period. The words of this rule are much the same as the words of the rule in schedule D. of the Income Tax Act of 1918 in England and of the rule in the Income Tax Act current in New Zealand, and there have been cases both in England, and in the Privy Council on appeal from New Zealand, which indicate the view of the English Courts which is to the effect that these and similar words are to be construed strictly, by ascertaining whether or not the expenditure was for the sole purpose of earning profits. So the amount paid to the Government in the nature of a fine arising out of a matter connected with the business and costs incurred in resisting the imposition of such fine were held in *Warl & Co. Ltd.*, v. *Commissioner of Taxes* (1) not to be charges that could be deducted. In *Commissioners of Inland Revenue* v. *Wornes & Co., Ltd.*, (2). their Lordships of the Privy Council held that no deduction could be made for monies spent by a company in printing and distributing literature directed against prohibition which expenditure was admitted to be in the interest of the preservation of the assessee's trade. We were referred to the Excess Profits Duty Act X of 1919, S. 20 and it was suggested that because the amount of the excess profits duty is to be allowed as a deduction in respect of the profits of a business for the purpose of incometax, therefore the costs of arriving at the excess profits duty must also be so allowed. It is clear on an examination of the section that this has got to be for a specified year and does not apply to any later year nor do I think that apart from that limitation the

(1) [1919] II K. B. 444.
(2) [1923] A. C. 145.

fact that the excess profits duty is by statute allowed to be deducted would make the costs arriving at the excess profits duty also a deduction. If the statute had desired to make it so, it would have been quite simple to have stated that the excess profits duty and any money expended in arriving at the right amount of excess profits duty shall be a deduction for the purpose of income-tax. The section does not say so and I see no reason why it should be implied.

I have come to the conclusion that on the first point the contention of the assessee is right and on the second wrong. The first point is the main and the more important point and I think that the assessee must have his costs of this reference except in so far as they have been increased by adding a claim on the second point. Costs in this case will be taxed on the Original Side scale.

I think that it would be desirable at some future time on a suitable occasion with the assistance of the Vakils' Association if they choose to assist in this matter, to consider the question of the taxation of costs, with a view to framing some rule of establishing some definite practice in such matter.

Coutts Trotter, J.—Now that we have unambiguous findings, I do not entertain the slightest doubt about the first point which seems to me almost too plain for discussion. Indeed when Mr. Ananthakrishna Iyer came to develop the argument it was clear that the only way in which he could contend for the claim made by Government was by arguing that under S. 9 (1) of the Income-tax Act of 1918 the profits of any business carried on by him, that is, the assessee, have to be expanded into profit of any business carried on by him solely so as to exclude any business that he may carry on in conjunction with others. Here we have a company part of whose business is to hold in a share in a separate business. It takes this share in the course of its own business and it receives whatever profits it receives or loses whatever it losses in the course of its own business.

With regard to the second point, I feel more doubt. The section occurs in many Acts of many countries and Mr. Justice Rowlatt, a Judge of great experience and learning in Revenue matters, has frankly said that he does not see his way to give a general definition of the true construction of the section, but that he is content to say about each case as it comes along whether in his view it falls within the section. This seems to me a difficult case, more difficult than the one which that learned Judge had to deal with. I do not think that the expenses incurred here can be said, in any sense that a plain man would understand, to be correctly described as expenditure incurred for the purpose of earning profits It seems to me that the expenditure was incurred after the profits had been earned. That appears to be sufficient to take the case out of the section.

I agree to the order as to costs.

1924 MADRAS 207

KRISHNAN, J.

Kurshit Kathumby agent Mohomed Ismail Sheriff Saheb—Petitioner.

v.

Hyder Khan Sahib and others—Respondents.

Civil Revision Petition No. 709 of 1922, Decided on 26th March, 1923. to revise the finding of Dt. Court of North Arcot, at Vellore, in O. S. 19 of 1921, D/-21st August 1922.

Court Fees Act, S. 7 (4)—Suit by Mahomedan co-sharer for partition and possession.

A suit by Mahomedan co-sharer, who sues other co-sharers for partition and possession of her share of her deceased father's properties, and alleges that she is in possess on of some of the items as indicative of her joint possession in law with the other co-shares of the deceased's estate, falls under Art. 17 clause (6) and under S. 7 clause (5). 43 Mad. 396; 44, I, C. 216 Foll. [P. 208 C. 1.]

C. Rajah Iyer—for Appellant.

C. Venkatasubramiah—for Respondents.

Judgment.- I think the order of the lower Court cannot be supported. It

has been laid down in *Gill* v. *Varadaraghavayya* (1) that to a suit for partition of immoveable property when the plaintiff is not a member of a joint family so as to make S. 7 clause (4) of the Court Fees Act apply, but alleges that he is in joint possession, the article applicable is Art. 17 clause (6). The present case is one of a Mahomedan co-sharer who sues her other co-sharer for partition and possession of her share of her deceased father's properties and she alleges that she is in possession of some of the items as indicative of her joint possession in law with the other co-sharers of the deceased's estate. There is no case here of her being excluded from any part of that estate by her co-sharers or to put in another way her being ousted from possession of any part of it. In such a case as this the suit is one for partition and possession of one's share by one having joint possession of the estate taken as a whole. It is clear from 43 Mad. 396 and the cases cited there one of which, in *Ahmuddin Tamijuddin* v. *Amiruddin* (2), is the case of Mahomedans, that the suit falls under Art. 17 clause (6) and not under S. 7 clause (5).

The order of the lower Court is set aside and it is directed to restore the case to its file and to dispose it of according to law. Costs here will abide and follow the result.

Order set aside.

(1) [1920] 43 Mad. 396—38 M.L.J. 92—11 L. W 174—(1920) M.W.N. 124—27 M.L.T. 146—55 I. C. 517
(2) [1916] 44 I. C. 216.

✱ ✱ 1924 MADRAS 208

SCHWABE, C. J., AND COUTTS TROTTER, JJ.

The Secretary Board of Revenue, Land Revenue and Settlement (Income Tax)—Referring Officer.

v.

R. M. A. R. R. M. Arunachalam Chettiar—Assessee.

R. C. No. 20 of 1922 Decided on 25th September, 1923.

Income-tax Act (VII of 1918) S. 3 (2) (VIII)—Profits made by variation of exchange by sending of remittance by a banker of Indian currency to Penang are assessable to income-tax.

Where a Firm carrying on business as a banker and money lender in Madras and elsewhere remitted to Penang sums aggregating over 4 lacs of rupees in the year of assessment within a period of 4 months on eight occassions and retransferred them to Madras on 13 occassions in 4 months and the assessee made a considerable profit on the transactions owing to the fluctuations in exchange between dollars and rupees.

Held the Firm is liable to be assessed to income-tax on that profit as such profit is not a receipt of a casual and non-recurring nature.

Where the transactions are outside the scope of an ordinary business of the assessee it is often a difficult question to decide whether or not they are to be treated subject to income-tax. Profits may be made by the realisations of security or by sale of land or moveable property and, in the case of one man they may be merely successful realisations of assets or alterations of investments while in the case of another man they may form part of the income of the business. Though in most cases an isolated transaction does not fall to be chargeable, the mere fact that it is an isolated transaction does not take it out of the category of chargeable property. [P. 209 C. 2]

C. V. Ananthakrishna Aiyar — for the Crown.

A. Krishnaswami Aiyar and M. Pathanjali Sastry—for Assessee.

Schwabe, C. J.—The assessee is Nattukottai Chetty carrying on business in Madras and elsewhere as banker and money-lender. In the year of assessment, he remitted from Madras sums aggregating over 4 lakhs of rupees to Penang, such sums being invested there in Straits Settlements dollars and ultimately reconverted into rupees and remitted back to Madras. The remittances were made on eight occasions within a period of four months in 1919 and the retransfer to Madras was on thirteen occasions covering a period of four months from the end of 1920 to the beginning of 1921. Owing to the fluctuations in exchange, which varied between 83 and 175 rupees per 100 dollars, the assessee made a profit of a considerable amount on the transactions. He has been assessed to income tax on that profit, and the question referred to this Court is whether he has been correctly assessed. Under S. 51 (1) of the Income Tax Act which was then in force, any question which

has arisen with reference to the interpretation of any of the provisions of this Act may be referred to the High Court. This action probably gives wider powers than S. 66 of the Indian Income Tax Act of 1922, the consolidating Act now in force, which limits the references to the High Court to questions of law. It is not, however, necessary to consider the exact meaning of the words of these sections because, the facts having been found, the question whether or not they bring the income within the reach of any particular section of the Act is a question of law.

S. 3 of the Act applies to all income from whatever source it is derived, if it accrues, or arises, or is received in British India. Certain exceptions are set forth in S. 3 (2) and among those exceptions is to be found (VIII) "any receipts not being receipts arising from business or the exercise of a profession, vocation, or occupation which are of a casual and non-recurring nature." By the combined effect of Ss. 5 and 9 income derived from business is chargeable to income tax in respect of the profits of any business carried on by the assessee. In the United Kingdom, income-tax is payable on the balance of profits or gains derived from carrying on a trade or business. I can find no distinction in this matter between the laws of the two countries. The English Acts have not got the exception in so many terms of receipts of a casual and non-recurring nature; but, as by the words of S. 3 (2) VIII of the Indian Act, receipts of a casual and non-recurring nature are only exempted when they are not receipts arising from business, the question to be considered both in India and England is whether a particular receipt is properly brought into account or omitted in arriving at the profits of a business. If the transactions are business transactions and result in a profit or loss made in the carrying on of the business, they must be brought into account; otherwise not. The questions which have arisen for decision have been whether particular transactions form part of a business carried on by assessee. They need not be part of some already established business but they must together form a business. If the transactions form part of the original business of the assessee the profits or losses on them must, of course, be brought into account. But where the transactions are outside the scope of the ordinary business of the assessee it is often a difficult question to decide whether or not they are to be treated subject to income-tax. Profits may be made by the realisations of security or by the sale of land or moveable property and, in the case of one man they may be merely successful realisations of assets or alterations of investments while in the case of another man they may form part of the income of a business. To give a simple illustration a Barrister might buy a picture and at a later date when the works of the particular artist were in demand, sell that picture and realise a profit. No income tax would be payable on this profit. If a picture dealer bought a picture and on the same events happening sold it at a profit, that profit would be a profit earned in his business and would be liable to income-tax. So too, profits made on an isolated speculation are not liable to income-tax but those made in speculation of a similar kind as a part of business would be liable. A difficult question may, however, arise as to whether the transactions are of such frequency as to amount to carrying on a business. The distinction is well illustrated by the cases of *California Copper Syndicate Company Ltd.* v. *Harris* (1) and *Hudson's Bay Co.* v. *Stevens* (2). In the former a company was formed for the purpose of acquiring and reselling mining property and also for working such property. It acquired and worked various properties and then resold the whole at a profit, and it was held that such profit was liable to income tax and Lord Justice Clark Macdonald in the course of his judgment subsequently approved by the Privy Council in *Commissioners of Taxes* v. *Melbourne Trust Company* (3) said "The question

(1) 5 Tax Cases 159.
(2) 5 Tax Cases 424.
(3) 1914 A. C. 1001—84 L. J., P. C. 21—111 L. T. 1040—30 T. L. R. 685 (P. C.)

to be determined being is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit making." In the latter, a company received by grant from the Crown and as consideration for surrender of their Charter large tracts of land and then proceeded over a period of time to sell that land in small lots and it was held that the profits on these sale were not liable to income-tax, the sales being merely realisations of assets, the company not carrying on a trade in buying and selling lands. In *Beynon Company Ltd.*, v *Ogg* (4), a company whose ordinary business was that of coal merchants, Insurance Brokers and Agents of colliery companies purchased on its own account as a speculation 250 Railway Coal Trucks and subsequently got rid of them at a profit. It was held that the profit was made in the operation of the company's business. It was pointed out by Sankey, J., that though in most cases an isolated transaction does not fall to be chargeable, it was not possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable property and it was necessary to look at the number of waggons bought, the amount invested and how they were sold, and, in fact, to look at the whole circumstances to say whether the assessee had embarked on the purchase of Railway waggons as part of his business.

Turning to the facts of this case, the assessee was a dealer in money and had by reason of his dealings with the Straits Settlements facilities at hand for dealings in exchange between Madras and the Straits Settlements. He had at Penang agents, themselves bankers who were in the habit of collecting for him outstandings in his money-lending business, and as and when required remitting them to India and in the process converting dollars into rupees. During the period in question in this case, he got regular information by letter and cable from these agents as to the movements of exchange in the Straits Settlements. He sent large sums of money extending over a period of four months. At first the market went against him and he sent increasing quantities of rupees, no doubt, with a view to averaging the cost of the dollars. The dollars were by arrangement with the agents left on deposit carrying interest, a fact not in itself conclusive and when he got them back, by reason of the increase in the value of the rupee he was able to realise by degrees an increasing profit. Taking all these facts into consideration, I think that the right inference to be drawn is that in this case those dealings in exchange had become part of the assessee's banking business, and I think it too that even looked at apart from his ordinary business, he did not enter into these transactions as an isolated investment of capital or speculation but as a business of a dealer in exchange.

On these grounds, I hold that the decision of the Commissioner is correct. The assessee must pay the costs of this reference.

Coutts Trotter, J:—I agree.

(4) 7 Tax Cases 125.

✱ 1924 MADRAS 210

KRISHNAN AND ODGERS, JJ.

M. Surayya—Decree-holder—Appellant.

v.

S. Venkatratnam — Judgment-debtor—Respondent.

A. A. A. O. No. 56 of 1922, decided on the 2nd October, 1923, against the order of the Addl. Sub. J., Rajahmundry, in A. S. No. 117 of 1921.

Limitation Act, Arts. 182 and 181—Application after suits to remove objections of claimants is revival of prior application.

When an execution application is brought and properties are attached in execution of that application if any obstacle is placed in the way of the properties being sold and assets realised for the purpose of meeting the decree debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed

by Art. 182 of the Limitation Act, but is in the nature of a revival of the original execution application and Art. 181 of Limitation Act will apply. This principle will apply even in the case of an attachment before judgment though it had not been followed by an application for execution of the decree after the decree was passed. (1907) 31 Mad. 71. (1919) 40 M. L. J. 1 Foll. [P. 311 C. 2]

G. Lakshmanna and V. Viyanna—for Appellants.

T. S. Raghunatha Rao—for Respondents.

Judgment.—This case raises a question of limitation in execution proceedings. The appellant before us brought a suit against the widow of one Narayya on a promissory note executed by the said Narayya and while the suit was pending he obtained an order of attachment before judgment of certain properties belonging to Narayya in the hands of the widow. He then obtained a decree against the assets of Narayya in the hands of the widow. 8 days thereafter a petition seems to have been put in by one Peramma claiming those properties to be hers and to be not attachable for the debt of Narayya. That claim petition was allowed. Thereupon the decree holder had to bring a suit to contest the order in the claim proceedings and having brought the suit he finally succeeded in getting a decree only on the 8th December 1920 that the properties belonged to his judgment debtor. In the meanwhile, it is true that he took no steps to execute the decree. He then put in the present application, which is now before us, on the very day that is, the 8th December, when the decree in the second suit was passed in his favour, to bring to sale the properties he had already attached in his application before judgment. That application was allowed by the District Munsif to the extent of the properties which he found were actually attached by the order of attachment before judgment and was dismissed as regards the rest of the properties. The Subordinate Judge on appeal ruled that, even as regards the properties taken in attachment before judgment, the application was barred by limitation as the application was made more than three years after the date of the decree.

The question thus before us is whether the view taken by the District Munsif that the present application is an application which could be treated as one for reviving the execution proceedings already commenced can be supported or not. It is clear from the authorities that, when an execution application is brought and properties are attached in execution of that application if any obstacle is placed in the way of the properties being sold and assets realised for the purpse of meeting the decree debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by Art. 182 of the Limitation Act, but is in the nature of a revival of the original execution application and Art. 181 of the Limitation Act will apply. If we apply that principle to the present case, there can be no doubt that the District Munsiff's view is correct and that the application by the appellant before us to sell the properties already attached is entirely within time. That this is the principle applicable as regards an execution application put in after the decree is not disputed by the other side because the authorities are all in favour of that view: *Chalavadi Kotiah* v. *Poloori Alamelanna* (1) and *Rameshwar Singh* v. *Homeshwar Singh* (2). It is however contended by the learned Vakil for the respondent before us that that principle will not apply in the case of an attachment before judgment unless it had been followed by an application for execution of the decree after the decree was passed. We are unable to accept that contention. Under the Code the attachment before judgment enures to the benefit of the decree-holder when the decree is passed so that it is no longer necessary to attach the property. vide O. 38 R. 11 of the Civil Procedure Code. The

(1) [1909] 31 Mad. 71—18 M.L.J. 46—3 M.L.T. 329.

(2) [1919] 48 I. A. 17—19 A.L.J. 26—1 P.L.T. 731—40 M.L.J. 1—59 I. C. 636 (P.C.)

principle applicable in the case of an application for execution after attachment applies equally to the case of an attachment before judgment, because, after all, the position is exactly the same whether the attachment was before judgment or after the decree, when a man is prevented from getting the fruits of his decree because of somebody else's improper obstruction and his claim has been wrongly decided and he has been obliged to bring a second suit to put the matter right. We think that the principle clearly applies to the present case and, therefore, we hold that the application is not barred by limitation in this case.

In the result, we set aside the order of the Subordinate Judge and restore that of the District Munsiff with costs here and in the Court below.

Order set aside.

✱ 1924 MADRAS 212

SCHWABE C. J. AND ODGERS. J.

P. Ayyannah Cheity — Defendant Appellant.

v

P. K. Subramania Iyer—Respondent—Plaintiff.

O. S. A. No. 81 of 1922, Decided on 16th July 1923, against the judgment of Coutts Trotter, J., D/-23rd August 1922.

Principal and agent—Commission on sale ordinarily means on a completed sale.

Where one of the terms of a contract between a vendor and purchaser, which provided that the commission payable to a commission agent should be paid by the purchaser and not by the vendor was that the whole contract was subject to the title being approved by a vakil.

Held that the contract to pay commission by the purchaser was also subject to the approval of the title by the vakil. [P 313 C 1]

Where the plaintiff says, "the defendant engaged me for the purpose of purchasing a house. The terms of the engagement were that I should negotiate for the purchaser at a commission of 3 p.c. on the purchase price."

Held in the absence of words to the contrary, "purchasing a house" means the completion of the purchase of that house. It does not mean a conditional contract, or even an unconditional contract, for the purchase and sale of it. In the same way "the purchase price" means the price paid and not the price agreed to be paid conditionally or unconditionally 4 T.L.R. 541 Foll. [P 212 C 2]

U. Radhakrishnayya — for Appellant.

Md. Ibrahim Saheb—for Respondent.

Schwabe, C. J.—This is an appeal from a judgment of Coutts-Trotter, J. in which he found in favour of a Commission Agent that he had earned his commission.

All these cases—and there have been a very great number of them in England—depend, in the first place, on what is the contract between the parties. Where you have a contract in plain terms stating when commission is payable and when it is not, there is no difficulty: but, where you have a contract containing terms which may bear more than one interpretation, there have been many cases where difficulties have arisen. Different Judges have taken different views and have left to some extent the law not as clear as one would wish to find it: but, in my judgment, one gets very little assistance from examining those authorities. What one has to do is to take the contract and the surrounding circumstances and see what was the intention of the parties to be deduced therefrom.

In this case the contract was verbal and it is stated by the plaintiff in his evidence, but the defendant has not the opportunity of stating his version because he died before the case was heard. The plaintiff says, "The defendant engaged me for the purpose of purchasing the house. The terms of the engagement were that I should negotiate for the purchaser at a commission of two per cent. on the purchase price." In the absence of words to the contrary, "purchasing a house" means the completion of the purchase of that house. It does not mean a conditional contract, or even an unconditional contract, for the purchase and sale of it. In the same way, "the purchase price" means the price paid and not the price agreed to be paid conditionally or unconditionally. For that proposition, there is direct authority in the case

of *Peacock* v. *Freeman* (1), where Lord Esher, Master of the Rolls said, "Land could only be said to be sold when the conveyance was complete, not when there was a mere contract to sell," and, interpreting the contract, Lord Justice Lindley said that the meaning of the contract was that if a sale were effected commission should be payable and that, though there had been acceptance of the terms of the contract itself, the commission being payable on sale, none was payable where the sale fell through.

In this case the evidence goes a little further, because the plaintiff swears that he asked his principal when he was going to get his commission, and the principal said. "It is written in the agreement. Why are you afraid?" referring to an agreement witnessed by the plaintiff between the proposed vendor and his principal. It was one of the terms of that contract that the title to be adduced by the vendor should be submitted to Mr. Radhakrishnayya and that his decision was to be final as to whether the title was good or bad, and the whole contract between the vendor and the purchaser was subject to the title being approved by Mr. Radhakrishnayya. That contract also included a term as between the vendor and the purchaser that the commission payable to the plaintiff should be paid by the purchaser, not by the vendor, and it is quite clear that as between the parties to that contract that commission was payable after the thing went through and the purchase money was paid over. If we have to refer to that contract as evidencing the terms of the contract between the plaintiff and his principal, it is impossible to take part of that contract, and it follows, in my judgment, that that contract too was subject to the approval of the title. I am inclined to the view that it is not necessary to go to that contract. One has to look at the terms of the varbal contract given in evidence by the plaintiff and to interpret them; and I interpret them to mean that he was to have commission on the completion of the sale. Any other interpretation would lead to a result which would be most improbable. Why should the principal agree to pay a heavy commission dependent on the amount of the purchase price for the settling of a price as between him and somebody who has no title or whose title is such that his Vakils advise him not to become the purchaser? I should want very clear words in a contract to make me find that the intention of the parties was that the commission should be payable by an intending purchaser whether he actually became the purchaser or not, and I find no such words here.

The learned trial Judge in this case relied on the authority of *Fisher* v. *Drewett* (2). That case purported to follow *Green* v. *Lucas* (3). On an examination of those cases, an examination which has taken place many times since in other cases, it is clear that they were determined by the interpretation of the actual words of the contracts in those cases, and in both of them it was held that the intention of the parties was that the commission was to be earned on the introduction of a person who was accepted as a lender or as a purchaser by the principal. One of them *viz.*, *Fisher* v. *Drewett* (2) is also an illustration of another principle which is of universal application in cases of this kind, namely, that the principal is bound to pay commission if the agent has introduced some one ready and willing to enter into a contractual relationship with him but the matter falls through owing to the default of the principal. I agree with the trial Judge that the case in *Clack* v. *Wood* (4) is distinguishable from this case and does not help the appellant.

This is not, in my judgment, a case of an agreement to pay commission in any event or a case in which there has been any sort of default on the part of the principal. Under those circumstances, in my judg-

(1) 4 T. L. R. 541.

(2) 39 L. T. 253 48 L. J., Ex. 32—27 W.R. 12.

(3) 33 L.T. 584.

(4) 9 Q. B. D. 276—47 L. T. 144—30 W. R. 931.

ment, the plaintiff entirely failed to make out a case for payment to him of the commission in the events that happened. This appeal therefore be allowed and judgment entered for the defendants, with costs here and below.

Odgers, J.—I agree. As the contract is not in writing and as the defendant is dead, we are left to infer the terms of the contract from the evidence of the plaintiff alone. I agree with my Lord in inferring from that evidence a contract that commission was only payable on the actual purchase of the house in Memorial Hall Street, and that 'purchase' means a completed conveyance and payment of a purchase price within the meaning of the decision in *Peacock* v. *Freeman* (1). As my Lord has said, these contracts for payment of commission are dependent on the circumstances and the expressions used in each case. I think, were it necessary to do so, a very strong deduction can be drawn against the respondent's case from the fact that he attested exhibit A, the agreement for the sale, in which it is provided that the vendees are to pay his brokerage of 2 per cent. The words in paragraph 7 of the agreement that 'the commission is to be paid to Mr. P. K. Subramania Iyer who brought about this agreement are strongly relied upon by the respondent: but, as the agreement makes purchase of the house subject to the title being approved by the purchaser's Vakil, it is to my mind perfectly clear that the commission agent knew of those terms being incorporated in the agreement and that the incorporation of them goes very strongly to show that those were actually the terms upon which, if at all, he is to be paid. I cannot see any reason for the presence of paragraph 7 in that agreement if the commission agent's work was all over and done by the time that agreement was entered into.

For these reasons, I agree that the appeal should be allowed with costs here and below.

Appeal allowed.

1924 MADRAS 214

SCHWABE, C. J., AND KRISHNAN, J.

Aburubammal—Garnishee — Appellant.

v.

The Official Assignee of Madras—Respondent.

O. S. App. No. 111 of 1922, decided on the 27th August, 1923, from the order of Coutts Trotter, J., D/- 11th September 1922.

Presidency Towns Insolvency Act, S. 52—"True owner" includes the owner of an equitable interest and there can be reputed owner of that interest—Insolvent must be reputed owner with consent of true owner.

The words "true owner" include the owner of an equitable interest and there can also be a reputed owner of that interest and that reputed owner can be the insolvent himself, that is the legal owner of the property. 39 Mad. 250 ; 25 Mad. 406 ; and 11 A. C. 426 Foll. [P. 215, C. 1]

It is essential for the section to apply that insolvent should at the commencement of the insolvency be the reputed owner. A letter demanding return of the thing in dispute from the insolvent under threat of criminal proceedings if not complied with is a sufficient determination of the consent.

Per Schwabe, C. J.—Consent is determined by the instructions to the Vakil to send the letter and the sending of that letter by him. [P. 216, C. 1]

(b) *Evidence Act, S. 114 — Letter posted to right address is presumed to be received.*

The presumption is that a letter which is proved to be posted and posted to the right address is in fact received by the receipient. [P. 215, C. 2]

Sanjiva Kamath—for Appellant.

V. *Varatharaja Mudaliar*—for Respondent.

Schwabe, C. J.—By an agreement in writing dated the 2nd August, 1921 the insolvent purported to give to the garnishee his motor car as security for an advance by her to him of Rs. 3,000. It was a term of the agreement that the insolvent should have the right to use the car and should keep it in good order, and deliver it up on demand. He also agreed that, if he exercised any acts of ownership over the car, he should be criminally liable, a stipulation which can have no effect in law.

The other relevant facts are that the loan was also secured by a joint promissory note of the insolvent and another renewed on November 9, 1921 to the end of January, 1922, and that by a letter dated February 10, 1922

from her Vakil, she demanded from the insolvent under threat of criminal proceedings that the car should be returned to her. The commencement of the insolvency was in May. 1922.

On these facts it is contended by the Official Assignee that he is entitled to the car free from any charge in favour of the garnishee as, being at the commencement of the insolvency with the consent of the true owner in the possession, order and disposition of the insolvent in his trade or business and therefore under S. 52 of the Presidency Towns Insolvency Act, the property of the insolvent, divisible amongst his creditors; and it has been so held by Coutts Trotter, J.

Now the legal owner of the property throughout was the insolvent, but the garnishee was the owner of an equitable interest in the property. It has been held on the true interpretation of S. 52 and of the same words in the English Bankruptcy Acts that the words " true owner " include the owner of an equitable interest, and that there can also be a reputed owner of that interest and that reputed owner can be the insolvent himself, that is the legal owner of the property, see *The Mercantile Bank of India, Ltd., Madras* v. *The Official Assignee of Madras* (1) following the judgment of Bhashyam Aiyangar, J., in *Punithavelu Mudaliar* v. *Bhashyam Aiyangar* (2); and see the English cases set out in Williams on Bankruptcy, 12th Edition, at p. 217. In *Colonial Bank* v. *Whinney* (3) it was held that where there was an equitable mortgage of shares by the deposit of the share certificate and a bank transfer, the registered share-holder remaining the legal owner, the depositee got an equitable interest and that another person could be the reputed owner of that equitable interest. The result is that in this case the garnishee must be taken to be the true owner of the equitable interest in this car conferred by the agreement of August 2, referred to above: but the car being left in the possession of the insolvent with power to use it to all appearance as though it were his own he had become the reputed owner. But it is essential for the section to apply that he should at the commencement of the insolvency be the reputed owner with the consent of the true owner. Now the question is whether the true owner was at that time consenting or not to the reputation of ownership to the reputed owner and that is a question of fact. In this case the letter of February 10, 1922 is in very plain language: "Under instructions from Mrs. Aburubammal I call upon you to forthwith return the car which has been given as security for the amount you have borrowed from her and which you have taken promising to return when demanded. You have not returned the car when demanded by her. Please take notice that, if the car is not sent at once, criminal proceedings will at once be instituted against you." I should infer from the terms of that letter that there had been a previous demand made verbally by the garnishee herself. But, however that may be, there is in this letter a very definite demand for the return of the car. The evidence is that that letter was posted, and it is quite clear that it was so posted because a certificate from the post office to that effect is produced before the Court. It is suggested by the learned Judge that it is possible that that letter was not delivered to the insolvent and that it is possible that, although not delivered, it did not come back to the Dead Letter Office through what the learned Judge speaks of, as the vagaries of the Madras Post: but the insolvent was called as a witness and he did not deny the receipt of that letter, though it is true he was not asked whether he had received it or not: and I fail to see how the learned Judge was justified in coming to the conclusion on that evidence that it has not been received, because the presumption is that a letter which is proved to be posted and posted to the right address is in fact received by the recipient. Speaking entirely for myself, I have always looked upon, and shall always look upon with the gravest suspicion the evidence of a

(1) [1916] 39 Mad. 250—35 I.C. 942.
(2) [1902] 25 Mad. 406—12 M.L.J. 282.
(3) L.R. 11 A C. 426—56 L J. Ch. 43—55 L.T. 362—34 W.R 705—3 Morrell 207.

man who comes to Court and says that he has not received the really important letters in the case, because although it is possible, I should require something more before I should be ready to find that the ordinary course of events has been departed from in so convenient a way. I must therefore find that that letter was in fact received. If it was received there can be no doubt in my mind that there was a determination of the consent of the true owner at that date. I should add that in my view even if that letter was not received I should incline to the view that the consent was proved to have been determined by the instruction to the Vakil to send that letter and the sending of that letter by him. It is possible that after that date that consent was in some way renewed and I confess that I should like to have a very much more clear explanation than I have got why nothing was done in the matter between February 10, and May. The garnishee gives evidence, and a considerable body of evidence, that she took most active steps thereafter to take possession of the motor car and to deal with it as her own, but that evidence is not believed and we are not in a position to do anything else than to accept that learned Judge's view, that it was not acceptable evidence. But he does not hold that after February 10, there was any act by her showing consent to further possession by the insolvent. nor do I think we ought so to find. If the insolvent had come into Court and stated, "I got that letter but after that date the lady came to see me and she said 'very well, go on using the car while I find a purchaser'" or something of that kind. that would be sufficient to say that this letter was not a final and conclusive withdrawal of consent. But I can find nothing at all in the evidence to amount to anything of that kind. That being so, I think, we must take that letter, demanding the return of the car under threat of criminal proceedings if not complied with, as a sufficient determination of the garnishee's consent.

In these circumstances this appeal must be allowed. In the ordinary course an order would be made directing the return of the car by the Official Assignee to the garnishee, he of course, if so advised, being entitled to redeem it as representing the insolvent on payment of Rs 3,000 and interest thereon at the promissory note rate and costs. We are, however, informed that the Official Assignee has spent money on the car during the time in which it has been in his possession on repairs or improvements and that it is still worth less than Rs. 3,000. He is, therefore entitled to a first charge, for which he has spent, on the car. Probably the best course to adopt would be that he sells the car and deducts from the sale price the amount spent by him on repairs and hands over the balance to the garnishee who will be entitled to prove as an unsecured creditor for any balance due to her. If the garnishee desires the car it is open to her to pay the amount spent by the Official Assignee on repairs and improvements of the car and have the car. She must have her costs here and below. She must elect which course she will adopt within 14 days of the Official Assignee informing her of the amount of his expenditure. There will be liberty to apply.

Krishnan, J.—It is clear from the authorities that have been noticed in the judgment of the learned Chief Justice that in S. 52 (2) (*c*) the words "true owner" include the owner of an equitable charge like the one which the garnishee has over the motor car in this case. It is also clear that the person who is really the owner of the equitable charge, can be the reputable owner of the equitable charge and that S 52 (2) (*c*) will apply to such a case as that. But there is another term in the section which has to be considered before we can apply it to the facts of this case, and that is that the car should have been in the possession of the reputed owner, in this case the insolvent, with the consent and permission of the true owner, *viz.*, the garnishee, at the date of the insolvency. By the letter of February 10, 1922 that has been referred to by the learned Chief Justice it was clearly intended to put an end to the consent which the garnishee had originally

given to the insolvent keeping possession of his car and that that letter was posted to the right address there can be no doubt because there is the certificate of posting produced, and the presumption in law is that the letter reached the hands of the addressee, who is the insolvent in this case. The insolvent, when called as a witness did not deny the receipt of the letter, neither side having put the point to him, thus the presumption remains, and we must take it, that the letter reached the hands of the insolvent before the date of the insolvency. That of course determines the original consent that had been given by the garnishee, the true owner. I do not propose to express any opinion on the question whether, when such a withdrawal of consent is not communicated to the person from whom the consent is withdrawn, such withdrawal will be effective or not, for that is a more difficult question to decide and it does not require decision in this case. I am in agreement with the learned Chief Justice that the letter was actually received by the insolvent, and that being so, the one essential condition of the section that the reputed owner must at the commencement of the insolvency have had possession or disposition of the article in question with the consent and permission of the true owner fails. If S. 52 (2) (*c*) does not apply, then it is quite clear that there is no other ground on which the Official Assignee can be allowed to take this car free from the charge created by the insolvent. I therefore agree to the order proposed by the learned Chief Justice in this case.

Appeal allowed.

✱✱ 1924 MADRAS 217

OLDFIELD AND DEVADOSS, JJ.

P. Gnanamma and another—Defendant—Appellants.

v.

K. Krishna Reddi and others—Decree holders and Auction purchasers—Respondents.

A. A. O. No. 149 of 1922, decided on the 15th March, 1923, against the order of the Dt. Court, Nellore, D/- 28th January, 1922.

(*a*) *Civil P. C., O. 21, R. 90—Evidence taken and finding given regarding proper publication before actual sale are not binding on any party.*

The Code does not provide for any enquiry into the validity of the publication of proclamation, until after the sale has been held. If the Court holds one, it must be regarded as doing so for its own satisfaction. The finding therefore, that there was the proper publication of the sale proclamation is not *res judicata* and the Court is not justified in refusing to take evidence and adjudicate on it after the sale. [P 218 C 2]

(*b*) *Civil P. C., O. 21, Rr. 54 (2) and 67—Publication of sale at Collector's Office is necessary even in the case of enfranchised* shrotriem *village.*

Publication of sale at the Collector's Office is requisite under O. 21, R. 67 read with R. 54 (2) not only in the case of ryotwari land but also in the case of enfranchised *shrotriem* village [P 219 C 2, P 223 C 1]

(*c*) *Civil P. C., O. 21 R. 90—Bidders may legally combine not to bid over a certain figure.*

Per Devadoss, J.;—It is not illegal for a number of intending bidders to arrange among themselves not to bid above a certain figure. [P 220 C 1]

M. Patanjali Sastri and *S. Sundaram Aiyar*—for Appellant.

A. Krishnaswami Aiyar and *B. Somayya*—for Respondents.

Oldfield, J.—This is an appeal by the petitioners, Judgment-debtors, against an order dismissing their petition under O. 21, R. 90 C. P. C. The majority of the grounds, on which the publication and conduct of the sale were impugned, were rightly held unsustainable by the lower Court, because they either had been or might have been taken in the proceedings for framing proclamation, of which the petitioners had notice, and, so far as they were taken, were either not established or were not material. We therefore can confine ourselves to two points, (1) the lower Court's failure to enquire into the allegation that the sale was not proclaimed in the village (2) its conclusion, adopted from a previous order, that no publication at the Collector's office was required, because the property was not ryotwari land.

That previous order is in fact material on both points, because as regards publication in the village also the conclusion in it was adopted, no futher enquiry being held. It was passed on a previous petition by the present petitioners, E. A. No. 71 dated

2nd April 1921, in which publication in two newspapers was asked for and also a postponement of the sale until 9th July 1921, apparently after the vacation. The sale had been fixed for 4th April 1921, and the petitioners' object to gain time, was sufficiently clear. In spite however of the decree-holders' opposition, referred to in the diary in the record, to a postponement and his presumable readiness to support the sale in case of proceedings under O. 21, R. 90, the lower Court took the exceptional course of allowing the sale to continue, but at the same time holding an enquiry into the validity of the proclamation, concluding the sale only when that enquiry had ended in the decree-holder's favour. That enquiry included the taking of evidence as to the publication in the village, which had been denied in the affidavit accompanying the petition and the decision that the proclamation was duly published has been adopted in the order before us.

One ground, on which this adoption has been supported, is that the lower Court merely utilized the evidence already taken, as though the previous proceeding during the sale had not been completed, and based its present finding on it. But that does not correspond with the facts, that the previous proceeding was completed by the refusal to adjourn the sale and that the lower Court does not now profess to have applied its mind to the evidence or to have done more than adopt the previous decision.

It is then necessary to consider whether, as is further argued, that previous decision concludes the parties as *res judicata*. Certainly the evidence for and against publication was taken fully and the order of 7-5-1921, refusing adjournment or postponement, discussed it fully, and certainly the judgment debtor had invited the Court to decide and the decree holders acquiesced in its deciding the question, the latter producing their evidence. It may moreover be said that, if there had been no proper publication, the sale would clearly have been ineffective, since on application it would have had to be set aside. But those considerations do not entail that the Court had jurisdiction to reach, or the judgment-debtors the right to ask it to reach, a conclusion on the point at that stage or that in doing so it acted otherwise than officiously. The Code does not provide for any enquiry into the validity of the publication of proclamation, until after the sale has been held. If the Court holds one, it must be regarded as doing so for its own satisfaction. Whether in case it is not satisfied that there has been proper publication, it would be entitled to refuse to proceed and to call on the decree holder to pay for a fresh publication, in spite of his readiness to take the risk of failure in proceedings under O. 21, R. 90, need not in the present case be considered. What is material is that when the enquiry is not prescribed by law, but is, as here, under-taken only to decide on the necessity for a postponement there can be no security for the Court's application of the standard of proof appropriate to a judicial proceeding or shortly for its having acted judicially and for its decision being a judgment. There is naturally no authority applicable to an exceptional incident of this description. But it is material that in *Sivagami Achi* v. *Subramania Aiyar* (1) the policy of this part of the law was regarded as being to avoid "the difficulties and delays, which even now occur in obtaining the execution of decrees" and to postpone consideration of objections to the publication and conduct of sales, until after they have been held, when the essential issue whether loss has been caused can also be tried. In the circumstances it is not possible to hold that the proper publication of the sale proclamation was *res judicata* or that the lower Court was justified in refusing to take evidence and adjudicate on it.

The lower Court further did not take evidence as to the publication at the Collector's Office, because it adopted the previous conclusion that such publication was requisite under O, 21, R. 67 read with R 54 (2) only in the

(1) [1904] 27 Mad. 259—14 M.L.J. 57—(F. B.)

case of ryotwari land and not in the case of enfranchised shrotriem villages such as are in question according to petitioners' affidavit dated 2-4-1921 and the sale proclamation and the admission made before us. For this construction of R. 54 (2) we have been shown no authority and in ordinary parlance the quit-rent payable to Government would be as clearly revenue as any other money payable to it for use in the ordinary course of administration. Revenue however has not been, so far as we have been shown, defined except in S. 1, Madras Act VI of 1867. True, according to that provision, revenue means "assessment, quit-rent, ground-rent or other charge upon the land payable to Government," and in the Revenue Recovery Act (II of 1864) the machinery for the collection of revenue is by Ss. 1 and 3 explicitly applied to shrotriemdars. The argument on the other side is however that a distinction is recognised in other statutes, for instance by the reference to "Lokhiraj lands and all other lands paying favourable quit rents" in S 4, Reg. XXV of 1802 and in the reference to "land charged with any fixed payment in lieu of revenue" in S. 7 (5) (a) of the Court Fees Act (VII of 1870) between revenue and such payments as a shrotriemdar has to make and that this distinction should be applied before the shrotriem villages in the proclamation before us are treated as land paying revenue to Government. But as regards the Regulation it is material that "lands paying favourable quit-rents" are one of a number of "articles of revenue" enumerated in the section and that it is not clear, the result for the purpose of Court Fee being the same, whether shrotriem lands would not fall under the description in S. 7 (5) (e) of the Court Fees Act, as "land partially exempt from the payment of revenue." In any case the foregoing reference to the two Madras Acts shows that no decisive result can be reached by recourse to other statutes. The real answer to the decree-holder moreover is that recourse to other statutes is not legitimate when, like those here relied on, they are not in *pari materia* with the statute under interpretation and that it is unnecessary, when, as in this case, the *prima facie* interpretation of the words used is consistent with the circumstances and the object of the provision. For it is easy to understand the division of land in private ownership under two heads, that for which directly or indirectly payments are made to Government and that for which there are none; land available for cultivation falling under the first and land not so available, for instance house sites, backyards and other urban or village sites, under the other; and it is easy to understand the necessity for advertisement of the sale of the former at the public office concerned with two important incidents of ownership, the liability and the right to recognition of liability for public dues. The lower Court's conclusion that publication at the Collector's office was unnecessary cannot in these circumstances be sustained.

The result is that the appeal must be allowed, the lower Court's decision being set aside and the petition remanded for rehearing after enquiry on the issues (1) whether the proclamation was published in the village (2) whether it was affixed in the collector's office (3) whether, if the finding on either or both of these points is in the negative, the applicant in consequence sustained substantial loss. Costs to date here and in the lower Court will be costs in the cause and be provided for in the order to be passed.

Devadoss J.-This appeal is against the order of the District Judge of Nellore declining to set aside an aution sale held on 7—5—1921. The petitioners are the 2nd and 3rd defendants, and respondents 1 to 4 are the plaintiffs, in O. S. No. 58 of 1917. The 6th respondent is the auction purchaser. The plaintiffs obtained a mortgage decree against the first defendant (the husband of the second defendant) and the third defendant, her son. The properties were brought to sale and were purchased for a sum, which the petitioners allege to be considerably below the value of the properties. They applied to have the sale set aside

on the ground of irregularity and fraud on the part of the plaintiffs and the auction purchaser. The learned District Judge declined to take evidence as regards the irregularities complained of as, in his opinion, they had already been found against the petitioners in a previous enquiry, and held that there were no grounds for setting aside the sale.

In this appeal several contentions are put forward. The first is that the amount of the income derived from the properties was not mentioned in the sale proclamation and that no particualrs were given for ascertaining the value of the properties. The petitioners were served with notices to be present at the time when the sale proclamation was settled and they did not choose to be present. They cannot, therefore, reasonably complain that a certain piece of information, which, according to them, would have given data to the purchaser as regards the value, have been omitted. There is nothing therefore in this contention.

It is next urged that the properties were grossly under-valued in the sale proclamation. It is in evidence that the two properties were valued at Rs. 7,000 each and there is no reliable evidence to show that the value of the properties was anything more than that mentioned in the sale proclamation. As a matter of fact, we find that the upset price had to be reduced as there were no bidders to bid up to the amount mentioned in the sale proclamation. This objection also fails.

The contention that there was a combination among the bidders and that they conspired not to raise the bid is not seriously pressed. It is not illegal for a number of intending bidders to arrange among themselves not to bid above a certain figure. The other allegations in the petition are not seriously pressed.

The contention that needs consideration is: was the learned Judge justified in refusing to take evidence as regards the allegations made in the petition? In his judgment, in para. 5 he says "para. 4 refers to four circumstances in connection with the publication of the proclamation. 1, 2 and 3 were dealt with in the order of the Court on the previous petition and were found against the petitioners"; and in para. 8, he observers, "For the foregoing reasons I am of opinion that it is unnecessary to take evidence for disposing of the petition." The inquiry referred to was held by the District Judge on a petition presented by the present petitioners on 2-4-1921 in which they prayed for orders " (1) for publishing the proclamation in this case duly in 'the Andra Patrika" and 'the Hindu' papers (2) for stopping the sale in this case till 9-7-1921 and (3) with such other reliefs as the Court may deem fit according to circumstances." The sale was advertised to be held on 4-4-1921. The petition was opposed by the plaintiffs and the learned Judge passed the following order on 16-4-1921: "The sale will continue from day to day till 30th April. Petitioner to pay batta. His witnesses must be ready that day. Adjournment to 30th April for evidence." The petitioners stated in paragraph 9 of the affidavit filed in support of the petition that " the proclamation was not published by tom-tom beat of the drum even in the two villages. Therefore the proclamation is not proper and maintainable. Evidence was taken on both sides and the Judge passed an order on the 7th May 1921 that "There are no grounds therefore to suppose that there was no proper proclamation". With regard to the allegation that notice was not affixed in the Collector's office, he remarked, " the properties being shrotriem lands it was not necessary to affix a copy of the notice of the sale in the Collector's office," and he concluded his order by saying, "I see no grounds to hold that there has been no proper publication of the sale. I therefore dismiss the petition with costs."

It is contended on behalf of the respondent that that order is binding on the parties. and that it was not therefore necessary for the Judge to enquire again into that matter after the sale has been held. This application is made under O. 21, R. 90. That rule can only apply to cases where there has been a sale and where the petitioners seek to set aside the sale.

No doubt the executing Court has power to satisfy itself whether a proclamation of sale was duly published or not, when an allegation is made by a party that is was not duly published. It is urged that, inasmuch as the petitioners invited the learned Judge to hold an enquiry they are bound by the result of that enquiry, whether the learned Judge has power or not to hold such an enquiry. The question is whether the parties are bound by the result of an enquiry which could not be held before the sale. The mere fact that the petitioners adduced evidence or consented to the enquiry and even asked the Judge to hold an enquiry would not be a sufficient compliance with the provisions of R. 90 of O. 21, whereby a party has got a right to go before the executing Court and ask that Court to hold an enquiry and set aside a sale on the ground of material irregularity or fraud in publishing or conducting it. No authority is shown for the contention that this finding of the learned Judge is either *res judicata* between the parties or that that decision is a sufficient answer to an application under R. 90. In this case the petition was mainly intended to get a sale adjourned and to have the proclamation of sale published in some of the well-known papers so that well to-do people or people who wanted to invest on land might bid at the sale. There is no prayer in the petition of 2-4-1921 for an enquiry as regards the irregularity or the absence of publication by beat of tom-tom in the village. It cannot be contended that, by making an application for adjournment of a sale and by consenting to have evidence adduced as regards one of the allegations in the petitions the petitioners either abandoned their right to have the sale set aside under R. 90 of O. 21, C. P. C. or under any other provision of law open to them. The object with which the learned Judge held the enquiry on the petition of April, 1921 was only for the purpose of satisfying himself as regards the truth or otherwise of the allegations made in that petition in order to consider whether the sale should be adjourned or not. In these circumstances the lower Court erred in not taking evidence and disposing of this petition on the merits.

In this connection it is necessary to notice the contention that it is not necessary to affix the notice of sale in the Collector's Office. It is difficult to say what materials the learned Judge had for saying in his order of the 7th May, 1921, that the properties being shrotriem lands, it was not necessary to affix a copy of the notice of sale in the Collector's office. Under O. 21, R. 54 " a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house and also, where the property is a land paying revenue to Government in the office of the Collector of the Dictrict in which the land is situate." It is argued for the respondent that, inasmuch as the property brought to sale are shrotriem villages, it was not necessary to affix the notice in the Office of the Collector of the district, for shrotriem villages pay only quit-rent of jodi and what is paid is not *revenue* and therefore O. 21, R. 54, cl. (2) does not apply to them. Mr. Krishnaswami Aiyar, in support of his argument, refers to the Court-fees Act, S. 7, cl. V. (c) and contends that 'revenue' there means revenue which is collected from ryotwari lands or from permanently settled estates and where a certain amount is paid as quit-rent it is not revenue but it is in lieu of it, and therefore R. 54 does not apply to a case like this. It has to be remembered that the Civil Procedure Code is an enactment of the Imperial Legislature and we have to see whether the legislature intended to use the expression, 'land paying revenue to Government,' in the sense in which it is ordinarily understood or in any particular sense.

From the earliest days of the East India Company the Revenue administration of the territory ceded to it formed an important portion of its activities. The word " revenue " meant the share of the produce of the land which the Government, either the East India Company or its predecessor, took from the ryot or the cultivator. There is no definition of

the word 'revenue' in the Civil Procedure Code or in the General Clauses Act, but in the Madras Revenue Rocovery Act of 1864 'pulic revenue' is said to include for the purpese of the Act cesses or other dues payable to Government on account of water supplied for irrigation. It is admitted that shrotriem villages are liable to pay road cess. The short answer to the respondent's contention is that shrotriem villages pay road-cess and therefore they are lands paying revenue to Government, but the discussion need not end here as the word "revenue" in the Madras Regulations as well as in Bengal and Bombay Regulations always meant the assessment which the Government levied from the occupier for the occupation of the land. In the Madras Regulation 24 of 1802 known as the Permanent Settlement Regulation, the words "land revenue" are used to denote the amount payable by the zamindars to the Government. It is therefore clear that what a zamindar pays to Government is revenue. Whether land held on inam or on other favourable tenures could be said to be land paying revenue to Government is a question which is not free from difficulty. In Bengal Law Reports, supplementary Volume, page 75, at page 87 there is a case, *Piziruddin* v. *Madhusudan Pal Chowdhry* (2), in which the question was whether a zamindar could grant a piece of land rent free out of his zamindari. In the course of the judgment, Mr Justice Shamboonath Pandit, one of the Judges who formed the full Bench observes: "In India that portion of the produce of lands which goes to the ruling power as its share is called reveue; and the produce is money or kind received from the cultivators by persons entitled to collect as well as the collection made in kind or money by other intermediate holders of different grades, from those who are above those persons that collect from tenants of the lowest grade up to those who pay the revenue directly to Government is also called rent." In another case *Mahomed Akir* v. *Asadunnissa*, (3), reported in the same volume at page 794, Sir Barnes Peacock, C.J. observes at page 831, "If the construction which I put upon the words of S. 10 is correct, the word 'revenue' will be read in its ordinary and natural sense. The provisions of the section are natural and consistent with justice, and force and effect will be given to every word of the section." The word 'revenue' therefore means ordinarily the share which the Government gets from the occupier as its claim upon what the Indian Raja and Governments got from the tillers of the soil. Considerable light is thrown upon this in the Fifth Report on the East India affairs. At page 34 of the Second Volume of this Report, there is this passage: "To form a correct judgment of the weight of the assessment upon the country generally, we ought to possess the following data. First a knowledge of the rents actually paid by the ryots compared with the produce of their labour. Secondly accurate accounts of what the zamindars and farmers collect and their payments to Government. Thirdly detailed accouts of the alienated lands showing the quantity of them, the person to whom they were granted, the dates of the grants and those by whom they are now held.

As I have said above, from the earliest days of the East India Company a good portion of its activities was directed towards the revenue settlement of the territory ceded to it by the Native Princes or acquired by it under treaties or otherwise, and, in all the correspondence and the earliest documents and papers the word "revenue" is used to denote what the East India Company or the Government expected to get from the lands as its share of the produce. In third volume of the Fifth Report at page 252 there is an extract from the proceedings of the Board of Revenue at Fort. St. George of the 8th September, 1806. It is addressed to the Subordinate Collector of Tanjore. It begins thus: "You will

(2) Beng. L. R. Sup. 75—2 W. R. 15 (F. B.)

(3) Beng. L. R. Supp. 774—9 W. R. 1 (F. B.)

be pleased to commence in the settlement of the revenues on your respective divisions without delay and on the following grounds: Para 1. Nanja. You first take the produce of each village in Faslis 1210, 1211 and 1212 and ascertain therefrom the average produce per veli. This average you will consider as the medium standard produce of the village " and various directions are given as to how the Government's share was to be ascertained.

It is contended that certain cesses are not revenue: no doubt they are not land revenue but anything which is made payable by reason of possession of land or that which is levied upon land may be taken to be revenue. In other words whatever is payable to Government either by way of cess or by way of dues by a holder of land as such would be revenue.

The policy of O. 21, R. 54 is patent. It is for the purpose of informing the Collector of the district as to the change of ownership of land so that he may proceed, in case of default of payment of revenue, against the person who is the owner of the land. Though land is primarily responsible for the payment of the revenue yet it is necessary for the revenue department to know who is the owner so that it may have its remedies against him. That being so it is not possible to accept the contention that a shrotriem village is not land paying revenue to Government simply because it does not pay the revenue which an ordinary ryotwari holding pays or which a Zamindar pays. The learned Judge has erred in thinking that the shrotriem in question is not land paying revenue to Government and that therefore notice of sale need not be affixed to the Collector's office.

The appeal is allowed and the learned Judge is asked to take evidence and dispose of the petition as directed by my learned brother.

Appeal allowed.

✱ 1924 MADRAS 223

KRISHNAN AND ODGERS, JJ.

K. Ramanatha Iyer and another Defendants—Appellants.

v.

T. S. Nagendra Aiyar—Plaintiff—Respondent.

A. A O. No. 256 of 1922, against the order of the Sub. J Madura, D/- 10th March, 1923.

(a) *Provincial Insolvency Act, (V of 1920) S. 28 Cl. 2 and 4—Share of partner vests in Official Reciever but insolvent can file suit for it if Official receiver does not interfere*

In the case of after-acquired property an insolvent has a right to maintain a suit subject to the Official Receiver or Official Assignee intervening and if the Official Receiver or Official assignee did not intervene, the insolvent is entitled to go on with the suit and the principle to be deduced from the authorities is that the insolvent has "a right against all the world except the Official Assignee." [P. 224 C. 1]

The share of a partner is such a property as can be attached under the C. P. C. and is thus such a property as would vest in the Official Receiver 7 L. W. 516 Dist. 30 Mad-145; 16 Bom, 153 Foll. [P, 224 C. 2]

T. L. Venkatarama Aiyar—for Appellants.

P. N. Appuswami Aiyar and P. V. Krishnaswami Aiyar—for Respondent.

Judgment.—This case refers to what is ordinarily called "the after-acquired" property of an insolvent. The respondent, after he was adjudicated an insolvent in 1909, seems to have started a partnerships with the appellant. He has now brought a suit to wind up that partnership and for an account and for payment over to him of any money that may be found due to him. The suit was brought in 1919. The partnership had been started in 1911 and it seems to have lasted till the end of 1916. In the Insolvency proceedings, no Receiver seems to have been appointed at first, and it was only on 29th March, 1919, the Official Receiver was appointed as Receiver. The defendant pleaded in the suit that the plaintiff was an undischarged insolvent and that he was not entitled to bring the suit, or to go on with it. The District Munsif gave effect to that objection and dismissed his suit. The Subordinate Judge has

reversed that decision and remanded the suit for disposal according to law. It is against that decision that the present appeal has been filed:

The question which we have to consider is whether, in the case of after-acquired property, the insolvent is entirely barred from maintaining any suit, in respect of it and whether the Receiver alone can sue. It is contended for the appellant that the Receiver alone can sue, because it is said, that all the properties of the insolvent including his after-acquired property are vested in the Official Receiver by Sect. 28, Cls. 2 and 4 of the Insolvency Act, V. of 1920. The argument is that, as the right to the property becomes vested in the Official Receiver, no right exists in the insolvent himself and that, therefore, he is not entitled to maintain a suit to enforce any claim to recover such property ; and it is said that, under the Insolvency Act V of 1920, no difference is made between the after-acquired property of the insolvent and the property owned by him at the time of the adjudication. The learned Vakil for the appellant relies on the case of *Subbaraya Chettiar* v. *Papathi Ammal* (I) as an authority in his favour for maintaining the proposition that he has put forward. But that very case has distinguished an earlier case of *Sriramulu Naidu* v. *Andalammal* (2), which following the case of *Fatimabibi* v. *Fatimabibi* (3) held that in the case of after-acquired property the insolvent has a right to maintain a suit, subject to the Official Receiver, or Official Assignee intervening and that if the Official Receiver or Official Assignee did not intervene, the insolvent was entitled to go on with the suit and that the principle to be deduced from the authorities that had been cited was that the insolvent had " a right against all the world except the Official Assignee. That case has discussed the English decisions on the point, as well as the earlier Indian decisions, and we can see no reason why we should not follow the principle laid down there, as regards the insolvent's after-acquired property. This case, as already stated, has been distinguished in *Subbaraya Chettiar* v. *Papathi Ammal* (1), which is a case regarding the property owned by the insolvents at the time of the adjudication. Whether that case was rightly decided or not, we need not express any opinion at present. However, it is clearly distinguishable from the present case, on the very ground that the learned judges distinguished it from *Sriramulu Naidu* v. *Andalammal* (2). No authority has been cited to show that, as regards the after-acquired property, the insolvent cannot maintain a suit, if the Official Receiver or Official Assignee does not interfere. We have, therefore come to the conclusion that the Subordinate Judge was right in the view he took, as regards this point, that is, as the property here is the after-acquired property, the insolvent was entitled to continue the suit. The Subordinate Judge has also dealt with another point, mamely that the share of a partner is not such a property as can be attached under the Civil Procedure Code and is thus not such property as would vest in the Official Receiver. That position has not been supported by the respondent's learned vakil, and we think it is not correct. In the view we have taken, it is not necessary to pursue that point. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1918] 7 L.W. 516—1918 M.W.N. 289—45 I.C. 239.
(2) [1907] 30 Mad. 145—17 M.L.J. 14.
(3) [1892] 16 Bom. 452.

1924 MADRAS 224

SPENCER AND DEVADOSS, JJ.

Md. Shamsgoya Rowther—Defendant—Appellant.

v.

Omandu Pillai and others—Plaintiff and Defendants—Respondents.

A. A. O. No. 269 of 1922, Decided on the 21st August, 1923, against the decree of the Sub. J., Trichinopoly, in A. S. No. 60 of 1921.

Criminal P. C., S. 145, Cl. 6—Unsuccessful lessee can sue for mesne profits without suing in ejectment.

An order under S. 145 (6) declares the party found to have been in possession of the property at the date of the notice to be entitled to possession thereof until evicted therefrom in due course of law. This does not mean that the successful party is thereby entitled as of right, to the property in defeasance of whatever legal title there may be existing in favour of the rightful owner. The party who was unsuccessful can therefore sue for mesne profits without suing in ejectment.

[P. 225 C. 1, 2.]

Practice—Plaintiff can give up some reliefs and press for others.

It is always open to a plaintiff to give up one of the reliefs to which he is entitled and to press for others. [P. 225 C. 2.]

K. P. Ramakrishna Aiyar — for Appellant.

K. Aravamuda Aiyangar—for Respondents.

Judgment.—The plaintiff is a lessee, who in this suit claimed mesne profits from the defendant, who had kept him out of possession and had obtained the order of a Magistrate under S. 145 of the Code of Criminal Procedure, confirming his possession "until evicted in due course of law".

The District Munsif dismissed the suit, because the plaint did not contain a prayer for possession. The plaintiff's lease was a short one for 3 years, and he did not want possession at the time of instituting his suit. The District Munsif held that it was necessary that the Magistrate's order should be vacated and that this could only be done in a suit for ejectment.

The Subordinate Judge held that it was not necessary that the Magistrate's order should be vacated, or that the plaintiff should bring a suit to recover the property.

We agree with him. S. 145 Cl. 6 of the Code of Criminal Procedure declares in what terms the order of a Magistrate proceeding under this provision of law should run.

The order declares the party found to have been in possession of the property at the date of the notice to be "entitled to possession thereof until evicted therefrom in due course of law".

This does not signify that the successful party is thereby entitled as of right, to the property, in defeasance of whatever legal title there may be existing in favour of the rightful owner. The Magisterial order only entitles the successful party to remain in possession, pending the decree of the Civil Court. The plaintiff of course will have to prove his lessor's title at the trial of the suit.

The form of the suit is not material. It is always open to a plaintiff to give up one of the reliefs to which he is entitled and to press for others. Whether the claim is for possession under Art. 47, or for mesne profits under Art. 109 of the Limitation Act, the period of limitation is the same.

The order of remand is therefore right and the appeal is dismissed with costs.

Appeal dismissed.

✱ 1924 MADRAS 225

HUGHES J.

Lakshmana Iyengar — Plaintiff—Petitioner.

v.

Narayana Iyengar—Respondent,

Civil Rev. Pet. No. 481 of 1922, Decided on 21st August 1923, from the Order of the Court of the Dt. Munsiff Srivilliputtur, D/-25th April 1922.

(a) *Civil P. C., S. 152—Court cannot amend where decree is in conformity with judgment though judgment is apparently wrong.*

A Court has no power to amend a decree when it is in conformity with the judgment, not even if there is an error apparent on the face of the judgment. 60 I. C. 368 not Foll. 3 L. W. 493 Foll. [P. 226 C. 2.]

(b) *Limitation Act, S. 5—Want of knowledge of a fact is a good excuse.*

Where a party could not reasonably know a defect in the decree but applied for amendment immediately after knowledge and the application was rejected on a technical ground *Held* the application could be treated as a review application and prior delay may be excused. [P. 227 C. 1.]

W. S. Subramania Ayyar—for Petitioner.

T. R. Srinivasa Ayyanagr and *K. S. Champakesa Ayyangar*—for Respondent.

Judgment.—Defendants 1 and 2 mortgaged the suit properties in avour of plaintiff under a usufructuary mortgage deed, in which

however no reference was made to the fact that the lands were security for a loan taken by defendant 1 and 2 from Government. The plaintiff paid off various instalments due for the Government loan and sued for the amount so paid. He asked for a personal decree against defendants 1 and 2 and also against 3rd defendant who was a subsequent purchaser. Judgment was pronounced on 29th January, 1921 and was to the effect that a decree would be passed in favour of the plaintiff as prayed for in the plaint. Accordingly decree was drawn up making 3rd defendant also personally liable.

It is now admitted by plaintiff that 3rd defendant should not have been made personally liable.

Warrant to arrest 3rd defendant was issued and 3rd defendant states that he only then came to know of the wrong direction in the decree and on 10th September, 1921, he applied in the course of the execution proceedings objecting to the execution but was told by the Court to apply for amendment of the decree. So on 20th September, 1921, he filed a petition under S. 151 and 152 of the Code of Civil Procedure to amend the decree. On 18 January, 1922 this petition was dismissed on the ground that the petitioner should not have applied for amendment of decree but should have applied for a review of the judgment.

On 3rd February, 1922, application for review of judgment was made and this was dis missed on the ground that it was out of time. The present revision petition is against this order.

I am asked on the authority of *Hanuman Lal* v. *Rama Peari Koer* (1) and some other cases to say that it was perfectly open to the District Munsif to make the required amendment and he should have done so. But the respondent points out that the present revision petition is not with reference to the order refusing to amend. I think that difficulty might be got over, but the respondent refers me to the decision in *Pitchayya* v. *Subba Rao* (2), a decision of a Bench of this Court, wherein it is held that a Court has no power to amend a decree, when it is in conformity with the judgment, not even if there is an error apparent on the face of the judgment. I think therefore I must hold that the decision of the District Munsif on the petition to amend was correct.

I must confine myself to the question whether there is ground for revision of the order dismissing the application for review as out of time.

It has been argued by the petitioner that the application for review was in time, because under S. 14 of the Limitation Act the time taken up in the infructuous proceedings by way of application for the amendment must be excluded. It is very doubtful, however, whether S. 14, could be applied at all, because it can scarcely be said that the District Munsif was unable to entertain the petition for amendment from defect of jurisdiction or other cause of a like nature. But the time so taken up might be excluded from calculation under S. 5 of the Limitation Act, if the Court was satisfied that the efforts of the petitioner in so prosecuting proceedings were *bona fide* and furnished sufficient cause within the meaning of S. 5. It is evident that the District Munsif did in fact consider that such time might be excluded but has not considered the delay because no explanation was given for the delay after 18th January, 1922 (on which date the order dismissing the amendment petition was passed) up to 3rd February, 1922, when the application for review was filed.

The respondent, however, points out, it may be correctly, that the question of excusing delay under S. 5, was a matter for the discretion of the District Munsif and this Court cannot interfere under S. 115 of the Code of Civil Procedure with the exercise of that discretion.

But the decree making the 3rd defendant personally liable was wrong and the judgment illegal. There must be some way of remedying it and I think the case already referred to, *Pitchayya* v. *Subba Rao* (2), points the other way.

(1) [1921] 2 Pat. L. T. 151—60 I. C. 368.
(2) [1916] 3 L. W., 499—34 I. C. 787.

The petition I. A. No. 1619, of 1921 filed on 20th September, 1921, may be itself treated as an application for review, the subsequent review petition being treated merely as a continuation of the former petition. The delay in presenting I. A. No. 1619 of 1921 may be excused, for the 3rd defendant was unaware of the mistake in the decree.

This revision petition is allowed and the order set aside and the District Munsif will be directed to dispose of the application for review on its merits. There will be no order as to costs.

Petition allowed.

✱ 1924 MADRAS 227

ODGERS AND HUGHES, JJ.

V. Govindan Nair and others—Accused—Petitioners.

v.

K. K. Krishnan Nair—Complainant-Respondent.

Cr. Rev. No. 862 of 1922 and Cr. Rev. Pet. No. 720 of 1922, Decided on 6th September 1923 revising the judgment of 1st Class Magistrate Calicut D/-28th November 1922.

Cr.P. Code, S. 350—Applies to a case of more than two successive Magistrates.

S. 350 (a) applies at the time when the succeeding Magistrate beigns to exercise jurisdiction that is every time another magistrate takes cognizance of a matter which has been begun or continued by his predecessor. On principle if a second Magistrate can act on evidence recorded wholly or partly by his predecessor and partly by himself there seems to be no reason why a third magistrate should not act on evidence recorded by his predecessors. [P 228 C 1 2]

T. Krishna Nambissan—for Petitioners.

T. Richmond and K. P. Raman Menon—for Respondent.

V. L. Ethiraj—for Public Prosecutor.

Odgers, J.—In this Revision case an apparently novel point is raised. A complaint was laid for trespass against the accused on the 10th June 1922; the alleged trespass having occurred on the 3rd June 1922, before a Magistrate called Mr. Sequeira who heard the prosecution evidence and was then transferred. He was succeeded by Mr. Gangadara Aiyer who heard the defence evidence and was then transferred. Judgment was delivered on the 11th September 1922 by Mr. T. A. Govinda Iyer, Second Class Magistrate. The appeal was heard by the Personal Assistant First Class Magistrate who confirmed the conviction arrived at by Mr. Govinda Iyer. In this Court the learned Vakil for the accused raises the point that S. 350 of the Code of Criminal Procedure is confined to two Magistrates, so that the judgment by the third Magistrate, Mr. T. A. Govinda Iyer is without jurisdiction, and the conviction is therefore illegal. The learned Vakil quoted cases which however do not apply to the question before us. In *Emperor* v. *Sakharam Pandurang*, (1) it was held that S. 350 applies only to Magistrates. *Hardwar Singh* v. *Khega Ogha* (2) followed in *Queen Empress* v. *Basappa* (3), had reference to Honorary Magistrates of which one was not sitting the whole time during which the case was heard. S. 350 runs as follows :—

"Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in an enquiry of trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the *Magistrate so succeeding may act on* the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the enquiry or trial." Then follow the provisos.

In the body of the section the words "the Magistrate so succeeding may act on the evidence so recorded by his predecessor do not seem to restrict that "Magistrate" to the second. The learned Vakil however relies on proviso (a) which runs, "In any trial the accused may when the second Magistrate commences his proceedings demand etc." and it is on the use of the words "Second Magistrate" in

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(1) [1896] 26 Bom. 50.
(2) [1893] 20 Cal. 870.
(3) [1895] 18 Mad. 394.

he proviso that he founds his contention that the "second" has to be restricted to the single occurrence of one Magistrate succeeding another. On consideration, I think the principle of law clearly is that the Judicial officer who hears the evidence shall pronounce the judgment Owing to circumstances in this country this is often impossible to carry out. Hence the necessity for S. 350, Cr. P. C. Now, once the principle is departed from, it appears to me not to matter how often you depart from it. For instance the Second Magistrate is authorised to act on the evidence recorded by the first though he has not seen and heard the witnesses. There seems on principle to be no objection, once this is allowed, to a third magistrate acting on the evidence recorded by the first. S. 350 (*a*) applies at the time when the succeeding Magistrate begins to exercise jurisdiction, that is every time another magistrate takes cognizance of a matter which has been begun or continued by his predecessor. It is thus not correct to say that a third Magistrate may be regarded as the second from the point of view of succeeding Magistrate No. 2 in whose case S. 350 (*a*) has already been applied when he (No. 2) commenced to take cognizance of the case. So every time a Magistrate takes cognizance of a case the section is applied and is so to speak finished with before there can be any question of its reapplication. Then when the third Magistrate appears, he is the 'second' with regard to No. 2 and that section is again applied to give him cognizance of a matter continued by his predecessor. It may be noted in this case there is no question of a further magistrate taking evidence. That was done by the first two. The third Magistrate merely delivered the Judgment. In principle, I am of opinion, this makes no difference. The preliminary objection thus fails. It may be stated that the accused did not apply for a *de novo* trial but applied for a *de novo* argument which was granted. The point of jurisdiction was not taken on appeal to the Lower Appellate Court.

On the merits there is very little to say. The two lower Courts have declared that the property delivered to the complainant did include the property on which the alleged trespass took place. I am not prepared to say sitting in revision that the lower Courts were without jurisdiction in coming to that conclusion.

The Criminal Revision Case must be dismissed.

Hughes, J.—The accused were found guilty under S. 447, I.P.C. and the conviction was confirmed on appeal. They have filed this revision petition and the first ground is that the Sub Magistrate who convicted them had no jurisdiction to convict them on the evidence wholly recorded by his two predecessors without a *de novo* trial.

It is doubtful whether in framing S. 350 Cr. P. C. the possibility of a case being dealt with by more than two successive Magistrates was contemplated. On principle if a second Magistrate can act on evidence recorded wholly or partly by his predecessor and partly by himself there seems to be no reason why a third Magistrate should not act on evidence recorded by his predecessors.

However that may be, as this is a petition in revision the High Court is not bound to interfere since the accused were not prejudiced and there has been no failure of justice. They did not ask for a *de novo* trial and the point was not taken in the appeal.

There is no force in the other grounds urged for revision. I agree that the petition must be dismissed.

Petition dismissed.

1924 MADRAS 228

KRISHNAN, J.

Gopobondhu Behara—Complainant—Petitioner.

v.

D. Venkatesam Pantulu and others Accused—Respondents.

Cr. Rev. Case No. 743 of 922 and Cr. Rev. Pet. No. 623 of 1922, decided on the 17th August, 1923, from the judgment of the Joint 1st Class Mag. Berhampore, D/-12th July 1922.

Criminal P. C., S. 439—In case of concurrent jurisdiction a High Court can be approached as a last resort.

Even though High Court has concurrent jurisdiction with Dt. Magistrate or Sessions Judge in the matter of ordering further enquiry it is a right course to adopt, to insist on the party exhausting all his remedies in an inferior Court, before he comes up to High Court. The fact that an order for compensation passed along with an order of discharge is revisable by the High Court only, does not alter the procedure.

[P. 229 C. 1]

S. Swaminathan and C. S. Venkatachariar—for Petitioner.

V. L. Ethiraj and C. Sambasiva Rao—for Respondents.

The Public Prosecutor—for the Crown.

Order.—It is not denied that, so far as this application is for getting a further enquiry ordered, it was open to the petitioner to go to the District Magistrate or the Sessions Judge. That being so even though this Court has concurrent jurisdiction in the matter, I think, it is a right course to adopt, to insist on the party exhausting all his remedies in an inferior Court, before he comes up to this Court. See the view taken by the Calcutta High Court in *Emperor* v. *Abdus Sobhan* (1) and by the Allahabad High Court in *Sharif Ahmad* v. *Qabul Singh* (2). The petition therefore, so far as it asks for further enquiry is dismissed. The petitioner may, if so advised, move the District Magistrate, or the Sessions Judge, as regards the order for compensation. No doubt it has been held that this Court alone can revise it. But as the order on the petition for further enquiry, if in favour of the petitioner, may have a material bearing on it, no order can be properly passed on it at this stage. The petition will be dismissed, with liberty to the petitioner to move this Court again, if so advised.

Petition dismissed.

(1) [1909] 36 Cal., 643. 13 C. W. N. 753—10 Cr. L.J. 190—2 I.C. 846.
(2) [1921] 43 All., 497—19 A.L.J. 425—22 Cr.L.J. 715—763 I.C. 875.

✱ 1924 MADRAS 229

KRISHNAN AND WALLACE, JJ.

C. Kunhammad and others.

v.

Emperor

Cr. App. No. 1763 of 1922, decided on the 7th August, 1923, against the order of the Court of the Special Mag. Tirur, in S. C. No. 404 of 1922.

Penal Code, S. 34—Common intention to commit offence and acts in furtherence thereof make all liable.

If two or more persons join in the commission of an act which amounts to an offence and they have a common intention to do that act, they would all be equally liable for the consequences. [P. 230 C. 1]

A. V. K. Krishna Menon—for Appellants.

The Public Prosecutor—for the Crown.

Judgment—The appellants before us were convicted by the Special Magistrate of Tirur, under Sect. 143 Indian Penal Code, and Sect. 126 of the Railways Act and sentenced to 5 years rigorous imprisonment each. The first contention of the learned Vakil for the appellants is that we must set aside the conviction under Sect. 126 of the Railways Act, because there is no proof as against each one of the accused that he did anything amounting to an offence under that section. He relies on *Aydrooss* v. *Emperor* (1), in support of his contention. In the first place, there is the evidence of P. W. 1 in this case, that specific acts had been done by each of the accused. That evidence is in general corroborated by the evidence of P. Ws 2 and 3. We see no reason to discredit the evidence in this case, which has been accepted by the trial judge.

As regards the authority quoted, that case is very different from the case before us. There the charge was under Sect. 126 of the Railways Act, read with Sect. 149 Indian Penal Code and it was held that Sect. 149 was not properly applicable to cases under the Railways Act. We need not express any opinion about that case. Here we have specific evidence, as already stated of what each accused did

(1) 1923 Mad. 187—17 M L.W. 21—1922 M.W.N. 800—24 Cr. L. J. 360—72 I. C. 360.

Even if we do not accept in detail the acts attributed to each of the accused, there can be no doubt whatever that all these five accused joined together and acted together in removing the rails from the railway line, in Tirur Railway Station. If two or more persons join in the commission of an act, which amounts to an offence and they have a common intention to do that act, they would all be equally liable for the consequences.

The evidence given by the defence to show that they were not present at the place, where the occurrence is said to have taken place, has been very carefully analysed and considered by the Lower Court and we accept the conclusions that it has come to on the point. We think that the conviction under Sect. 126 of the Railways Act must be confirmed.

As regards the conviction under Sect. 143 Indian Penal Code, no argument has been addressed to us to show that the accused are not guilty under that section. We confirm the convictions of the accused. As regards the sentence, we think that it is by no means excessive, considering the very serious character of the offence committed and we confirm it. The appeal is dismissed.

Appeal dismissed.

1924 MADRAS 230

KRISHNAN AND WALLACE, JJ.

Mulimayandi Thevan and others—Prisoners—Appellants.

v

Emperor—Opposite Party.

Cr. App. No. 1918 of 1922, Decided on the 7th August, 1923, against the order of the S. J., Trichnopoly, in S. C. No. 55 of 1922.

Evidence Act, S. 24—Panchayatdars are not persons in authority.

Pahchayatdars are not persons in authority within the meaning of S. 24. Considering the nature of the functions of panchayatdars they are practically private detectives helping the police in finding out the criminals. They cannot be treated as men having any authority over the accused. [P. 230 C. 2; P. 231 C. 1]

J. C. Adam for the Crown.

Judgment.—This is an appeal against the conviction of the appellants by the Sessions Judge of Trichinopoly with a jury for dacoity under S. 395 Indian Penal Code. The conviction being by a jury, we are not entitled to canvass the case on the evidence and we must accept their verdict if there is no misdirection. It is however suggested that the jury had been misdirected on two points and were thus misled and prejudiced against the appellants. The first point taken is that no reference was made by the Judge to the defence witnesses. There was one defence witness called, it is true, but all that he said was that the 2nd accused is a man of some property worth about Rs. 7,000. We do not think that the omission to bring this fact to the notice of the jury can be treated as at all material in this case. It does not touch the question of evidence as regards dacoity.

The second point taken is that the learned Judge should not have admitted in evidence at all the statements made by certain of the panchayatdars that some of these accused made confessional statements before them. The learned Judge no doubt admitted these statements in evidence but in his charge in paragraph 7 he distinctly told the jury that they should not take into consideration these confessions at all as they were not reliable. He also held that the confession made to one of the panchayatdars examined as P. W. 27 was inadmissible in evidence as P. W. 27 seems to have told the accused that he would be let off and thereby induced him to make the confession. In the first place we are not satisfied that the panchayatdars were persons in authority over the accused at all and that the confessions made to these (panchayatdars) could properly be excluded from the evidence on that ground. The question as to the authority of the panchayatdars was considered in *Emperor* v. *Fernand* (1). It was held by the Bombay High Court that they could not be considered to be persons in authority within the meaning of S. 24 of the

(1) [1902] 4 Bom.L.R. 785.

Indian Evidence Act. We concur with that view. Considering the nature of the functions of these panchayatdars they are practically private detectives helping the Police in finding out the criminals. They cannot be treated as men having any authority over the accused. That being so, we think that the confessions made were strictly admissible in evidence. As the learned Judge has himself told the jury to exclude from their consideration these confessional statements, even if we suppose that there was a mistake in admitting them, that would not be a very material mistake after the jury had been warned not to take the matter into consideration. We therefore think that there was no material mistake of law or misdirection in the charge.

We confirm the convictions and the sentences which are not excessive. The appeal is dismissed.

Appeal dismissed.

✱ 1924 MADRAS 231

SCHWABE, C. J. AND COLERIDGE, J.

N. Kesava Mudaliar—Petitioner—Respondent.

v.

V. S. Govindachariar and others—Respondents—Appellants.

Civ. Mis. Pet. No. 3304 of 1922, decided on the 16th April, 1923.

Civil P. C., S. 109 (c)—Questions of public importance or private importance to both parties render a case fit but not mere question about construction of agreement.

What is contemplated by S. 109 (c), is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not expressly measurable in money, it is of great public or private importance to both parties. General questions connected with the mere construction of agreements, which do not raise either far-reaching questions of law or matters of dominant public importance are not allowed to be the subject of appeal to Privy Council. Dispute between two rival temples belonging to two different sections of the Hindu community about the right of one of them to hold their processions in the streets of Madras turning on the construction of an agreement between the temples made many years ago was held to render the case a fit one. [P. 231 C. 2, P. 232 C. 1]

T. Rangachariar and *C. Narasimha chariar*—for Petitioner.

T. R. Venkatrama Sastri—for Respondents.

Schwabe, C. J.—This is an application for leave to appeal to the Privy Council. The suit was for an injunction and the question mainly turned on the interpretation of an agreement between two, if I may use the word "rival", temples made many years ago. According to the contention of one temple, the other was, by reason of this agreement, permitted to hold certain processions in the streets of Madras on certain days only. According to the interpretation of the contract of the other side, they were entitled to hold their procession on those days taking a second place to the other temple but were free to hold other processions on any other day they pleased.

As the amount involved is incapable of valuation, the question is whether we should certify, under the Civil Procedure Code, S. 109 (*c*), that this is a fit case for appeal to His Majesty in Council. The meaning of that section has been much discussed in this Court and in the Privy Council, and in a recent case, *Raja of Ramnad* v. *Tiruneelakantam Servai* (1), after an examination of the cases, I stated that I understood the law to be that:

> "what is contemplated is a class of cases, in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not expressly measurable in money, it is of great public or private importance";

and Coutts Trotter, J., added that in his view, their Lordships of the Judicial Committee, when speaking of private importance, should be regarded as meaning private importance to both parties to the litigation and not only to one of them. Our attention has been called to a recent

(1) 1923 Mad. 232—17 M. L. W. 775—14 M.L.J. 217—32 M. L. T. 128—1923 M.W.N. 415—72 I. C. 250.

decision of the Privy Council in *Albright* v. *Hydro Electric Power Commission* (2), in which their Lordships dealing with a Canadian case stated:

It has been the policy of their Lordships' Board not to entertain applications, which will prevent the decisions of the Supreme Court being final, on general questions connected with the mere construction of agreements, which do not riase either far-reaching questions of law or matters of dominant public importance."

It is true that in this case the main question turns on the proper interpretation or construction of a written contract; but I think that the words "mere construction of agreements" in the passage quoted above mean when the question to be determined does not affect rights of great public or private importance; and what we have to consider in this case is whether the result of the decision on the construction of this contract involves a matter of great public or private importance. On the whole, I think it does. There are two temples of considerable antiquity and of considerable importance. Disputes between these temples have been going on for years. The decision which we gave has, in effect. determined most of these disputes in one way; and I think it is matter of considerable private importance to both parties and almost of public importance whether we were right or wrong in the conclusion we have come to.

On the whole, I think there must be a certificate granted under S. 109 (c) of the Civil Procedure Code, that this is a fit case for appeal to His Majesty in Council.

Costs to be costs in the appeal.

Coleridge, J.—I should like to make it clear that it is impossible to arrive at a money valuation of the claim between the parites and I have nothing further to add. I agree to the order propoed.

Leave granted.

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(2) [1923] A. C. 167.

✱ 1924 MADRAS 232

SCHWABE, C. J., AND WALLACE, J.

Nanni Kudumban and others — Accused.

v.

Crown.

Ref. No. 5 of 1923, decided on the 11th July, 1923.

(a) *Criminal P. C., S. 307—Judge's opinion in the reference or at the hearing and the verdict of the Jury usually are to be considered by High Court as a trying Court.*

Where a Judge hears a case with a Jury and disagrees with the jury and disagrees to such an extent that he feels that he cannot accept their verdict, he is entitled to refuse to accept that verdict and then submits the case with his reasons to the High Court and the High Court then has thrown upon it the burden of examining for itself the entire evidence in the case deriving such assistance as it can by giving what is described as due weight to the opinion of the Sessions Judge and the Jury. The opinion of the Sessions Judge is the opinion as expressed in the reference or at the hearing. The opinion of the Jury might possibly be expressed in some other way, but it will usually be found expressed in the verdict. The so called 'verdict' does not bind him. It becomes for all legal purposes a mere 'opinion' and this is what S. 307 refers to when it speaks of the 'opinion' of the Jury. If the Court comes to the conclusion on that evidence that it should not convict if the case came before it in the capacity of trying Judge, and in arriving at that conclusion it must give due weight to the fact that other persons have taken other views and have seen the witnesses, in such a case it is the duty of the High Court to acquit the prisoner. [P. 233, C. 1]

(b) *Criminal Trial — Identification parades require most careful scrutiny.*

Identifica ion parades do require the most careful scrutiny, because if a witness has, before the parade, seen the person that he is going to identify, it does not matter in what order you put this person for such a witness will no doubt identify that man. [P. 233, C. 2]

The Public Prosecutor — for the Crown.

A. S. Swaminadhan amicus curiae— for Accused.

Schwabe, C. J.—In this case very probably at the suggestion of Mr. Adam the case was adjourned so that the accused's interests might be presented by an *amicus curiae* and his attendance has been very useful to the Court in calling its attention to certain decisions on the construction of S. 307 Criminal Procedure Code. Speaking for myself I agree with the view expressed in *Emperor* v. *Lyall* (1) and

(1) [1901] 29 Cal. 128—6 C.W.N. 253.

Emperor v. *Anandacharan Thakur* (2) as to the functions of the Court where S. 307 has been brought into operation. I think that the intention of the legislature has been clearly expressed by the section itself and it comes to this: where a judge hears a case with a jury and disagrees with the jury and disagrees to such an extent that he feels that he cannot accept their verdict he is entitled to refuse to accept that verdict and then submit the case with his reasons to the High Court and the High Court then has thrown upon it the burden of examining for itself the entire evidence in the case deriving such assistance as it can by giving what is described as due weight to the opinion of the Sessions Judge and the Jury. The opinion of the Sessions Judge is the opinion as expressed in the reference or at the hearing. The opinion of the Jury might possibly be expressed in some other way, but it will usually be found expressed in the verdict; and I agree with what was said by Benson, J., in *Emperor* v. *Chellam* (3) namely. "The so-called 'verdict' does not bind him. It becomes for all legal purposes a mere 'opinion' and this, I take it, is what S 307 refers to when it speaks of the 'opinion' of the jury." I however do not think it necessary to go as far as Davies, J. in the same case when he suggested that the opinion must be something other than a verdict. I think the result is that this Court, when faced with that duty, has to make up its own mind realising of course that it has a disadvantage in not having seen the witnesses, but has a freer hand than the Court of Appeal generally has; and I think that if the Court comes to the conclusion on that evidence that it should not convict if the case came before it in the capacity of a trying Judge, and in arriving at that conclusicn it must give due weight to the fact that other persons have taken other views and have seen the witnessses, in such a case it is the duty of this Court to acquit the prisoner.

Now turning to the facts of this case, my own feeling is that having read all the evidence and having given such weight as I can to the fact that the jury were ready to convict while the Judge thought that it would be perverse if they did convict, I am not in the least satisfied that in this case the right persons have been convicted; and I think one must, as in all criminal cases, when one is in that state of mind, give the benefit of any doubt to the prisoner. My reasons for saying that are that a long time passed between the occurrence and the identification of any of the accused coupled with the fact that the assault and the cattle raid took place at night. I should be prepared to say if I had had the evidence before me that there was nothing very astonishing in the witnesses being able to identify by star light the assailants in those circumstances, especially when the witnesses are men whose duty is to guard cattle or sheep by night. But I do not think that it is human nature on such a night to get a very clear impression of the features of persons seen at a short distance, which would be so impressed upon the mind that on seeing those persons again many months afterwards there would be any certainty of recognition. In this case after the lapse of some months the accused were brought up on different occasions for identification and if one could be absolutely certain that the identifying witnesses had no opportunity of seeing these accused beforo the parade, the fact that these witnesses picked out the same persons would be strong corroboration of the prosecution case. But one cannot shut one's eyes to the fact that these identification parades do require the most careful scrutiny, because if a witness has before the parade seen the person that he is going to identify, it does not matter in what order you put this person for such a witness will no doubt identify that man. I am not saying that in this case there was anything of that kind. It may be that these persons are particularly lucky to escape. It may be that the identification parades were conducted in such a way that there was no loophole and no possibility of any kind of unfair

(2) [1909] 36 Cal. 629—13 C.W.N. 757—9 C.L.J. 638—10 Cr. L.J. 32—2 I.C. 497.
(3) [1905] 29 Mad. 91—3 Cr. L.J. 371.

ness. But I must say on the evidence in this case I should not be satisfied to convict the accused. In these circumstances they must be acquitted.

Wallace, J.—I agree. I wish to say one or two words on the legal question under S. 307, Cr. P. C. It is there clearly laid down that, when a case comes up under that section to the High Court, the question whether the verdict in the case is to be for acquittal or for conviction is entirely open to the High Court, and left open to it to decide after considering the evidence and the opinions of the Judge and the Jury. The Court is bound in no way by these opinions, any more than a Judge trying a case with assessors, though he must give due weight to the opinion of tha assessors, is bound to follow their opinion. I think we are, as a Court bound, to decide for ourselves whether the evidence on which the jury based their verdict of "guilty" is in our eyes sufficient to justify such a verdict. I agree with the Chief Justice, for the reasons given by him that in this case the evidence is not sufficient to justify such a verdict. I therefore agree with the order proposed by the Chief Justice.

Accused acquitted.

1924 MADRAS 234

SCHWABE, C. J. AND COLERIDGE, J.

Kaveribai Ammal by agent S. L. Narayana Rao—Defendant — Appellant.

v.

B. Mehta and Sons — Plaintiffs—Respondents.

Ori. Side App. No. 41 of 1923, decided on the 24th April, 1923, from the order of Kumarswami Sastri, J., D/- 3rd April, 1923.

(a) *Letters Patent (Madras) Cl. 15—Order refusing to alter sale proclamation or to postpone sale is interlocutory and is not appealable.*

Under Cl. 15 an order of a merely interlocutory nature passed by a single judge on the original side is not appealable. 35 Mad. 1 (F.B.) Foll.

(b) *Civil P. C., S. 47—Order refusing to postpone or alter terms of sale is interlocutory.*

An order refusing to postpone a sale or alter the terms of the sale proclamation, either by raising the upset price, or by dividing the property into lots, is only an interlocutory order. [P 235 C 2]

(c) *Civil P. C., O. 21, R. 83—Extension of time in mortgage decree cannot be granted.*

An application to extend the time fixed by mortgage decree for the purpose of allowing the amount of the decree to be raised by mortgage or by private sale of such property cannot be granted in view of O. 21 R. 83. [P 235 C 2]

(d) *Civil P. C., O. 21 R. 69—Order under R. 69 is merely interlocutory.*

Under O. 21, R. 69 the Court in its discretion may adjourn a sale to a specified day, and the order in the exercise of that discretion is an order of a merely interlocutory nature. [P 235 C 2]

L. S. Veeraraghava Iyer and A. Ramakrishna Aiyar—for Appellant.

T. Ethiraja Mudaliar—for Respondents.

Schwabe, C.J.—This is an interlocutory appeal from an order of Kumaraswami Sastri J., sitting on the Original Side, refusing the application by Judge's Summons to alter the price fixed, as the upset price in the proclamation of sale, to alter the mode of selling of certain part of the property into a sale in convenient lots, instead of a sale as a whole and to postpone the date of the sale.

The suit was a mortgage suit The preliminary decree gave what seems to be a short time of three months for redeeming. That time having elapsed, no application having been made for extension of the time and no appeal having been taken from the preliminary decree, a final decree was passed ordering a sale. The Court then directed the sale on a certain day and in the ordinary way under O. 21, R. 66, caused a proclamation to be drawn up. Thereafter this summons was taken out and the learned judge having dismissed it, this appeal is brought to this Court; and the question is whether such an appeal lies.

Under the Code of Civil Procedure then in existence, which is in many ways similar on this matter to the present Code, a Full Bench of this Court in *Sivagami Achi* v. *Subrahmania Ayyar* (1), held that the Court in exercising its powers settling the terms of the sale proclamation acts ministerially and not judicially, and

(1) [1902] 27 Mad., 259—14 M.L.J. 57 (F.B.)

that therefore no appeal lies. I think it is true to say that for the purpose of that decision it was not necessary so to hold ; but, however that may be, that is a finding of the Full Bench. Speaking for myself, I have very great doubts as to whether it is a correct finding or not, but it is a finding by which we are bound, provided there is nothing in the alteration in the Code to make it no longer applicable. On that, an interesting argument has been addressed to us and I should myself desire to refer that question to a Full Bench, if I considered it necessary to follow that case in order to decide the point before us, but I do not think it is. The question to be determined here must turn on the proper interpretation of the Cl. 15 of the Letters Patent, which says :—

" We further ordain that an appeal shall lie from the judgment (not being an order of a certain kind) of one judge of this Court."

There is no doubt that those words give a right to appeal in respect of many kinds of orders, and the law, so far as this Court is concerned, is to be found in the Full Bench decision in *Tuljaram Rao* v. *Alagappa Chettiar* (2), where a very large number of instances were given of orders, which were appealable and one or two instances were given of orders which were not appealable and the Court came to the conclusion that the kind of order which was described was merely interlocutory. In my judgment, the order in this case was merely interlocutory. It does not finally dispose of the rights of the parties at all. I should add that, in so far as it is an application to extend the time for the purpose of allowing the amount of the decree, to be raised by mortgage or by private sale of such property, the Court of First Instance by reason of the terms of O. 21, R. 83 (3) was expressly forbidden to make such order, and on that ground the Court had no power to make such an order, and no appeal can lie from its refusal to do so. So far as the question of granting further time is concerned, the power of the Court below to do so must be sought under O. 21, R. 69, which says that the Court, in its discretion may adjourn a sale to a specified day, and in my view, the order in the exercise of that discretion is an order of a merely interlocutory nature. I think the same applies to the question here, whether there should be an alteration of the terms of the sale proclamation, by raising the upset price and dividing the property into lots. The matter is so purely one of discretion of the Lower Court, not affecting the final rights of the parties at all that it ought to be treated as merely interlocutory.

On these grounds, this preliminary point succeeds and this appeal must be dismissed with costs.

Coleridge, J.- I agree.

I should like to add that in my opinion *Sivagami Achi* v. *Subrahmania Ayyar* (1) needs to be reconsidered by a Full Bench, as in my opinion the alteration of the Code was deliberate and was intended to take away the ministerial functions that were alleged to be vested in the Court and distinctly made it a judicial function from which an appeal will lie.

Appeal dismissed.

(2) [1910] 35 Mad., I—1910 M.W.N. 697—8 M.L.T. 453—21 M.L.J. 1—8 I.C. 340 (F.B.)

1924 MADRAS 235

SPENCER, J.

Y. Ankamma—Accused—Petitioner.

v.

P. Adribhotlu—Complainant — Respondent.

Cr. Mis. Pet. No. 41 of 1923, decided on the 23rd February, 1923, from the Sub. Mag., Ponnur.

Criminal P. C., Ss. 344 and 439—Application for stay does not lie to High Court.

Application for stay of criminal proceedings pending civil suit cannot be made to the High Court unless Magistrate has refused it.

[P 236 C 1]

T. R. Subramania Aiyar for K. S. Ganapathi Aiyar—for Petitioner.

Ch. Raghava Rao—for Respondent.

Order.—There is no appeal or petition pending in this Court in this

connection. This is not a case for the exercise of the extraordinary powers of this Court, under S. 107 of the Government of India Act.

The petitioners may apply under S. 344, Criminal Procedure Code, to the Sub-Magistrate to postpone the trial before him, pending the decision of the civil Court, and if he fails to get a reasonable order, he may then ask this Court to revise the order so passed. The petition is dismissed.

Petition dismissed.

✱ ✱ 1924 MADRAS 236

SCHWABE, C. J. AND KRISHNAN, J.

Shakoor Gani-Defendant-Appellant.

v.

T. S. Sabapathy Pillai—Plaintiff-Respondent.

Ori. Side App. No. 67 of 1923, decided on the 12th September, 1923 from the decree and judgment of Coutts Trotter, J., D/-14th August, 1923.

(a) *Contract Act, S. 72—Payment made to take delivery on terms disputed by plaintiff but insisted on by defendant is under duress though not under 'protest' and is recoverable.*

Where a defendant (seller) insists on payment of a certain amount, which the plaintiff (buyer) maintains he is not bound to pay and the seller refuses to give delivery of the goods, unless the buyer pays such amount and the buyer pays the amount and takes delivery such a payment is not a voluntary payment, but a payment under duress or protest, though the payment is not made in terms 'under protest' [P. 239 C. 1]

(b) *Tariff Act, S. 10—Duty refers to amount payable after considering tariff value and rate of duty.*

The word 'duty' in the Section must refer to the amount payable and arrived at, by taking into account, (*a*) the tariff value, and (*b*) the rates of duty. In the latter part of that Section what can be recovered is the duty paid, and that cannot be arrived at, without taking into account the tariff value. This anomaly does remain that after the making of a contract, in cases where there is no tariff value and there is a fluctuation in the market price, the duty in fact, that is payable, will be more or less according as the market price has risen or fallen, and on the contract ex-godown, the effect would be that on a fall in the market price, the seller, if he can show that the market price has fallen, would get the benefit for himself really at the expense of his purchaser. [P. 238 C. 1]

A. Krishnaswami Aiyar, S. Doraiswami Aiyar and *V. Thyagaraja Aiyar*—for Appellant.

V. V. Srinivasa Aiyangar—for Respondent.

Schwabe, C. J.—This case, which is a test case, raises an interesting question, as to the true meaning of S. 10 of the Tariff Act now in force, Act VIII of 1894 as amended by Act IV of 1916.

The facts of the case are quite simple. The plaintiff entered into a contract in December, 1922, for the purchase by him, from the defendant, of certain Java Sugar, to arrive by a named ship, due somewhere about the end of the year, at a price working out at about Rs. 20 a cwt., "ex godown." At the time of the contract, duty was payable on sugar, at 25% on what is known as the "tariff value." This tariff value is fixed annually in practice, though by this statute S. 3 (2),

"The Governor-General in Council may, by notification fix, for the purpose of levying duties, the tariff values of any articles enumerated in the Schedules,"

and no time is fixed for the issuing of such notification. In this case, the tariff value had, in fact, been fixed about a year previously, at Rs. 26-4-0, and it is accepted in this case that the method used by the Governor-General in Council, in fixing tariff values, is to take at the date when they are fixed the average of the market prices ruling during the previous twelve months ending in September, and the practice being to bring the new tariff valuation into operation from the beginning of January. In this case, when the goods arrived, there had been a notification of an alteration of the tariff valuation of sugar, by reducing it from Rs 26-4-0 to Rs. 16-4-0, the rate of duty payable remaining the same at 25%. The effect of this was that the actual duty paid in respect of these goods was Rs. 2-8-0 per cwt, less than it would have been, if the old tariff value had remained in force. As the sale was *ex godown*, the result, of course, was that the seller paid so much less duty, while the

buyer would have to pay to the seller a fixed price which included duty, and the seller would be, if his contention referred to hereafter is right, Rs. 2—8-0 per cwt. better off than he would have been, if the delivery had taken place before the alteration of the tariff value. The tariff Act makes provision by S. 10, the object of which is to protect parties to contracts, for future delivery of goods, from having to pay more duty than, in fact, is current at the time of delivery, or being able to escape the payment of such duty. The principle, no doubt, is that merchants dealing in commodities may be quite willing to take the risk of a rise and fall in the market price of the commodity between the contract date and the delivery date, as being a matter which is their business, but merchants are not, as a rule, prepared to take the risk of the sudden alteration of prices of the commodities, in which they deal by reason of the Act of the legislature in imposing, increasing, reducing, or remitting the duties payable in respect of those commodities.

Sect. 10 runs:

"In the events any duty of customs, or excise, on any article being imposed increased, decreased or remitted, after the making of any contract for the sale of such article, without stipulation as to the payment of duty, where duty was not chargeable at the time of the making of the contract, or for the sale of such article duty paid where duty was chargeable at that time,—(*a*) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, is paid, the seller may add so much to the contract price as will be equivalent to the duty or increase of duty; and (*b*) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the purchaser may deduct so much from the contract price, as will be equivalent to the decrease of duty. or remitted duty."

It is argued on behalf of the seller that the word "duty" in the first part of this section refers to "rate of duty" and rate of duty only and that, for the purpose of seeing whether that section applies or not we are not entitled to look at an alteration of the tariff value. It is argued that tariff value, is merely a convenient way of arriving at the market value, that, where, *ad valorem* duty is imposed, it has to be paid on market value. that the tariff value is a convenient method of arriving at the market value, and that the buyer or the seller, as the case may be, takes the risk of the rise or fall in the tariff value, in the same way as he takes the risk of the rise and fall of market value, in cases where there is no tariff value. I confess that, at first sight, I was much impressed with the argument in favour of that construction; but on a close examination of the statute and particularly looking at the history of this section, I have come to the conclusion that the contention is not right. In the Tariff Act of 1894, before amendment, this clause, *i.e.*, S. 10 was contained, and there was power then, under S. 22 of the Sea Customs Act, which was then in operation, for the Governor-General in Council from time to time by notification to fix, for the purpose of levying tariff duty, the value of goods, and in Sch. II to that Act one finds that, in the case of many articles including sugar, there was a tariff valuation in the second column and a rate of duty in the third column; so that at that time, in order to ascertain the duty payable, one had to take the tariff valuation fixed by the statute itself and take the rate per cent., on that tariff valuation also so fixed and, indeed that was the way of ascertaining the duty payable in most of the dutiable goods in the schedule to that Act. It seems to me that the duty payable depends just as much on tariff valuation as on the rate of duty. The tariff valuation is not the real value; in fact, it is agreed that it is based on a value of an entirely different period, namely, the preceding year, and the legislature has chosen to say, in effect, that the duty payable shall be, *e.g.*, 5 per cent per cwt., a cwt., being taken to be of the hypothetical value, whatever the real value may be, of Rs. 10. The rate of duty payable per cwt., is to be ascertained and it could only be ascertained by working out that sum, and it

seems to me that, if the Governor-general-in-Council makes an alteration of the tariff valuation. he is acting within the power of legislature delegated to him for this purpose and the position is exactly the same, as if a new statute or a new schedule was brought in, by the legislature to alter the tariff valuation fixed in the original schedule, by increasing or decreasing it; and in sush a case, I think it would be very difficult to argue that there has not been an increase or decrease, as the case may be. in the duty payable. The Act of 1916 brought into the Tariff Act the power of the Governor-General-in-Council to fix the tariff values and at the same time altered the form of the schedule. by substituting for tariff value merely a unit, or the words "*ad valorem.*" As far as sugar was concerned. it became 25 per cent *ad valorem*; but, by reason of the amendment to S. 3, referred to above, that meant, as there was a tariff value in existence, the same thing, namely 25 per cent of the tariff value. I can find no reason for supposing that it was the intention of the legislature in any way to alter the rights of contracting parties under S. 10 and I think they remain as before. In my view the word "duty" in that Section must refer to the amount payable and arrived at, by taking into account, (a) the tariff value, and (b) the rate of duty. It is to be observed that in the latter part of that Section what can be recovered is the duty paid and that cannot be arrived at, without taking into account the tariff value. This anomaly does remain that after the making of a contract, in cases where there is no tariff value and there is a fluctuation in the market price, the duty in fact, that is payable, will be more or less according as the market price has risen or fallen, and on a contract *ex godown*, such as this, the effect would be that, on a fall in the market price, the seller, if he can show that the market price has fallen, would get the benefit for himself really at the expense of his purchaser. But that results from the fact that the legislature in S. 10 is only contemplating things that follow from the acts of Government. The words used are "being imposed, increased, decreased, or remitted", showing quite clearly that it considered only the imposition or alteration of duty by Government, leaving it to the parties in cases where duty is payable on real market value, to make their own arrangements by their contracts. It is not uninteresting to observe that S. 10 of the Tariff Act is based on S. 20 of the English Customs Consolidation Act of 1876, the existing version of which is to be found in the Finance Act, 1901, S. 10. It was perhaps not a very happy idea in drafting the Indian statute to take the section bodily from the English Act, when the method of levying customs in England and in India is totally dissimilar; for, in England there is no duty payable on tariff value, or. indeed, on any value, real or otherwise. The duties, as far as I know, are all imposed there, by weight or measure and the sort of question that has arisen in this case and as far as I know has arisen for the first time in this case, could not have arisen in England. S. 10 might, in my judgment, well have been made much clearer, so that this question could not have arisen. Giving the best consideration I can, to the words themselves, I have come to the conclusion that the plaintiff in this case is right.

A second point was taken, namely, that this was a voluntary payment, and, therefore, cannot be recovered back. The learned Judge has found on the evidence before him and there was ample evidence to support the finding that the plaintiff had to pay the full contract amount, in order to get the goods, though he asked to be allowed to clear the goods, on payment of an amount less than the contract price, by reason of the alteration in the tariff valuation, but that the defendant had refused and insisted, as a condition of getting the goods, on his paying the full amount. On these facts, it is quite clear law that that amounts to money obtained by duress. It is common in such cases and advisable to pay in terms under protest, in which case no question can arise. But the principle of law does not depend on

the protest being made or not; that is merely evidence of the fact that an excess demand was made and that the plaintiff meant to retain his rights to claim back the excess. But the real question to consider is whether or not it was a voluntary payment, or whether it was a payment extorted by the other party using, no doubt, as he thought legitimately, his hold over the goods, to make the plaintiff pay what the defendant considered it was his right to have; but, it cannot be said, under those circumstances, that the payment was a voluntary payment. That being so, as the defendant was wrong in his contention, as we hold in this case, he must repay to the plaintiff the amount claimed, that is to say, the amount of over-payment, as money had and received to the use of the plaintiff.

The appeal is, therefore, dismissed with costs.

Krishnan, J.—I entirely agree that this appeal fails. The judgment of the learned trial Judge is right and it must be upheld on both the points that have been taken before us. As the learned Chief Justice has dealt with the questions fully in his judgment, I think it is unnecessary to add anything of my own in the case. I, therefore, contend myself by saying that I agree to the order proposed by the learned Chief Justice.

Appeal dismissed.

✱ 1924 MADRAS 239

ODGERS, J.

Doraiswami Udayan — Prisoner — Appellant,

v.

Emperor

Cr. App. No. 1601 of 1922, decided on the 26th July, 1923, against the order of the Court of Session, Coimbatore.

Criminal Trial—Prosecution must call all witnesses who prove their connection with the transaction unless it thinks that they will tell a lie or they are not necessary.

All witnesses who prove their connection with the transaction, connected with the prosecution, should be called, unless the prosecution is under the *bona fide* belief that such witnesses would not speak the truth, but the Public Prosecutor is not bound to call as witnesses for the Crown any person whose evidence in his opinion is unnecessary. (1882) 8 Cal. 131 Appr. (1915) 42 Cal. 422 Dist. (1894) 15 All. 84; (1923) 49 Cal. 277 Foll.

[P. 240 C. 1,2]

L. A. Govindaraghava Aiyar—for the Accused.

The Public Prosecutor — for the Crown.

Judgment.—In this case one Duraiswami Udayan has been covicted of causing grievous hurt with a dangerous weapon to one Govindasami Udayan by cutting him on both hands on the head with a sickle at Dharapuram on the 28th March 1922. A certain person named Thangaswami died in February 1922. The wounded man's grand father and Thangaswami's mother's father were brothers. The accused is the mother's sister's son's of Thangaswami. Thangaswami died leaving two widows called Parvathi Ammal and Chandrodava Ammal. They had apparently in accordance with the wishes of their husband, executed a release deed, Ex. M. in favour of Govindaswami by which they released to him certain properties of their deceased husband in which they had a widow's estate. They refused to register it and Govindaswami had it compulsorily registered in the Dharapuram Sub-Registry on the 25th March 1922, three days before the occurrence in question. The reason for the unwillingness of the widows to register appears from Govindaswami's deposition in the Court of the Stationary Sub-Magistrate of Dharapuram as due to the influence of Thangasami's mother *i. e.* the mother-in-law of the widows. She wished that Thangaswami and his wife should adopt the accused Doraiswami. There is thus, to my mind, ample ground for ill-feeling between the accused and Govindaswami on account of the registration of this release deed. Exhibit M. One point in the defence theory may be noticed for convenience here, and that is, that Govindaswami has concocted this case against his distant relative, the accused, in order that he might become an

undesirable person for the widows to adopt. I think this is extremely far-fetched and I must say that it is entirely unconvincing in the circumstances of this case. [After discussing the evidence the judgment proceeded:-]

In this state of the evidence it is impossible for me to say that the accused is not guilty. A legal point however has been taken and that is this. Mr. Govindaraghava Aiyar points out that there are certain persons who, according to him, would have been available to give evidence about the occurrence, but were not called. The first two are Pachaimuthu and Ramaswami Udayan, the father and uncle of the accused. They more or less assisted the accused because when they ran up they caught hold of Govindaswami. According to the Sub-Inspector of Police, P. W. 4 Govindaswami in his dying declaration mentioned the names of Thondi Goundan, Ayodya Udayan, Kalimuthu Udayan and Subramania Udayan. These were examind by the police but they were not called. The learned vakil cites in support of his argument two cases. *In the matter of the petition of Dhunno Kazi* (1) and *Ram Rajan Roy* v. *Emperor* (2). In the former case it is laid down that all witnesses, who prove their connection with the transaction, connected with the prosecution should be called. It will be noticed from the deposition of P. W. 7 that four persons ran up from the south after Govindaswami had turned to run to the north. They may or may not have seen some part of what occurred. That is no ground for saying that these witnesses have proved their connection with the transaction in question, or that they may be able to give important information as to the subject of the charge. If such were proved then the only thing as laid down in the cases referred to that can relieve the prosecution from calling the witnesses is the *bona fide* belief that such witnesses would not speak the truth. The 2nd case is a case of murder and it was laid down that in a capital case the prosecution should place before the Court the testimony of all the available eye-witnesses though brought to the Court by the defence. Neither of these considerations apply here On the other hand, the Full Bench of the Allahabad High Court has laid down in *Queen Empress* v. *Durga* (3) that the Public Prosecutor is not bound to call as witness for the Crown any person whose evidence in his opinion is unnecessary. Compare also *Emperor* v. *Reed* (4). I do not think that the opinions stated in the Calcutta cases have any application to the present. It seems to me that the case is adequately proved against the accused by the prosecution evidence tendered. If the four persons above named could in fact have spoken in favour of the accused, it is curious that they were not called, nor were their names mentioned as persons who knew anything about it by the accused either in his statement before the Lower Court or on his appeal petition to this Court. He put in a written statment before the Sub-Magistrate in which he alleges ill-feeling on the part of Govindaswami on account of property and that he was himself dragged out of his house, beaten and produced before the police. There is no mention of any person whatever to whom this state of things would be known or who would be likely to have said anything material to record. The accused called no evidence. For these reasons the conviction must be confimed. The accused has been sentenced to 5 years' rigorous imprisonment and was originally charged under S. 307, but I think somewhat mercifully the conviction was reduced to one under S. 326. There was a savage attack on a defenceless man and the wounds inflicted were of a very severe character. I am therefore not disposed to interfere with the sentence which will also be confirmed.

Conviction and sentence confirmed.

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(1) [1882] 8 Cal. 121—11 C L.R, 169.
(2) [1915] 42 Cal. 422—19 C.W.N. 28—16 Cr. L.J. 170—27 I.C. 554.
(3) [1894] 16 All. 84—(1894) A.W.N. 7 (F. B.)
(4) 1922 Cal. 461—49 Cal. 277—23 Cr. L.J. 742—69 I.C. 630.

1924 MADRAS 241

SPENCER AND DEVADOSS, JJ.

M. Nagir and another—Appellants

v

Krishnan Chettiar —Respondent.

A. A. O. No. 332 of 1922, Decided on 10th August 1923, against the order of the S. J., Madura, D/-31st August 1922.

Civil P. C., S. 145—Where sureties agreed to produce judgment-debtor on the fixed date but failed, closing without dismissal of the execution petition does not put an end to their liability.

The defendant was arrested upon an execution Petition. After arrest he paid Rs 1,750 and as regards the balance there was an application (E. A. No. 178 of 1922) under O. 21 R. 40 that he should be released from custody on security being given for his reappearance. The surety bond executed by the appellants provided that the defendant should be brought before the Court on the 4th July 1922, and that the sureties would be responsible for bringing him before the Court on that date and that in case of failure to produce on the said date they agreed that they themselves, their heirs and properties should be liable for Rs. 7,2000 balance due under the decree. It did not appear whether any proceedings took place in Court on the 4th of July 1922 but on the 20th of July 1922 the decree-holder presented a petition asking for warrants against the defendant and sureties for the balance. Although the execution petition was noted as closed there was no order dismissing the petition moreover security was given in connection with E. A. No. 178 which was not shown as disposed off at any time previous to the order directing warrants to issue against the sureties.

Held that sureties were liable since they did not plead that they produced Judgment-debtor on 4-7-1922.

Held further that previous notice was not necessary.

K. Rajha Aiyar —for Appellant.

K. S. Jayarama Ayyar and *R. Seturama Sastri*—for Respondent.

Judgment.—The defendant in O. S. No. 174 of 1921 on the file of the Subordinate Judge's Court of Madura was arrested upon an execution petition E. P. No. 60 of 1922. After arrest he paid Rs. 1,750, and as regards the balance, there was an application (E. A. No. 178 of 1922) under Order 21, Rule 40 that he should be released from custody on security being given for his reappearance. The surety bond executed by the appellants in this case provided that the defendant should be brought before the Court on the 4th of July 1922 and that the sureties would be responsible for bringing him before the Court on that date and that in case of failure to produce him on the said date they agreed that they themselves, their heirs and other properties should be liable for Rs. 7,200, balance due under the decree. It does not appear whether any proceedings took place in Court on the 4th of July 1922, but on the 20th of July 1922 the decree-holder presented a petition asking for warrants against the defendant and the sureties for the balance due under the decree. It appears from the manuscript execution petition that the relief asked for was altered in consequence of an office note put up in the Subordinate Judge's Court, and that the relief as finally asked for was that the sureties be ordered to produce the defendant in Court and that, in default, warrants should be issued against the defendant and the sureties. The decree-holder amended the prayer as directed, noting at the same time that the sureties were bound to produce the judgment-debtor in Court on the 4th of July and that by failure to do so they had rendered themselves liable for the decree amount.

The present appeal arises out of an application under S. 47 of the Civil Procedure Code, but wrongly described as an application under S. 151 for cancellation of the Court's order directing arrest warrants against the judgment-debtor's sureties. The Subordinate Judge held that the order for arrest alrea y passed was a proper order and dismissed the petition.

Now it is argued first that as the execution petition No. 60 of 1922 had been noted as closed on the 29th of April 1922, the liability of the sureties came to an end. In support of this argument the decision in *Lalji Suboy* v. *Odoya Sunderi Mitra* (1) has been cited. That was a decision of the Calcutta High Court upon

(1) [1887] 14 Cal. 757.

S. 336 of the Civil Procedure Code of 1882. The authority of this decision has been questioned in *Sundara Reddi* v. *Varadaraju Pillai* (2) and as it deals with an application under S. 336 which corresponds to S. 55 of the present code, a case of a judgment-debtor expressing his intention to apply to be declared an insolvent and furnishing security for appearing when called upon, the decision has not much bearing on the question now before us. In the present case, although E. P. No. 16 of 1922 was noted as "closed" there is no order dismissing the petition, and it must be noted that the security was given in connection with E. A. 178 which is not shown as disposed of at any time previous to the order directing warrants to issue against the sureties.

Then it is argued that the effect of the decree-holder asking that the sureties should be produced in Court on a date subsequent to the 4th of July 1922 was that he condoned the default to produce the defendant on the 4th of July. The liability of the sureties to pay the decree amount in the present case is governed strictly by the terms of the bond which they gave. In that bond they distinctly promised to produce the defendant before the Court on the 4th of July and they agreed in default thereof to be liable for Rs. 7200. The amendment in the execution petition presented on the 20th of July, E P. No. 118, was made under the orders of the Court under some mistaken impression that the surety bond provided for the production of the defendant on any date subsequent to the 4th of July on which the sureties might be required to produce him and that the bond had not already been broken when the execution petition was presented. If the execution petitioner's Vakil amended the prayers in the petition under the directions of the Court, that will not amount to any relinquishment or waiver of his rights to enforce the surety bond. Although the execution petition was in the proper form when first presented and the sureties were not liable by the terms of their bond to be ordered to produce the defendant at a date after the 4th of July, the order finally passed against which they appeal, was under S. 145 for executing the decree against them, and is not open to any legal objection. Lastly, Mr. Rajah Aiyar for the appellants argues that the sureties have not been given any notice that the decree-holder intended to proceed against them for default on the 4th of July and thus they have had no opportunity of showing that they did produce him on that date or of explaining their failure to produce him, if in fact they did not do so, but in the grounds of Civil Miscellaneous Appeal it is not anywhere suggested that the appellants in fact complied with the terms of their bond and that the Lower Court should have found that in fact they produced the judgment-debtor on the 4th of July. The question before the Lower Court and in the appeal was only whether the order to arrest the sureties for failure to comply with the terms of their surety bond was correct, and on this point we cannot come to any other conclusion but that the Lower Court was right.

The Civil Miscellaneous Appeal is dismissed with costs.

Appeal dismissed.

(2) [1916] 2 M. W. N. 273—34 I. C. 407.

1924 MADRAS 242

COLERIDGE, J.

(*Sobhanadri*) *Apparao*—Petitioner

v

The Government Pleader—Opposite Party.

C. R. P. No. 312 of 1922. Decided on the 4th April, 1923, from the order of the Dt. Munsif, Bhimavaram, D/-23rd September, 1921.

Madras Civil Rules of Practice, Rr. 36, 32, and 33 to 35— R. 36 applies also to parties.

R. 36 which prescribes the fee to be paid by a person who has got leave to inspect documents, applies as well to the case of a

party to the suit who gets leave under R. 32, as to the case of a stranger who gets leave under Rr. 33 to 36. [P. 243 C. 1]

T. Ramachandra Rao — for Petitioner.

The Govt. Pleader — for Respondent.

Judgment.—The petitioner applied under R. 32 Civil Rules of Practice, for search of documents and was ordered to pay the fee prescribed under R. 36. He objects that there is no fee for R. 32 and that R. 36 applies only to Rules 33 to 35 as these sections come under a separate heading, "Inspection of documents by a stranger" and that this heading covers Rr. 33 to 36 and not 32 which is under the heading, "Inspection of proceedings by a party."

I cannot agree for if so when he had put in his memorandum under R. 32 there the matter would end for the Rule does not say what is to happen thereafter. It is R. 36 that says "If leave is granted the following fees shall be paid and this must govern all the sections where leave is being asked.

I dismiss the petition with costs.

Petition dismissed.

✱ 1924 MADRAS 243

AYLING AND ODGERS, JJ.

Ayarvali Pokker and others In re

R. T. No. 6 of 1923, Cr. App. Nos 153 and 94 of 1923, Decided on the 4th April, 1923, against the sentence of the senior Sp. J. Calicut in case No. 146 of 1922.

(a) Criminal P.C. S. 503—Malabar Ordinance I of 1922, S. 10—Charge of murder—Examination of witnesess on commission is not authorised.

S. 10 of the Malabar (Restoration of Order) Ordinance I of 1922 read with S. 503 of the Cr. P. C. does not authorise a special Judge acting under the Ordinance to issue a commission for the examination of witne ses. [P. 244 C. 2]

(b) Criminal P. C., S. 257—In serious cases inconvenience of removal of convicts from one jail to another about 300 miles off by Rail does not justify examination of the convicts on commission.

The inconvenience and expense to the State entailed by the conveyance of three convicts from Coimbatore to Calicut was held to be not so serious that application for the attendance of these witnesses should be deemed to be made for the purpose of vexation or delay or defeating the ends of justice. Their examination on commission was held to be an irregularity leading naturally to failure of justice though accused sent interrogatories at the commission. [P. 244 C. 1, 2]

U. L. Ethiraj—for Accused.

The Public Prosecutor — for the Crown.

Ayling, J.—The four accused in this case have been convicted of offences under Ss. 302 and 149 I. P. C, murder committed in the course of rioting, and have been sentenced, three of them to death, and the fourth to transportation for life. The learned counsel who argued the case for the three accused Nos. 1, 2 and 4, who have been sentenced to death, draws our attention at the inception of the hearing to the fact that the Sessions Judge has illegally declined to summon three defence witnesses cited by the first accused and has issued a commission for their examination purporting to act under the provisions of S. 503 of the Criminal Procedure Code. He argues that this procedure is illegal that the accused have been materially prejudiced and that for this reason the convictions cannot stand.

The trial was held under the provisions of Malabar (Restoration of Order) Ordinance I of 1922, S. 10 which provides that "in the trial of cases under this Ordinance the Court shall follow the procedure laid down in the Code of Criminal Procedure 1898 for the trial of warrant cases and shall have all the powers conferred by the said Code on a Magistrate in regard to the issue of processes to compel an appearance and to compel the production of documents and other moveable property." Turning to the provisions of the Criminal Procedure Code for the trial of warrant cases by Magistrates contained in Chapter 21 of the Code, we find that under S 257 "If the accused after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness" the Magistrate is bound to issue the process "unless he considers that such application should be refused on the

ground that it is made for the purpose of vexation or delay or for defeating the ends of justice." Such ground has to be recorded by him in writing. The section was binding on the Special Judge who tried the case now under appeal.

We have ascertained from the Special Judge that, on accused being asked to name their witnesses, the first accused named three witnesses, Challil, Mokari and Kunhi Moyi meaning that they should be orally examined in Court; and under the section already quoted it was his duty to issue processes for the attendance of these witnesses unless he chose to refuse the request on the ground that the application was made for the purpose of vexation or delay or for defeating the ends of justice. In the latter case he was bound to record his reasons

The witnesses in question are witnesses whose evidence, if true, would be of the utmost importance in the case. They were cited to prove that one of the murders charged against the accused, that of Kunhi Kumar Nayar, was the work of not accused 1,2 and 4 as alleged by the prosecution but of another man altogether, one Kunhammud who is said to have since committed suicide. The Special Judge appears to have nowhere in the course of the trial recorded his reasons for refusing to issue processes to these witnesses, but in reply to a reference from this Court, he has reported that he examined them by commission according to his practice during these trials, as "to obtain witnesses from Coimbatore, Trichinopoly and Bellary and even Andamans seemed to entail unreasonable delay, expense and inconvenience." We are not concerned here with the attendance of witnesses from the Andamans or even from Trichinopoly and Bellary, but only from Coimbatore; and we do not think that the inconvenience and expense to the State entailed by the conveyance of three convicts from Coimbatore to Calicut could be treated as so serious that an application for the attendance of these witnesses should be deemed to be made for the purpose of vexation or delay or defeating the ends of justice. It seems to us that it was the duty of the Special Judge, in a case of this character involving a capital charge and in view of the importance which the evidence of these witnesses would possess, if believed, to take the usual steps to enforce the attendance of these witnesses.

The issue of a commission on the other hand, was in our opinion illegal. Under S. 503 the power to issue a commission is limited to a Presidency Magistrate, a District Magistrate, a Court of Sessions or the High Court, and the Special Judge comes under none of these categories. His powers are regulated by S. 10 of Ordinance 1 of 1922 above referred to and as already pointed out are limited to the powers conferred by the same Code on "a Magistrate." We cannot accept the suggestion of the learned Public Prosecutor that the powers thus conferred include powers which under the Criminal Procedure Code are confined to a District Magistrate. The omission to clothe a Special Judge with such powers may have been accidental, but we are not concerned with that. Reading S. 10 of the Ordinance with S. 503 of the Code of Criminal Procedure we can only conclude that the issue of the commission by the Special Judge was *ultra vires*.

The next question is what is the effect of the special Judge's illegal action. We have been referred by the Public Prosecutor to S. 16 of Ordinance 1 of 1922 which says that "no sentence finding or Order shall be invalid by reason or any error, omission or irregularity in any of the proceedings before or during the trial unless such error, omission or irregularity has in fact occassioned a failure of justice." We do not think that we can decline to interfere with the conviction relying on this ordinance. The accused's right to have his defence witnesses examined by the Judge or the Magistrate who disposes of the case is one which has been secured for him by the Code of Criminal Procedure, and where the action of the Court has deprived him of this right, we think it must be

said that a failure of justice is the natural result of the irregularity and this is the way in which the words of S. 537 of the Criminal Procedure Code which are exactly the same as the words of S 16 of the Ordinance have been invariably interpreted. We do not think that this is affected by the fact that the accused finding that they could not have their way and that the Court would not summon the witnesses made the best of a bad job by putting interrogatories. We think the illegality is such that the only course we can take is to set aside the conviction.

Lastly we are confronted with the question of what further order we should pass. The Court of the Special Judge of South Malabar has ceased to function from the 25th February 1923, and we cannot therefore, even if we would, order a retrial by that tribunal. It has been suggested by the Public Prosecutor that S. 4 of Act 1 of 1923 would empower us to direct a retrial by the Court of the Sessions Judge of South Malabar but the section in question is somewhat obscure and we entertain grave doubts as to whether in itself it would authorise such action. On the other hand under S. 11 of Ordinance 1 of 1922, which gives us jurisdiction to hear the present appeal, we possess all the powers conferred on an appellate Court under S. 423 of the Criminal Procedure Code and this includes the power, in reversing a conviction, to direct a committal for trial. In the exercise of this power we accordingly set aside the convictions and the sentences passed on the appellants and direct their committal to the Sessions Court of South Malabar on the charge framed against them by the Special Judge in this case. At the same time we order that the case against them on this charge shall be transferred for disposal to the Sessions Court of Coimbatore.

Retrial ordered.

1924 MADRAS 245

OLDFIELD AND RAMESAM, JJ.

K. P. K. Thambatti Thamburathi (deceased) and others — Plaintiffs—Appellants.

v.

K. V. T. Taravathi Karnavan San, kara Menon and others—Defendants—Respondents.

S. A. No. 1227 of 1920, Decided on 13th December, 1922, against the decree of the Sub. J., South Malabar, Calicut, in A. S. No. 101 of 1919.

(a) *Civil P. C., O. 22 R. 4 (2)—Legal representative cannot contend contrary to what his predecessor has done.*

Provisions of O. 22, R. 4 (2) do not entitle a legal representative to put forth contentions contrary to what his predecessor has contended. [P. 246 C. 2]

(b) *Contract Act. S. 200—Grant of* melcharth *by a person having no authority—Grant may be ratified by a competent person.*

The grant of a *malcharth* in itself does not terminate the interest of the prior mortgagee. That interest is terminated, not solely on account of the grant of *melcharth* but only if and when the *melcharthdar* also finds money for redemption and pays it to the previous mortgagee, and hence the granting of *malcharth* by a person who is entitled to deal with the mortgaged property not being itself void the same can be ratified by a person having authority to make such a grant. [P. 246 C. 2, P. 247 C. 2]

C. V. Ananthakrishna Aiyar and *K. P. Ramakrishna Aiyar*—for Appellants.

Judgment.—The facts, so far as they are necessary for the arguments which we propose to consider, are that the second plaintiff here one of the appellants, is a *Melcharthdar* under a *melcharth* given by the first plaintiff, the senior lady of a *Kovilagam*. Third plaintiff was the senior male member of the *Kovilagam*. Many years back, the first plaintiff's predecessor had been removed from management under Exhibit XI, Subsequently, the first plaintiff, as she contends, was restored to management by Exhibit F executed by the senior male member, who had in due course succeeded the person who took office under Exhibit XI. The suit is for redemption of a previous *kanom* of the *Kovilagam* property, and the main question raised is whether the first plaintiff had authority to give

the *melcharth*. Exhibit B. There is a subsidiary question as to whether, if she had no authority to give Exhibit B. that was made good by the ratification of her action in doing so, constituted by the third plaintiff's pleadings. And lastly, there is a question as to the effect of the proceedings and the conduct of the third plaintiff in the lower Appellate Court and of his death during their pendency in this Court and the refusal of his legal representative to follow his original pleadings.

Dealing first with the two points last mentioned, we have the conduct of the third plaintiff in the Appellate Court described in paragraph 5 of the Court's judgment. Third plaintiff's connection with the case began, when he applied to be made a plaintiff in the Court of first instance, stating in his affidavit that he approved of Exhibit B and that decree for redemption of Exhibit B might be given to the second plaintiff. In the lower Appellate Court, the Pleader for the third plaintiff as stated in paragraph 5 of the judgment under appeal, represented that he did not ask for a decree on the strength of title. The language of the lower Appellate Court is not felicitous. But we understand it to have meant that the third plaintiff did not ask for a decree in favour of the *Kavilagam* or himself, not that he in any way withdrew his support of the second plaintiff or his suggestion that a decree should be passed in the second plaintiff's favour. So for, we cannot see how the third plaintiff did anything which in any way detracted from the effect of his previous affidavit as a ratification of the plaintiff's act in giving Exhibit B; whether it did effect a ratification of that act we shall consider in the sequel.

Next, the legal representative of the third plaintiff in this Court was really joined as the legal representative of the second defendant although he does not now rely on that character and has appeared before us only as representing the third plaintiff. His claim to do so is not being disputed by any of the other parties. Mr. Krishna Variar on his behalf states that he desired to oppose the second plaintiff's claim and to repudiate the action of the third plaintiff, in so far as it approved or ratified the grant of Exhibit B. We are not able to understand how this can be justified by .O 22 R. 4, clause 2, or how that provision can be applied to the case of a legal representative whose predecessor never made or could have made a defence at all. In *Birendra Kishore Manikya Bahadur* v. *Akram Ali* (1) and *Rangasami Gounden* v. *Nachiappa Gounden* (2) it was laid dawn as settled law that "he who has the right to complain must do so when the right of action is properly open to him and he knows the facts." We are not able to understand how the present legal representative of the third plaintiff has any different legal character from the third plaintiff himself or any which would enable him to abandon the third plaintiff's contentions in the present proceedings, with which alone we are concerned.

As regards his right to take other proceedings we of course express no opinion. We accordingly deal with the question of satisfaction as between the first and the third plaintiffs. Third plaintiff in his affidavit, referred to, said that on an examination of the records in the case he has satisfied himself that the *melkanom* deed included in them and this suit are proper, beneficial and profitable to the *Kavitagam* and that all the reliefs asked for in the plaint might be granted to the second plaintiff. There is no doubt that, unless some objection on that ground can be made good this language constitutes a clear ratification of the first plaintiff's action in giving Exhibit B. It is urged that it does not constitute such a ratification with reference to S. 200, Indian Contract Act, on the ground that the grant of a *melcharth*, such as this, would have the effect of terminating a right or interest of third persons, the defendants. We are unable to follow this argument. The grant of a *melcharth* in itself does not terminate the interest of the prior mortgagee. That interest is terminated, not solely on account of the grant of *melcharth* but only if and when the

(1) [1912] 39 Cal. 439.
(2) [1919] 42 Mad. 523 (P. C.)

melcharthdar also finds money for redemption and pays it to the previous mortgagee.

This failing, we have been referred to S. 196, Indian Contract Act, the argument being that there is no ratification, because the first plaintiff did not purport to grant Exhibit B as the agent of any one competent to grant it; and in connection with this argument it has been urged further that the grant of Exhibit B was simply void and on that account could not in any case be the subject of ratification. Exhibit B purports to be granted by the first plaintiff as Valia Tomburathy, the title which she enjoys as the senior-lady of the *Kovilagam* who would in the absence of any other arrangement be competent to grant *melcharth*. The properties, the subject of the document, are described as belonging in the *jenm* to the lady's *Kovilagam*, and the document recites that the *melcharth* amount has been received by her for the welfare of the *Kovilagam*. We think that Exhibit B must be read as executed by the first plaintiff in the capacity of the person who was competent to represent the *Kovilagam* and as such to deal with its properties. What is said is that there can be no representation of the *Kovilagam* in the ordinary sense except by the person appointed under Exhibit XI who would correspond with the *karnavan* of a *tarwad*; and that on behalf of such a person first plaintiff could not act, because he could not delegate his own delegated authority to her. The fallacy in this argument is that it regards first plaintiff's action as founded only on Exhibit F and not on the ratification which third plaintiff's pleadings afford. Shortly she can and does plead that she acted not on behalf of, but instead of, the person empowered by Exhibit XI and that she acted on behalf of the members of the *Kovilagam*, whom third plaintiff now represents, or his predecessor could have acted for; and we can see no objection to her doing so or, after third plaintiff's ratifications of her acts, to their acceptance as valid. It is clearly useless to criticise the argument founded on ratification on the ground that the third plaintiff had no legal right to act on behalf of *Kovilagam* For that is exactly the reason why the doctrine of ratification is invoked. It has been urged that the doctrine cannot be invoked where the act generally is in itself void. But the granting of the *melcharth* by a person who is entitled to deal with the mortgaged property is not in itself void. We have been shown no instances in which an act has been held void for the present purpose where the only objection to the validity of the act is derived from its being done without proper authority. In these circumstances, we hold that the grant of Exhibit B by the first plaintiff was ratified by the third plaintiff and that nothing has occurred since his ratification, which can deprive it of effect.

The result is the second appeal is allowed, the lower Appellate Court's decision being set aside and the appeal being remanded for disposal according to law with reference to the other issues framed already. Costs to date in the lower Appellate Court and here will be costs in the appeal and be provided for in the lower Appellate Court's decree. The stamp-value on second appeal will be refunded on application. The question of costs at the trial in the Court of first instance will be dealt with by the lower Appellate Court on re-hearing with reference to the result thereof.

Appeal allowed.

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AYLING AND ODGERS, JJ
AFTERWARDS.
SPENCER, AND VENKATASUBBA RAO, JJ.

M. C. P. T. Kelu Karup—Appellant.

v

K P. P. Raman Nair and others—Respondents.

S. A. No. 2121, of 1920, Decided on 21st November 1922 from the decree of District Court North Malabar in App. No. 519 of 1919.

Malabar Law—Saswatham *by grantor after grantor's life is valid if for benefit of* stanom.

Whether a *saswatham* lease is binding or not is a mixed question of law and fact. The,

validity of a *saswatham* demise after the lifetime of the grantor will depend on whether it was for the benefit of the *stanom* or not. 44 M. 509 rel. [P. 248 C. 1, 2]

(b) Grant—Construction—Recitals alone not sufficient proof.

Ordinarily, the recitals in a document upon which the grant depends would not be sufficient evidence that the grant was made for the purposes mentioned therein, but they are required to be supported by proof *aliunde* that they were made for those purposes. No presumption as to the correctness of the recitals arises from the mere fact that a document is more than 70 years old, without considering other circumstances. 42 C. 876; (P.C.) Ref. [P. 249 C. 1, 2]

P. S. Narayanasawamy Aiyar—for Appellant.

C. Mathavan Nair—for Respondent.

Ayling and Odgers, JJ.— [24th March, 1922.] The District Judge has held that the Marupat, Exhibit A, executed by the mother of defendants Nos. 1 to 6 on the strength of which the present suit is brought is not binding on the Tavazhi of the executant because it purports to supersede a *saswatham* demise, Exhibit I, executed in favour of first to sixth defendants' father by the *jenmi*. It is clearly in the interests of the Tavazhi to hold the property on a *saswatham* demise rather than on an ordinary *kanom* for a term of years and if the *saswatham* demise, Exhibit I, is genuine and binding on the successors of the *stani* who granted it, the District Judge is, in our opinion, right, in holding that the action of the defendants' father in executing Exhibit A was contrary to the interests of the Tavazhi and does not bind the Tavazhi. The learned Vakil for the appellant points out, however, that the District Judge, while holding, contrary to the decision of the District Munsif that Exhibit I is a genuine document, has not considered whether it is binding on the successor of the *stani* who granted it. This is so. In the plaint, the plaintiff (the present appellant distinctly took the ground that the *stani* had no right to grant irredeemable demises. The same position was taken up by the seventh defendant, the present *stani* in office, in paragraph 3 of his written statement; but in the course of the hearing of the litigation, the parties appear to have gone off on another question as to whether Exhibit I was genuine or not and the question of its validity after the lifetime of its grantor appears to have been overlooked.

Issue No. 1, which was the main issue framed in the original suit, is clothed in such general terms that it is impossible to say by whose fault this point came to be overlooked. Whether the *saswatham* lease is binding or not is a mixed question of law and fact. It is thus put by Innes and Muthuswami Aiyar, JJ., in a passage quoted with approval in *Kaithal Kuttiyali* v. *Kuzhatte Puthen Veetil Thirumangalath Kanharatan Um-mama* (1): "But he (the *Stanomdar*) is also manager of the family for the time being; if he grants a lease or makes an alienation to enure beyond his lifetime which is for the benefit of the family, it will be upheld, as, on the other hand, any such transaction, if prejudicial to the family will be set aside." In other words, the validity of the *saswatham* demise, Exhibit I, after the lifetime of the grantor will depend on whether it was for the benefit of the *stanom* or not. We feel considerable doubt as to whether we should allow this point to be raised in second appeal especially as it will necessitate a finding being called for from the lower Appellate Court but, in view of the definite objection taken in the plaint, we think on the whole that it is better in the interests of justice to have the point cleared up. The District Judge has held that Exhibit A is invalid solely by reason of the existence of Exhibit I and we think it right that the validity as well as the genuineness of the latter should be determined before Exhibit A is declared to have no effect.

We must, therefore, call for a finding from the lower Appellate Court on the following issue:—

"Was the *saswatham* demise, Exhibit I, binding on the *stanom* after the death of its grantor?"

Evidence may be adduced by either side. The finding to be returned

(1) [1921] 41 Mad. 509—13 L.W. 208—1921 M.W.N. 169—41 M.L.J. 202—62 I.C. 62.

within a month after the re-opening of the Court. Seven days for objections.

The remaining arguments advanced on behalf of the appellant do not commend themselves to us. The question, whether any allowance should be made in respect of costs owing to the late stage at which this point is pressed on the Court, will be considered if necessary when the second appeal is finally disposed of.

[After the return of the finding of the lower appellate Court, on the issue referred, the following judgment was delivered :—]

Spencer, J.—This suit was brought by a *melcharthdar*, holding under a *melcharth* granted by the 7th defendant, who is the *stani* of a *stanom* in Malabar, to redeem a *kanom*, Exhibit A of 1882. The defence to the suit raised by the defendants Nos. 1 to 6 at the trial was that the properties in suit were not held under the *kanom*, Exhibit A, but under a *saswatham* grant, Exhibit I, of 1852. The District Munsif held that this *saswatham* document was a forgery and he gave the plaintiff a decree for the redemption of the *kanom*. On appeal, the District Judge held that the *saswa ham* deed, Exhibit I, was genuine, and that the *kanom*, Exhibit A, was void, as it was not for the benefit of the Tavazhi on behalf of whom Chiruthayi. the mother of defendants Nos. 1 to 6, executed it.

In second appeal the question was raised whether the *saswatham* demise, assuming it to be a genuine document, was binding on the *stanom* after the lifetime of the donor. This question has been raised in the pleadings but has been lost sight of in the course of the trial. A finding was, therefore, called for from the District Judge on the issue, "was the *saswatham* demise, Exhibit I. binding on the *stanom* after the death of its grantor?" The District Judge has now found this issue in the affirmative. But for his finding he has been obliged to rely entirely on the recital in the *saswatham* deed to the effect that the grantee had saved 18 items of property from lapsing to the tenants of the *stanom* which held the *jenm* right. Ordinarily, the recitals in a document upon which the grant depends would not be sufficient evidence that the grant was made for the benefi of the religious institution represented by the donor. In *Hari Kishen Bhagat* v. *Kashi Parshad Singh* (2) the Privy Council observe that alienations to be valid against reversioners, required to be supported by proof *aliunde* that they were made for valid and legal necessity. The same rule applies in the case of *shebaits* and other persons who have no authority to alienate property except for the benefit or preservation of the estate which they represent. Unavoidable necessity must be established in order to justify absolute alienations of grants of perpetual leases of endowed property [*vide Pulaniappa Chetty* v. *Sreemat Deivasikamony Pandara Sannathi* (3)]. The District Judge after referring to the recitals in Exhibit I, has applied the test of time for assuming that the grant was lawfully made. He says that the recitals in the *kanom* deed, Exhibit A, indicate that the *saswatham* right was regarded as valid, because the then *stani* took a surrender of it from Chiruthayi.

I am of opinion that the District Judge was not justified in assuming the correctness of the recitals in Exhibit 1 from the mere fact that document is more than 70 years old without considering other circumstances. He quotes in his finding the decision of the Privy Council in *Magniram Sitaram* v. *Kasturbhai Manibhai* (4). That was a case where a permanent lease had been left unchallenged for a period of nearly a hundred years and it was held that the Court might assume that the grant was made for

(2) [1915] 42 Cal. 876—42 I.A. 64—17 M.L.T. 115—19 C.W.N. 370—13 A.L.J. 223—2 L.W. 21[illegible] 21 C.L.J. 225—28 M.L.J 565—17 Bom. L.R 426 -1915 M.W.N 11—27 I.C. 6[illegible]4 (P.C.)

(3) [1917] 40 Mad. 709—44 I.A. 147—21 C.W.N. 729 -15 A.L.J. 485—1 Pat. L.W. 6[illegible]7—33 M.L.J. 1—19 Bom L.R. 56[illegible]—22 M,L.T. 1—1917 M.W.N 5[illegible]7—26 C.L.J. 153—6 L.W. 222—39 I.C. 722 (P.C.)

(4) 1922 P.C. 163 46 Bom. 481—49 I.A. 54—24 Bom. L.R. 584—42 M.L.J. 501—26 C.W.N. 473—20 A.L.J. 371—35 C.L.J 421—1922 M.W.N. 319—30 M.L.T. 268—66 I.C. 162 (P.C.)

necessity so as to be valid beyond the life of the grantor. Their Lordships refer in their judgment with approval to *Chockal ngam Pillai* v. *Mayandi Chettiar* (5), the appeal from which is reported as *Mayandi Chettiyar* v. *Chockalingam Pillay* (6). That was a case in which certain lessees had remained in possession under a grant made by the manager of a temple for 79 years. They claimed to have had 200 years of possession but it was found that the lease was granted in 1813 which was 79 years before the suit of 1892. Now, we must see how far the facts of the present case support an inference that the *saswatham* grant remained undisputed for a long period after the death of the donor. We know that the donor died in 1862. This appears from the statement of the witness examined after the remand. He was succeeded by a bad manager who relinquished his office in 1875 under Exhibit C. From 1875 to 1882 the *stanomdar* was the same person who granted the *kanom* demise, Exhibit A. He died about 1904 and was succeeded by the 7th defendant.

Exhibit I itself refers to the existence of a prior *kanom* demise. The grantee, Kunkan Nair, in 1876 by Exhibit II, sold this property Kandiyil Parambar to Chiruthayi, thus converting it into *putravakasam* property. Exhibit II speaks of this item as being held under *kanom* and *saswatham* right. Then, in 1882, under Exhibit A, Chiruthayi purports to surrender the *saswatham* right given previously and to take a renewal of the *kanom* right for 24 years, the surrender being made a consideration for the fresh grant.

As observed by the District Munsif the recital in Exhibit II that the property was held on *kanom* and *saswatham* rights indicated that the members of the defendants' family regarded the *kanom* as requiring to be renewed from time to time upon reasonable terms.

The defendants who claim to derive rights from Kunkan Nair, in whose favour Exhibit I was executed, cannot now question Chiruthayi's power to deal with the property which Kunkan Nair had conveyed to her to be held as *putravakasam* property under Exhibit II in 1876. The District Munsif has treated Chiruthayi's act in taking a renewal of the *kanom* grant under Exhibit A as a settlement of a doubtful title to hold under the permanent grant If the conduct of the parties is any indication of the binding and permanent character of the *saswatham* demise, we find that it remained unchallenged only for 20 years from 1862, when the donor died, to 1882, when the right was surrendered. The defendants made no attempt to put forward the right of the Tavazhi to hold the property under a permanent grant until the present suit for redemption was brought; in other words, although the *saswatham* grant was allowed to remain unchallenged for 20 years after the death of the donor, it has been treated as no longer in existence for the last 30 years preceding this suit. I am, therefore unable to accept the District Judge's conclusion as maintainable on the facts found by him.

We allow the appeal and, setting aside the lower appellate Court's decree, we restore the decree of the District Munsif. Each side will bear their own costs here and in the lower appellate Court as the point on which the appeal succeeds was not taken earlier. Time for redemption, six months from this date.

Venkatasubba Rao, J.—I entirely agree,

As my learned brother has set out the facts, I shall not recapitulate them. The District Judge, in coming to the conclusion that the *saswatham* demise was binding on the successors of the *stan* who granted it, purported to rely upon the decision of the Judicial Committee of the Privy Council in *Magniram Sitaram* v *Kasturbhai Manibhai* (4). But it seems to me that the learned District Judge has wrongly applied the rule of evidence laid down by their Lordships to the facts of the present case. If the *saswatham* demise had remained unchallenged from 1852 to 1918, it would, no doubt, have been proper to presume that the

(5) [1896] 19 Mad. 485—6 M.L.J. 247.

(6) [1904] 27 Mad. 291—31 I.A. 83—8 C.W.N. 545—14 M L.J. 200—8 Sar. 587 (P.C.)

grant was made in exercise of a power possessed by the donee and that the demise was lawfully, and not unlawfully, made.

Let us look at the facts proved in the case The *saswatham* demise was made in 1852. The donor died in 1862. The successor could then have challenged the alienation, but it was conceded that he was a bad manager and did positive harm to the *stanom*, and it could not, therefore, be expected from such a man that he would do anything to protect the interests of the *stanom*. The learned District Judge very properly observes that no inference can be drawn from the omission of this *stani* to impugn the grant. The latter relinquished the *stanom* in 1875 after the institution of a suit for his removal. His successor obtained from the mother of defendants Nos. 1 to 6 the *kanom* deed sued on.

Their Lordships of the Judicial Committee in the case quoted above, observed that a long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of a valid power. The lapse of time in the present case is not as, the District Judge remarks, seventy years "which almost coincides with the allotted span of human life, three score years and ten" but just thirty years, the interval of time between the *saswatham* grant of 1852 and the *kanom* demise of 1882.

The learned Judges by whom the finding was called for, held in effect that if the *saswatham* grant was binding on the successors of the donor, the defendants' mother was incompetent to surrender it and accept a *kanom* demise in lieu of it; if, on the contrary, the *saswatham* was not binding, then the action of the defendants' mother in executing the *kanom* was in the interests of, and binds, the Tavazhi. They further held that the validity of the *saswatham* after the lifetime of the grantor would depend upon whether it was for the benefit of the *stanom* or not.

Having regard to the judgment delivered on the previous occasion, we are concerned merely with the question of the validity of the saswatham demise, and I may state that no other question has been argued before us. No evidence was forthcoming to show that the grant was made for the benefit of the stanom. The defendants rely solely upon the recitals in the deed. I may refer to a passage in the judgment in *Magniram Sitaram* v. *Kasturbhai Manibhai* (4) :—

"At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate to assume that the grant was lawfully and not unlawfully made.

When the kanom demise of 1882 was executed, the donee, that is, the father of the defendants Nos. 1 to 6, was alive. He had knowledge of the circumstances in which the original grant was made. Why then, if the saswatham was valid and unimpeachable, did he permit it to be surrendered? Then again, the first defendant was forty-eight years old at the time of the trial of the suit and it is stated that several other members of his family had also long ago become majors. The kanom was not impeached from 1882 to 1918. If they be believed that their mother had needlessly sacrificed their interests, there was nothing to prevent them from having questioned her act earlier. The legitimate inference to be drawn from these facts is that they acquiesced in the kanom, because they were aware that the saswatham demise of doubtful validity and the act of their mother in executing the kanom was in the interests of the Tavazhi.

The position of affairs, is therefore, this. On the one hand there is the saswatham demise which was made in 1852 and which, in any event, was good during the lifetime of the grantor and was attacked after his death, within seven years of a prudent manager succeeding to the office. On the other hand, we have the kanom

demise made in 1882 when an apparently valuable right was surrendered by the senior most member of the family, that is, the mother of defendants Nos. 1 to 6, without demur on the part of their father who was the original donee and was aware of the circumstances in which the saswatham grant was made. We have the further fact that the kanom demise was n timpugned by defendants Nos. 1 to 6 till a very recent date. In these circumstances, no presumption can arise in favour of the truth of the recitals in the saswatham grant. There has not been the lapse of time sufficient to raise a presumption that the saswatham grant was made under circumstances which justified the grant. There is no evidence to show that the original grant of 1852 was for the benefit of the stanom and that it is binding on the successors of the stani who made the grant. It follows that if the saswatham demise is not valid the mother of defendants Nos. 1 to 6 was acting in the interests of the Tavazhi in giving up the invalid saswatham right for a valuable kanom demise.

In the result, I agree with the order proposed by my learned brother.

Appeal allowed.

✱✱ 1924 MADRAS 252

PHILLIPS AND VENKATASUBBA RAO, JJ.

Thareesamna and others—Appellants

v.

The Deputy Collector, Cochin and others—Respondents.

Appeal No. 145 of 1921, Decided on 17th April 1923, against the order of Dt. Court, Malabar (S.) in L. A. No. 2 of 1919.

Land Acquisition Act, S. 23—Value in view of prospective uses (not remote) is to be considered but not the purpose of acquisition.

The owner is entitled to the value obtainable in open market for the land if put to its most lucrative use. Court may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote pe iod it may be applied. If the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price. But when the special value exists also for other possible purchasers, the owner is entitled to have this element of value taken into consideration, 1. K. B. 16 at 31 and (1910) 17 C. L.J. 34 Foll.

[P 253 C 1]

No evidence of former sales can generally be obtained which shall be precisely parallel in all its circumstances to the sale of the land compulsorily acquired, and differences will exist and it is impossible to state with precision what allowance should be made for them

[P 254 C 2]

Where the basis of the calculation is that he lands are valued as building sites, the claimants cannot also have an advantage to which they will be entitled only if the lands have been dealt with as agricultural lands.

[P 255 C 2]

C. V. Anantha Krishna Aiyar—for Appellants.

O. T. Govindan Nambiar and T. S Visvanatha Aiyar—for Respondents.

Phillips, J.—I think the District Judge is inclined to allow insufficient weight to the award itself, which is the estimate of an impartial officer, based upon evidence and personal enquiry, and cannot therefore be ignored in coming to a conclusion on the evidence, but notwithstanding this I am not prepared to differ from his conclusions and I agree in the order proposed by my learned brother.

Venkatasubba Rao, J.—The land acquired is 6 acres 56 cents in extent and is in Cochin Town. The learned District Judge has very clearly set out in his judgment the situation of the land, and it is sufficient for the present purpose to say that it is close to Kalvetti densely covered with houses and that a tidal channel runs through it. On the west is the European quarter fronting the sea and on the north is the commercial land abutting on the back-water. The learned District Judge has proceeded on the assumption that the value of the land in the aforesaid two localities cannot furnish any basis for purposes of comparison and this has not been seriously attacked before us.

The main question, however is: is the value to be assessed on the footing that the land is agricultural. as has been done by the Deputy Collector, or is its adaptability for building purposes to be taken into consideration, as has been done by the District Judge? On behalf of the Government

three witnesses were examined. The 1st witness, who is a Municipal Councillor, admits that on the acquired portion people have lived for a long time and that there were tiled dwelling houses. He, however, states that it is marshy and not fit for commercial purposes and that respectable people would not live there. The second witness says that, except for 60 feet breadth of the canal, the whole site is available for house building and admits that the most profitable way of developing the acquired land would be to deepen the channel and use the banks for ware-houses. He also says that respectable people would not live on the site, and the 3rd witness similarly deposes that the land is not fit for mercantile purposes, that it is not healthy and that well-to-do people would not live there. The effect of the evidence is that the sanitary conditions are not satisfactory and that people, who can afford to live in more healthy surroundings or in more fashionable parts of the town, would not generally reside on the site acquired. The land has been acquired for building purposes and it is not disputed that, when it is reclaimed, it can be rendered suitable for house-sites.

The learned District Judge has held that the owner is entitled to the value obtainable in open market for the land if put to its most lucrative use. It seems to me that he has stated the principle correctly. In *The Queen* v. *Brown* (1), agricultural land was held to have a potential value for building purposes, Cockburn, C. J. observing "A Jury * * * * * * may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied ....",

If the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price. But when the special value exists also for other possible purchasers, the owner is entitled to have this element of value taken into consideration. See the observations of Lord Moulton in *In re Lucas* v *Chesterfield Gas and Water Board* (2). The principle underlying this dictum is that the purpose for which the land is acquired should not be taken into consideration, for, if it were so, the public would be purchasing, as it were, its own improvements. See *Wernicke* v. *Secy. of State* (3). Land Acquisition Act, S. 24 (5) embodies this rule. But when the special value exists for other possible purchasers, there is a market in which that special value goes towards fixing the market price. See again the observations of Lord Moulton in *In re Lucas and Chesterfield Gas and Water Board* (2) above cited Under S. 23, the Court is to take into consideration the market value of the land. The expression "market value" has been described "as the price that an owner, willing and not obliged to sell, might reasonably expect to obtain from a willing purchaser [*Kailash Chandra Mitra* v. *Secy. of State* (4)], and the special adaptability for building purposes has been repeatedly held to be an element to be taken into consideration. "If, for instance," says Vaughan Williams, L. J., in *Bwilfa and Marthyr Dare Steam Collieries Ltd.*, v. *Pontypridd Waterworks Co.* (5) he (the umpire) has to assess the value of land which is used as an agricultural land, he is entitled to take into consideration its adaptability for building land, because that is a fact which is in existence at the time the notice to treat is given."

The value for future purposes is generally referred to as the potential value of the land. "The tribunals assessing compensation may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which, in the course of events, it might within a reasonable period be applied....." Lord Halsbury's Laws of England", Vol. VI, page 37.

(1) [1867] L.R. 2 Q.B. 630.

(2) [1909] 1 K. B. 16—77 L. J K. B. 1009—24 T. L R. 858—99 L. T 767—72 J P. 437—6 L.G.R. 1106.
(3) [1909] 13 C.W.N. 1046—2 I.C. 562.
(4) [1910] 17 C. L. J. 34—18 I. C. 638.
(5) [1902] 2 K. B 135.

This is a well established principle and has been recognised in numerous decisions in India. It was held in *Premchund Bussal* v. *Collector of Calcutta* (6), that the correct principle to apply is to assess the market value of the property not according to its present disposition but as laid out in the most lucrative and advantageous way in which the owners could dispose of it (p. 103). Similarly in *In re The Collector of Poona* v. *Kusinath Khasgiwala* (7), where the land acquired was originally devoted to agricultural purposes, compensation was awarded on the footing of the most lucrative use of the land; and it was not disputed that there the most advantageous way was to use it for building purposes. This principle was applied in *In the matter of the Land Acquisition Act, Munji Katsey* (8) where the land acquired lay in the vicinity of a town where building was going on and there was a fair probability of the owner being able, owing to its situation, to sell or lease his land for building purposes. I may also refer to a recent decision of this Court in *Raghunatha Rao* v. *Secy of State* (9) which recognises this principle.

The Deputy Collector arrived at the value of the land by capitalizing income. The income was necessarily of the land according to its present disposition and not as laid out in the most lucrative and advantageous way in which the owner could dispose of it. The income was of the land as used for agricultural purposes. The method adopted is opposed to the principle as enunciated in the decisions on the subject both English and Indian. The learned District Judge, on the other hand, has adopted the method of valuation of fixing the price with reference to the value of the lands adjacent to the land acquired and possessing similar advantages. I have no doubt whatsoever that he has adopted the correct method.

I have so far dealt with the principle to be applied in determining the compensation. The next question to be decided is, has the District Judge come to a right conclusion on the evidence before him? In my opinion, he has correctly appreciated the evidence, and, as I agree with his conclusion, I shall deal with this aspect of the case very briefly. He has adverted to the sale deeds covering the lands in the vicinity. Of these it seems to me that the following are material and furnish the basis for the valuation of the land in question. (1) Ex. IX relates to No. 369 sold in 1913 at Rs. 75 per cent. (2) Ex. VI relates to No. 382 sold in 1916 at Rs. 80 per cent. (3) Ex VIII relates to No. 360 sold in 1917 at Rs 100 per cent. (4) Ex XI relates to the thirty-years leases granted by the Municipality in 1918 at Rs 176 to 225 per cent, of Survey No. 578 reclaimed by the Municipality. Then we have another class of sale deeds which have not the same direct bearing on the question but which, in a greater or less decree, prove that the value of land has been rising and is generally high throughout Cochin: (1) Ex. VII which relates to No. 79 sold for Rs. 170 per cent. in 1919 after the date of the notification. (2) Ex. III which relates to No. 607 which fetched in 1918 Rs. 700 a cent. (3) Ex. XXIII which relates to No. 571 which fetched Rs. 1,440 a cent. This was in 1919 after the date of the notification. On this material and on some oral evidence, the District Judge has come to the conclusion that Rs. 100 a cent. fairly represents the value of sites with a good road frontage in the locality in question. I am not prepared to disagree with him. As was observed in *In re The Trustees for the Improvement of the City of Bombay* v. *Kersandas* (10), no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the land compulsorily acquired, and differences exist, and it is impossible to state with precision what allowance should be made for them. The learned

(6) [1876] 2 Cal. 103.
(7) [1886] 10 Bom. 585.
(8) [1891] 15 Bom 279.
(9) [1920] 44 Mad. 264—13 L.W. 11—39 M.L.J. 623—1920 M.W.N. 759—28 M.L.T. 397—60 I.C. 187.

(10) [1908] 33 Bom. 28—10 Bom. L.R. 88

District Judge has rightly refused to adopt a valuation based on Exs. III and XXIII. The lands comprised by them are situated in the northern portion which, as already observed, is the valuable commercial land abutting on the backwater. No. 79 fetched no doubt Rs. 170 per cent, but this fact is not very useful, not only because the sale was subsequent to the date of the notification but also because the plot is, as the District Judge discribes it, 'a good corner block.' I may here state that, in respect of the land covered by Ex. XI, it costs the Municipality Rs. 80 per cent. to reclaim it. It was argued on behalf of some of the claimants that the thirty-year lease of this reclaimed land fetched on the average Rs. 200 per cent. and deducting Rs. 80 from it a compensation of at least Rs. 120 per cent, should have been awarded. But this argument ignores the fact that the situation of the reclaimed land, No. 578, is more favourable than that of the land in question. The former is much nearer the commercial quarter of the town.

Dealing with individual claims, in regard to Nos. 373 to 375 the Dt. Judge thinks, that, as they constitute a compact site, Rs. 100 per cent, would be reasonable, and he deducts for costs of reclamation Rs. 60 and awards Rs. 40 per cent. I am satisfied that this is a fair valuation It is difficult to say whether Rs. 100 or Rs. 120 or a little more or less is the proper value of the land, and it is equally difficult to say whether the cost of reclamation would be Rs. 80 or Rs. 60 or some other figure near it. The District Judge had before him the evidence that it costs the Municipality Rs 80 per cent to reclaim the land covered by Ex. XI. It is, indeed, impossible to accurately estimate the costs of reclamation. It will depend upon the state of the land acquired, and costs of labour and of material. As their Lordships of the Judicial Committee observe in *In re Secy. of State for Foreign Affairs v. Charles Worth Pillink and Co.* (11). "In such an enquiry relating to subjects abounding with uncertainties, there is more than ordinary room for guesswork, and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at." On the whole, however, I have come to the conclusion that Rs. 40 per cent. is a proper valuation.

In regard to the valuation of a house on this site there has been some dispute. The learned District Judge allowed Rs. 2,000 for it. There is evidence that it is worth that sum and there is no evidence contra.

Mr. Anantakrishna Aiyar argued on behalf of the claimants to whom these portions of the land belonged that his clients were entitled to the value of the trees on the land on the footing that they were fruit-bearing trees. The contention is untenable, because the basis of the calculation being that the lands are valued as building sites, the claimants cannot also have an advantage to which they will be entitled only if the lands have been dealt with as agricultural lands. On the other hand what has been awarded is an inclusive price, and the claimants cannot be heard to say that the trees should be separately assessed as fruit-bearing trees.

The next item to be dealt with is item No. 392. For the land and houses the District Judge has awarded Rs. 6,000. The valuation of Rs. 75 per cent, allowing for the inferiority of the site, is, in my opinion, right. The houses are valued at Rs. 4,800, and I am not prepared to say that the amount is excessive. The District Judge also takes note of the fact that there was an offer of Rs. 6,000 for the land and the houses together. I see no reason to differ from the findings of the District Judge on any of these points.

These conclusions will entail the dismissal of Appeal No. 145 of 1921 and the memorandum of cross appeal filed on behalf of the 1st respondent, the Deputy Collector of Cochin. They will accordingly be dismissed with costs. So far as the memorandum of objections is concerned, the costs will be paid by the 1st respondent to the appellant and 3rd respondent separately and will be taxed on the respective amounts claimed against each in the memorandum of objections.

(11) [1900] 26 Bom. 1—28 I. A. 121—8 Sar. 1, (P. C.)

Tnere remains only one matter to be dealt with, the compensation fixed in respect of No. 378. The District Judge allowed only Rs. 50 per cent. on the ground that the land in question did not have a proper access or a good frontage. He further allowed Rs. 1,000 for a house standing on the site. Adding the statutory 15 per cent. he fixed the total sum at Rs. 1,840. The valuation was not seriously disputed either by the claimant or by the learned Advocate General who appeared on behalf of the Government The District Judge, however, was under misapprehension as regards this portion of the claim. He thought that there was an omission on the part of the owner to make a claim pursuant to the notice given under S. 9, and he held that S. 25 (2) was, therefore, applicable and refused to grant as compensation more than the amount awarded by the Collector, namely, Rs 1,530 odd although on the merits he came to the conclusion that Rs. 1,840 was the correct valuation. It is now conceded that there was a claim pursuant to the notice under S. 9 and that there was an oversight on the part of the District Judge. The learned Advocate General, however, sought to support the judgment on the ground that it appears from the record that the application by the owner under S. 18 requiring a reference to the Court was made after the expiry of the period of six weeks mentioned in Cl. 2 of that section. The point was for the first time taken before us, and we are not in a position to say that, if an opportunity had been given to the owner, he would not have had an answer on this part of the case, and we cannot see our way to allow this objection to prevail. That objection failing, we must necessarily allow the memorandum of cross objections filed by the 2nd respondent to the extent found in his favour by the District Judge. He will pay and receive proportionate costs both here and in the lower Court.

Appeal dismissed.

1924 MADRAS 256

AYLING AND ODGERS, JJ.

Allaga Pillai —Petitioner.

v.

Emperor—Opposite Party.

Cr. Rev. No 706 of 1922 and Cr. Rev. Pet. No. 591 of 1922, Decided on March 22nd 1923, from the judgment of Sub. Divl F. C. Magistrate Madura Town in Cr. App. 60 of 1922

Cr. P. C. S. 39—Special powers by Government notification are valid.

Notification of Government published in the Fort St. George Gazette under date 4th June 1915 empowers the Second Class Magistrates mentioned in the ist appended to the Notification to try cases under the Opium Act. This is a special empowering of the person within S. 39 of the Cr. P. Code. 16 Cr. L. J. 268 ref.

[P. 256, C. 2]

V N. Venkatavaradachari—for Petitioner.

The Public Prosecutor — for the Crown.

Order.—The only point raised in this Criminal Revision Case is, that the Magistrate who tried the case, the Second Class Magistrate of Thirumangalam, had not been empowered to try cases under the Opium Act, I of 1878, as required by S. 3 of the Act. We are referred to a Notification of Government published in the *Fort St. George Gazette* under date 4th June 1915 which empowers the Second Class Magistrates mentioned therein by virtue of their office to try cases under the Opium Act. The Second Class Magistrate of Thirumangalam is mentioned in the list appended to the Notification. We entertain no doubt whatever that this is a 'special empowering' of the person holding that office in virtue of his office within the meaning of S. 39 of the Criminal Procedure Code and would satisfy the requirements referred to by the learned Judges in *Mahomed Ksim* v. *Emperor* (1).

The petition is dismissed.

Petition dismissed.

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(1) [1915] 2 L.W. 233—17 M.L.T. 191—1915 M.W.N. 269—16 Cr. L.J. 268—28 I.C. 156.

1924 Madras 257.

(SPECIAL BENCH).

SCHWABE, C.J., COUTTS-TROTTER AND KUMARASWAMI SASTRI, JJ.

In re *Court Fees*.

Interpretation of statutes—"From a certain date" means on and after that date.

A notification contained in *Fort St. George Gazette* of May 5th of 1922 published fresh rules imposing increased institution fees on the suits on the Original Side of the High Court. The words of notification are "the amendments do come into force *from* the date of publication in the *Fort St. George Gazette*." The notification reached the High Court about 5 P.M. on 5th of May.

***Held per Chief Justice*—(1) If the named date is the beginning of a defined limited period, that is, where there is a terminus *a quo*, then *prima facie* the *first day* is included. Therefore 'from a named date' means "on and after that day" and the plaints filed on May 5th were subject to the amended rules. [P. 258, C. 1.]**

***Per Coutts-Trotter, J.*—Where the statute fixes only the terminus *a quo* of a state of things which is envisaged as to last indefinitely the common law rule obtains that you ought to neglect fractions of a day and the statute or the regulation or order takes effect from the first moment of the day on which it was enacted or passed, that is to say, from midnight of the day preceding the day on which it is promulgated; where on the other hand a statute delimits a period marked both by a terminus *a quo* and a terminus *ad quem*, the former is to be excluded and the latter is to be included in the reckoning.**

***Held* this notification clearly came within the former class and must be taken to have come into force on the first second of the 5th May, that is to say, from midnight of the 4th May and therefore the plaints filed on 5th May are liable to the enhanced fees laid down by the notification. [P. 259, C. 2.]**

***Per Kumaraswami Sastri, J.*—There was nothing to justify charging the people who filed their plaints on 5th May without the knowledge of the notification which only reached the High Court at 5 P.M. with higher fees in respect of plaints filed during the course of the day.**

***Held* further that the law is that there is no hard and fast rule in deciding whether the word "from" is inclusive or exclusive of the date of notification and that each case must depend upon its own circumstances and subject-matter and therefore justice and equity demand that the date of notification ought to be excluded. [P. 264, C. 2.]**

V. V. Srinivasa Ayyangar—For the party.

Advocate General (C. P. Ramaswami Ayyar)—For the Crown.

Schwabe, C.J.:—The question to be decided in this case is whether on a proper interpretation of the notification contained in the *Fort St. George Gazette* of May 5th, 1922, the rules imposing increased institution fees on suits on the Original Side of this Court apply the new scale to suits instituted on that day or not. The words of the notification are "that the amendments do come into force *from* the date of publication in the *Fort St. George Gazette*," and the whole question is whether those words mean on and after that date, including May the 5th, or after that date excluding May the 5th.

The matter has been most fairly and clearly argued by the Advocate General for the Crown and Mr. V. V. Srinivasa Aiyangar for the litigants, and I have also had the opportunity of studying and considering the judgments of my brothers, who take different views on this matter. I approach this matter conscious of the salutary rule that, in all statutes imposing taxation, any real ambiguity must be decided in favour of the subject and against the Crown. I consider that the hour of the day at which the Gazette was actually published is a wholly irrelevant consideration, because on neither view does it make any difference. If the Gazette had been published early in the morning, according to the view of Kumaraswami Sastri, J., the tax will come into operation only the next day. If it had been published late in the night, according to the view of Coutts-Trotter, J., the tax would still be operative from the time the office opened for the receipt of plaints on that day. I agree that we have nothing to do with the English Common Law except in so far as it may afford some guide as to the proper meaning to be attached to words in the English language. I think this may be deduced from a study of all the English authorities, namely, that in every case the word "from" preceding a date may have one of two meanings, namely, on and after, that is, including the named date, or merely after, that is excluding the named date, and that it is necessary to look at the context and the circumstances of each case to arrive at the true construction. But I think further that, unless there are valid reasons to the contrary, certain rules may be deduced and they may be stated thus: (1) that, if the named date is the beginning of a defined limited period, that is, where there is a terminus *ad quem* as well as a terminus *a quo*, then *prima facie* the first day is excluded; (2) that, if the named date is the beginning of an indefinite period then *prima facie* the *first day* is included. I say *prima facie* because

in my view there must be exceptions, for example, if I announced that I should sit on the Original Side from Monday next, I should interpret that to mean including Monday, and that whether I had announced that I should do so for a month only or whether I had left the terminus *ad quem* indefinite. In my view these rules have been recognised by the framers of the two Indian Statutes, the Indian General Clauses Act X of 1897, section 3, sub-section (12), and the Madras General Clauses Act I of 1891, section 9, following the English Interpretation Act of 1889, 52 and 53 Vic., chap. 63. I do not think it necessary to decide whether any of these Interpretation Acts applies, though I incline to the view that the English Act applies, as none of them deal specifically with this point.

Applying the general rules stated above to this case, the named date must be included unless there is some valid reason why it should not be, and I can find none. It is true that it may have the effect of making persons pay more than they understood they had to pay when they filed their suits; but this seems to me a ground for criticising the method of imposing this tax rather than a ground for interpreting the notice in any particular way; and I think that this argument is more than counterbalanced by the fact that this was a sudden imposition of a tax which in many cases could be avoided if notice was given of it in time for suits to be filed between the time of the publication and of its actually coming into operation. What has greatest weight with me is that I am of opinion that in ordinary plain English, unless there is anything indicating the contrary intention in the context, "from a named date" means "on and after that day."

I do not discuss the authorities in detail because I think the whole matter is summarized in the words of A. L. Smith, L. J., in *In re North, Ex parte Hasluck* (1). "In the reckoning of time each case must depend on its own circumstances and subject-matter," and giving the best consideration that I can to this case and the circumstances and the subject-matter of this notification, in my judgment, the plaints filed on May 5th are subject to the amended rules, and it must be declared accordingly.

(1) [1895] 2 Q.B. 264=64 L.J Q.B. 694=14 R. 436 =72 L.T. 854=2 Manson 326=59 J. P. 724.

Coutts-Trotter, J.:—The short point for our decision is whether the new scale of fees applies to the plaint filed in this Court on the 5th May, the date of its publication in the *Fort St. George Gazette*. The High Courts of India are enabled to make rules for regulating the practice and proceedings of such Courts and to settle a table of fees to be allowed to officers of Court under section 107 of the Government of India Act, 5 and 6 Geo. V, c. 61, and 6 and 7, Geo. V, c. 37, and 9 and 10 Geo. V, c. 101, all of course being statutes passed by the Imperial Parliament. The Advocate-General therefore contends that it follows that section 36 of the Interpretation Act of 1889, 52 and 53 Vict., c. 63, alone applies and that we are not concerned with the Indian Statutes. Section 36, sub-section (2) of the Interpretation Act is as follows:—

"Where an Act passed after the commencement of this Act, or any order in Council, order, warrant, scheme, letters patent, rules, regulations, or bye-laws made, granted or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day."

If this contention be not correct, the orders made by the High Courts under the authority of the Government of India Act must be governed by the Indian General Clauses Act X of 1897 and the relevant sections of that Act are section 3, sub-section (12) and section 9. Section 3, sub-section (12) is as follows:—

"Commencement used with reference to an Act or Regulation shall mean the day on which the Act or Regulation comes into force."

Section 9 enacts that in any Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to." In my opinion this case is not really affected by the consideration of whether the English Interpretation Act or the Indian General Clauses Act is to be looked to for the guiding rule in this case. The whole argument of Mr. Srinivasa Iyengar is based on the use of the preposition "from" in the notification instead of the more obvious

"on." To my mind no useful purpose is served by drawing distinctions between particular propositions such as "on," "from," "from and after" and so forth and for that I have the authority of *Doe* v. *Spence* (2) and of Lindley, L.J., in *Sidebotham* v. *Holland* (3). It appears to me that while it is true that no one general rule exists as to the computation of time [See Sir William Grant in *Lester* v. *Garland* (4) and *In re North, Ex parte Hasluck* (1)] the English Common Law has evolved two perfectly clear principles and they are the principles which I conceive that the draftsman of the Indian General Clauses Act intended to embody in the sections which I have quoted. What I conceive to emerge from the decided cases is this: that as the law in general neglects fractions of a day you must either exclude or include the whole of the day with which a given statute or rule or regulation deals. And the exclusion or inclusion, I think, is clearly provided in two other rules. If you are fixing the point of time at which a certain state of things is to be called into existence, that state of things comes into existence at midnight of the day preceding the day at which or on which or from which or from and after which the new state of things begins. In such cases the statute or rule is only concerned in fixing the terminus *a quo* of a new state of law which is enacted to continue indefinitely, in other words, until repealed by a new enactment of the legislature where, in short, you have a terminus *a quo* but no terminus *ad quem*. This principle is well illustrated by the case of *Tomlinson* v. *Bullock* (5). It is one of obvious convenience for it would be an intolerable burden upon the litigant public to require it to ascertain at which precise hour of the day a particular statute is passed or a particular rule or regulation is promulgated. The other rule is this. When you have a period delimited by statute or rule which has both a beginning and an end, the word "from" excludes the opening day and any words fixing the closing day include that day. As was pointed out by Day, J., any other canon of construction would lead to an absurdity. For instance a policy of insurance to be good for one day from the 1st January might be valid only for a few hours or even for a few minutes or conceivably not at all, unless you exclude the 1st January from the computation. Illustrations of the application of this principle are to be found in *Isaac* v. *Royal Insurance Co.* (6), *In re Railway Sleepers Supply Company* (7), *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association* (8), *Sheffield Corporation* v. *Sheffield Electric Light Company* (9), and *Goldsmiths' Company* v. *The West Metropolitan Railway* (10). The distinction appears to me to be vital and reconciles all the cases referred to in the argument. I think the rule that emerges is this. Where a statute fixes only the terminus *a quo* of a state of things which is envisaged as to last indefinitely, the common law rule obtains that you ought to neglect fractions of a day and the statute or regulation or order takes effect from the first moment of the day on which it is enacted or passed, that is to say, from midnight of the day preceding the day on which it is promulgated: where, on the other hand, a statute delimits a period marked both by a terminus *a quo* and a terminus *ad quem*, the former is to be excluded and the latter to be included in the reckoning. This notification clearly falls within the former class and must be taken to have come into force on the first second of the 5th May, that is to say, from midnight of the 4th May. It follows that the plaints filed on the 5th May are liable to the enhanced fees laid down by the Regulation.

A very large part of the argument addressed to us on behalf of those who filed plaints on the 5th May was based on what was called a hardship suffered by them if our decision should be favourable to the Crown. Increased taxation is always in a sense a hardship to the subject but I cannot see any special hardship imposed upon these particular litigants. If the suits which they filed are not in their

(2) [1805] 6 East 120=2 Smith 255=8 R. R. 422.
(3) [1895] 1 Q.B. 378=64 L.J.Q.B. 200=14 R. 135=72 L.T. 62=43 W.R. 228.
(4) [1808] 15 Ves. 248=33 E.R. 748.
(5) [1879] 4 Q.B.D. 230=48 L.J.M.C. 95=40 L.T. 459=27 W.R. 552.
(6) [1870] 5 Ex. 296=39 L.J. Ex. 189=22 L.T. 681=18 W.R 982.
(7) [1885] 29 Ch. D. 204=54 L.J. Ch. 720=52 L. T. 731=33 W.R. 595.
(8) [1891] 1 Q.B. 402=60 L.J.Q.B. 47=63 L.T. 807=55 J.P. 168.
(9) [1898] 1 Ch. 203=67 L. J. Ch. 113=77 L. T. 616=46 W.R. 485=62 J.P. 87.
(10) [1904] 1 K.B. 1=72 L. J. K. B. 931=89 L.T. 428=52 W.R. 21=68 J.P. 41=20 T.L.R. 7.

opinion worth the expenditure entailed by the increased rate of institution fees, they would doubtless be permitted to withdraw them—a suit evaluated at that rate by the person who institutes it, is not likely to be based on a very solid cause of action. In any event a line has to be drawn one side or the other more or less arbitrarily and it does not seem to me that considerations of supposed hardship can possibly affect the determination. In my opinion the Crown succeeds, whether this matter is regulated directly by the Common Law of England and the Engligh Interpretation Act of 1889 or by the Indian General Clauses Act which, in my opinion, should be construed in the light of the numerous decisions of the English Courts. I do not think too much importance should be attached to the terminological significance of the words "period" and "series" which are the expressions used in the Indian Act. But it is clear that such considerations, if invoked, tend to support the contention of the Crown. In the case of the word "period" it is incontestably so, for the word obviously imports from its Greek origin the completion of a circuit, that is to say, something which has both a terminus *a quo* and a terminus *ad quem* to begin and end the circuit.

Kumaraswami Sastri, J.:—By a notification in the *Fort St. George Gazette Extraordinary*, published on Friday the 5th of May, 1922, the Table of Fees which under Appendix II of the old rules on the Original Side, were levied in respect of the institution of suits was amended and instead of a fixed fee of Rs. 30 levied under serial No. 1, it was provided that Rs. 150 was to be levied in all suits where the value of the subject-matter did not exceed Rs. 10,000 and that, in respect of suits of higher value, Rs. 20 was to be levied for every Rs. 5,000 or part thereof in excess of Rs. 10,000. In respect of serial Nos. 2 and 2 (*a*) it was provided that, in the case of suits cognizable by the City Civil Court or the Court of Small Causes, the same fee was to be levied as would be leviable were the suits instituted in those Courts, with a proviso that the fee shall, in no case, be less than Rs. 150. This notification states that the amendments "do come into force from the date of publication in the *Fort St. George Gazette*."

A Gazette Extraordinary was issued on the 5th of May, 1922, containing the notification and it reached the High Court at about 5 p. m. that day and several plaints had been filed before that hour. As the office hours are 11 a. m. to 5 p. m. the notification reached the Court at the close of the office hours. The question raised is whether the plaints instituted that day are to be charged with a fee of Rs. 30 as under the old rules or with the fee provided for by the amended rules and this question turns on whether the notification is to take effect from the 5th of May the day of publication or whether that day is to be excluded in determining the question as to from what date the amended rules have operation. The wording of the notification, being that it is to take effect "from the date of publication" it is argued by the Advocate-General who appears for the Government that the word "from," in construing the notification must be taken as inclusive of the date of publication and that the notification should apply to plaints presented on that date before the publication as the law does not take notice of fractions of a day. Mr. Srinivasa Iyengar who appears on the other side contends that the date of publication should be excluded and that the use of the word "from" does not necessarily connote the inclusion of the first day. Reference has been made by the Advocate General in the course of his arguments to the General Clauses Act X of 1897 and the Madras General Clauses Act I of 1891, but these Acts do not afford much help as Act X of 1897 only applies to the construction of the Acts of Governor General in Council and the Regulations made pursuant to those Acts and is not made applicable to any rules that may be framed. The legislature has refrained from making the provision of this Act applicable to rules framed under statutory power. The Madras General Clauses Act I of 1891 similarly has no application to the question involved in this case. Section 36 of the Interpretation Act of 1889 (52 and 53 Vic., c. 63) is also of no help even assuming that the Act applies to rules made under the powers conferred by section 107 of the Government of India Act (a point on which I express no opinion) as the section refers to rules being expressed to come into operation "on" a particular day and not "from" a particular day. We have therefore to fall back on the general principles which govern cases like the present.

There has been a great diversity of opinion as regards the legal effect of the use of the word "from" with reference to the computation of time and as to whether it must be treated as inclusive or exclusive of a terminus *a quo*. Hard and fast rules were attempted to be laid down in the earlier English cases. For example in *Castle* v. *Burditt* (11) it was held, relying on the rule laid down in *R.* v. *Adderley* (12), that where the computation of time is to be made from an act done, the day on which the act is done is to be included. Distinctions were attemped to be drawn between the use of the words "from the date" and "from the day of the date." It was, however, recognized even in the earlier cases that no hard and fast rules could be laid down. Lord Mansfield in *Pugh* v. *Duke of Leeds* (13), where a lease was to run from the day of the date of the indenture for 21 years and the question was whether the date of the lease must be included or excluded, observed as follows: "In grammatical strictness and in the nicest propriety of speech that the English language admits of, the sense of the word "from" must always depend on the context and subject-matter whether it shall be construed inclusive or exclusive of the terminus *a quo*."

All the earlier authorities were referred to and discussed by Sir William Grant, M. R., in *Lester* v. *Garland* (4), which has been followed in subsequent cases. On a consideration of the authorities on the question as to whether in computing time from an act or event, that day is to be included or excluded, he observed as follows:—

> "It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think it would be more easy to maintain that the day of an act done or an event happening ought in all cases to be excluded than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render it a sort of indivisible point so that any act done in the compass of it is no more referable to any one, than to any other portion of it, but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed until the day is passed. But it is not necessary to lay down any general rule; whichsoever way it should be laid own, cases would occur, the reason of which would require exceptions to be made."

The Master of the Rolls referred with approval to the argument of Sergeant Palmer that in all the previous cases except one the act done, from which the computation is made inclusive of the day, is an act to which the party against whom the time runs is privy; and, as he has unquestionably the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it as a part of the time allowed him; whereas in the case under consideration the event was one totally foreign to the party whose time for deliberation was to begin to run from that event. Maxwell in the "Interpretation of Statutes" (Sixth Edition, p. 605) observes as follows:—

> "In the computation of time, distinctions have been made by the Courts which were founded chiefly on considerations of convenience and justice. The general rule, anciently, seems to have been that both terms or endings of the period given for doing or suffering something were included; but when a penalty or forfeiture was involved in non-compliance with a condition within the given time, the time was reckoned by including one and excluding the other of the terminal days. A distinction was afterwards made depending on whether the point from which the computation was to be made was an act to which the person against whom the time ran was privy or not. Thus, if the time ran "from" when he was arrested or received a notice of action, it might justly be computed as including the day of that event; but not so, if it ran from the death of another person; a fact of which he would not, as in the previous cases, necessarily be cognizant, or, in other words, in such and cognate cases the exact meaning is signified by the phrase 'from and after'.

In *In re North, Ex parte Hasluck* (1), the point for consideration was whether the day of seizure by a Sheriff should be included or excluded in computing the period of 21 days referred to in section 1 of the Bankruptcy Act of 1890. Vaughan Williams, J., observes as follows:—

> "There seems no doubt that by the common law when an act is complete on a particular day, and it becomes necessary to

(11) [1790] 3 T.R. 623=100 E.R. 768.
(12) [1780] 2 Doug. 463=99 E.R. 295.
(13) [1777] 2 Coup. 714=90 E.R. 1323

calculate from that day, the day on which the act was so completed must be reckoned in the computation. This is the principle established in *R.* v. *Adderley* (12), and it was upon this it was held in *Glasington* v. *Rawlins* (14), with regard to the act of bankruptcy grounded upon lying in prison for two months after arrest that the day of the arrest must be included in the computation of time."

After referring to the section in the old and new Bankruptcy Acts the learned Judge observed as follows :—

"I do not feel disposed, however, to revert to the common law principle unless the law clearly compels me to do so, because it is much more convenient to have one rule of computation of time in bankruptcy, and it is not readily to be assumed that the legislature intended to establish two rules."

Lord Esher, M. R., on appeal observed as follows :—

"No general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or, indeed, where time is mentioned in a contract and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made. Notwithstanding the elaborate array of authorities which have been cited to us they seem on being shifted to contain no binding rule to the effect that time must be computed according to a hard and fast rule ; that seems clear from the judgment in *Lester* v. *Garland* (4) which Sir William Grant after a learned examination of the whole subject laid down what I conceive to be the wholesome view that no general rule exists. A great deal of difficulty has been caused in the administration of the law and particularly of the common law by decisions in which technical rules have been formulated which were not true—that is, were not in accordance with the facts of the case. To say that by the common law a part of a day is the whole of a day is to say something which is contrary to the truth ; it is a technical rule which was imposed upon the law with the result of bringing the law into disrepute. It is immaterial whether those older decisions were right in the particular cases ; if they, or any of them, laid down any general rule as to the mode of computing time, that rule has been departed from in recent times and no longer exists."

A. L. Smith, L.J., observed :—

"It is contended that the old authorities show that formerly when time had to be computed from the doing of an act, the first day, that is, the day on which the act was done was included and that the rule is applicable to the present case. But it has been shown from subsequent cases that there is no such universal rule and that in the reckoning of time each case must depend on its own circumstances and subject-matter and for this I need only refer to the judgment of Sir William Grant in *Lester* v. *Garland* (4) to that of Kelly, C. B., in *Isaacs* v. *Royal Insurance Company* (6) and of Chitty, J., in *In re Railway Sleepers Supply Company* (7)."

Rigby, L. J., observed as follows :—

"It is said that the law takes no account of fractions of a day ; but that is not a correct statement, for it means that the law will never enquire at what time a particular event took place ; for instance, a difference of five minutes in the registration of two deeds in the Middlesex Registry would be sufficient to determine a question of priorities, and the time of their respective registration will, as a matter of course, be looked at. If the doctrine is cut down to the proposition that in the computation. the law takes no account of fractions of a day, then it means one of two things ; either that the fraction of a day is to be taken as a whole day or that it is to be excluded altogether from the calculation ; it does not help us to determine in any particular case whether the part is to be left out or kept in. It was contended before us and it seems at one time to have been thought to be law that where a fact or event was mentioned from which a given period of time was to be reckoned the Court was bound to reckon the portion of the day on which the act was done as though it were a whole day and to reckon it as the first day of the period. That doctrine underwent a thorough examination in *Lester* v. *Garland* (4), at the hands of Sir William Grant who considered the cases in which the first day had been included or excluded and came to the conclusion (which I think was inevitable) that there was no general rule on the subject. His own view was that if there were to be a general rule it ought to be one of exclusion as being more reasonable than one to the opposite effect.

(14) [1803] 3 East 407=102 E.R. 653.

His classification of the cases shows that where the calculation is in favour of a person, the construction should be adopted which is more favourable to him . . . . . In my opinion although Sir William Grant did not put the proposition in so many words, his judgment leads us to the conclusion that the question whether the day on which the act is done is to be included or excluded must depend on whether it is to the benefit or disadvantage of the person primarily interested.

The law is thus stated in Halsbury's Laws of England, Vol. 27, page 446:

"Expressions such as 'from such a day' or 'until such a day' are equivocal since they do not make it clear whether the inclusion or exclusion of the named day be intended. As a general rule however the effect of defining a period in such a manner is to exclude the first day and include the last day."

I may also refer to Stroud's Judicial Dictionary where it is stated "from" is much akin to "after" and when used with reference to computation to time, for example, from a stated day, *prima facie* excludes the day of the date." In Wharton's Law Lexicon it is stated that the word "from" ordinarily excludes the day from which the time is to be reckoned but is construed inclusive of that day if the context requires it. *Sidebotham* v. *Holland* (3), was referred to by the Advocate General as showing that the words "at," "on," "from" and "on and from" have the same meaning. That case turned upon the date of commencement of a tenancy and all that Lindley, L. J., held in that case was that the words "at," "on," "from" and "on and from" were, for the purpose of considering the validity of a notice, equivalent expressions and the learned Judge observed that any distinction between them *for such a purpose as that* was far too subtle for practical use. I do not think that it is authority for holding that wherever these words are used they have the same meaning. *Tomlinson* v. *Bullock* (5) referred to turned on the construction of section 3 of the Bastardy Act, 35 and 36 Vict., Ch. 65, which runs as follows:

"Any single woman who may be delivered of a bastard child after the passing of this Act," etc.

It was held that the Act came into immediate operation and that order on application may be made in respect of a child born at any time of the day on the 10th August, 1872, when the Act received the Royal assent. Lush, J., was of opinion that the Act was not intended to deprive the mother of a child born on the day on which it was passed of all remedy against the putative father, that it intended to substitute another remedy for that which it took away, and that if that intent can be effectuated without violence to its language it is the duty of the Court to so construe the Act as to carry out that intention. The case proceeded on considerations as to the intention of the legislature and of the hardships that would be caused to the mother and bastard. I do not think it is authority for the proposition that the use of the word "from" invariably includes the first day. The law as laid down by the more recent decisions being that there is no universal rule and that in the reckoning of time each case must depend upon its circumstances and subject-matter, there is no reason to hold that the exclusion of the first day where the word "from" is used is only to be in cases where there are two termini, as contended for by the Advocate General. His main argument was that the rule of the common law being that "from" is to be included for the computation of time, that the law would not take notice of fractions of a day, and that the authorities only made an exception where there were both termini, the common law rule ought to be applied in this country so as to include the first day whenever the word "from" is used. The common law rule, if there was any such hard and fast rule, as contended for by the Advocate General, has not been applied in a series of recent decisions, the test laid down being whether the inclusion or exclusion would be just or equitable or would be in accordance with intentions of the parties having regard to the circumstances and subject-matter of each case. I do not think that the rules of English Common Law based as many of them are on a system of jurisprudence and on considerations so different should be applied to this Court unless necessary for the ends of justice. It has not been held in any case that the English Common Law applies to this country. The rules of equity and good conscience are by the Civil Courts Act to govern cases not covered by Hindu and Muhammadan laws. The rule that the law will not take notice of fractions of a day

has been used for the purpose of excluding the first day in cases where the inclusion would work hardship and I do not think there is any reason for including the day where an act is said to be done from a day and excluding the day where an act is said to be done from a day to another day. A number of days beginning with a fixed date is still a series of days and they do not cease to be a series simply because they are to go on indefinitely. It is argued that the exclusion is necessary when there are two termini because if one day is given for the doing of an act the law would be reduced to an absurdity. But it has always been recognized even in the older decisions that the word "from" would exclude the first day, if otherwise it would lead to an absurdity and that though the law does not in general take notice of fractions of a day, yet it admits it if necessary. This was recognised as early as *Combe* v. *Pitt* (15). If the rule is that "from" includes or excludes the first day according to the context and the intention of the parties, it would necessarily exclude the first day when there are two termini and one day given and there is no necessity for having two rules of construction according as there are one or two termini.

Applying the law as laid down in the previous cases to the facts of the present case, we have to see whether the 5th of May, 1922, is to be included or excluded. I might, in this connection, state that I do not think that the principles which govern, or the devices which are resorted to, by the Executive for the purpose of raising money by taxation ought to have any weight with us in determining whether the date of publication is to be included or excluded. I do not think the High Court is part of the tax gathering machinery of the Government or has any concern with the consequences to the Government of their decision on the construction of the rule. The rule, I take it, was passed by the Judges of the High Court in the exercise of the powers entrusted to them to control the administration of justice and the fees were raised because in the opinion of the Judges it was just and proper that litigants ought to pay more for the benefits which they derive by resorting to the jurisdiction of the High Court. The notification expressly states that it is to have effect from the date of publication, the object of the publication being that the public ought to have notice that the fees were being raised so that they might know exactly what they were in for when they resorted to the High Court for justice. The notification, as I have already said, was (as appears from a note of the Deputy Registrar) received in the High Court at 5 p.m., the office closing at 5 p.m. It seems to me that the litigants who filed plaints before they or even the office had knowledge of the publication of the rule did what was perfecty valid under the old rules and they presented the plaints with Rs. 30 stamp irrespective of the value of their claim. A person who files a plaint which is properly stamped and which is in order at the time of presentation is entitled to have his plaint admitted on presentation though as a matter of convenience the office receives the plaints and admits them at the end of the day or later on. There seems to me to be very little justice or equity in directing that persons who have done what was perfectly a legal and valid act at the time should pay a Court-fee which is much higher simply because a notification was received at the close of the day making the higher fees chargeable from the date of the notification. It may well be that if those persons had notice that instead of Rs. 30 they had to pay at least Rs. 150 and a maximum that would range according to the value of their claim, they might rather have compromised with the other side or might have had resort to other proceedings like arbitration for settling their claims. I can find nothing to justify charging people, who filed their plaints on that day without knowledge of the notification which only reached the High Court at 5 p.m., with the higher fees in respect of plaints filed during the course of the day.

Having regard to all the facts and circumstances of the present case, I think that, if the law is that there is no hard and fast rule in deciding whether the word "from" is inclusive or exclusive of the date of notification and that each case must depend upon its own circumstances subject-matter, justice and equity demand that the date of the notification ought to be excluded. I would, therefore direct that all the plaints received on the 5th of May, 1922, be stamped with Rs. 30.

(15) [1763] 3 Burr. 1424=97 E.R. 907.

1924 Madras 265.

(FULL BENCH).

SCHWABE, C.J., COUTTS-TROTTER AND KRISHNAN, JJ.

In the matter of an *Advocate of the High Court.*

Decided on the 20th August, 1923.

Letters Patent (Madras), Cl. 10—Advocate convicted for perjury in England—Disbarment by Benchers of his Inn—Subsequent good conduct—Admission as Advocate in India—High Court is not bound by the decision of the Benchers—Propriety of conviction cannot be gone into.

In an inquiry into the conduct of a practitioner under the Letters Patent, the propriety of a conviction and sentence could not be questioned, though the facts of the case might be considered, to see whether the culpability of the individual concerned, was such as to disqualify him for his profession. [P. 266, C. 1.]

It is possible that, where the criminal law of the two countries differs, in respect of the matters charged, or in a case where it is alleged that there had not been a fair trial in some foreign country, the above rule might be held not to be applicable.

The Madras High Court is not bound to follow the decision of the Benchers of the Inns of Courts. It has, by the Letters Patent, a discretion vested in it, and it must in every case exercise that discretion itself, giving, of course, due weight to the views of the Benchers of Lincoln's Inn in England. [P. 266, C. 2.]

An order for disbarment is not necessarily final or conclusive for all time and it is open to the Court to re-admit a practitioner, after the lapse of time, if it is satisfied that the practitioner has in the interval conducted himself honourably and the sentence of exclusion has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, so that he may be safely entrusted with the affairs of his clients and admitted to an honourable profession, without its suffering degradation; and in such a case, it is open to the proper tribunal to restore a man to the rolls, whether he be a Barrister, Advocate or Attorney. (6 B. & S. 703; 12 C.L.J. 525, *Ref.*). [P. 266, C. 2.]

No different standard of conduct or character is required from a barrister of Indian race, to a barrister of English race and also no different standard of honour should be held to exist for a practitioner at the English Bar of whatever race, and the practitioners of this Court, whether Barristers or Vakils. [P. 268, C. 1.]

In the matter of disciplinary jurisdiction, the English Court cannot be put on the same footing as a foreign Court. [P. 269 C. 2.]

C. Madhavan Nair—for the Government.

F. S. Vaz—for the Bar Association.

The Advocate in person.

Schwabe, C. J.:—The Advocate was called to the Bar by the Hon'ble Society of Lincoln's Inn, in January, 1913. He was admitted as an Advocate of this Court, under the rule, which includes among the qualifications for such admission a call to the Bar in England. After his call to the Bar he remained in England for some time and practised there. Unfortunately he became involved in matrimonial disputes, arising out of his relations with two English ladies, one of whom he married and with the other of whom he went through a form of marriage. According to him it was valid under the Mahomedan Law, but it was clearly invalid according to the Law of England. It was alleged by the first of these ladies that he ill-treated and deserted her, and she in some way having got into communication with the Editor of a Newspaper one Horatio Bottomley, the latter published a series of articles, reflecting seriously on the character of the Advocate. He brought and himself conducted an action for libel based on these publications. At the hearing of that suit, he gave evidence and was cross-examined by Horatio Bottomley, a very skilled cross-examiner, who also conducted his case in person. The evidence given did not commend itself to the Jury and the Advocate lost his case. He was subsequently prosecuted for perjury, in respect of the answers, alleged to have been given under that cross-examination. He was convicted and sentenced to six months' imprisonment and on appeal the conviction was upheld. The matter came before the Benchers of his Inn, and after a full enquiry it was decided by reason of that conviction, he had been proved unfit to remain a member of that Honourable Society and he was disbarred and expelled therefrom. He appealed to His Majesty's Judges and his appeal was dismissed. The Lord Chancellor stated that:

"It was impossible to allow a man who had been convicted of perjury to remain a member of the Bar, and, although, he hoped that the appellant having learnt his lesson and received his punishment might be able to lead an honest and successful life in the future, the tribunal could not interfere with the Benchers' decision."

No steps were taken at the time to remove the Advocate's name from the roll of Advocates of this Court, and after a lapse of some years, he commenced practice, as an Advocate in Madras. The attention of the High Court having been called to these facts, he was called upon to show cause why his name should not be

removed from their roll and he now appears to show cause.

In such cases, the Court will not allow the propriety of the conviction and sentence to be questioned, but can and will enquire into the facts to ascertain the degree of moral turpitude involved and to form an opinion whether the legal practitioner in question should be removed, or suspended or be otherwise dealt with. It has been argued before us that the rule as to not allowing the propriety of the conviction and sentence to be questioned does not apply, where the conviction took place in England and the application to the Court is in this country. I do not consider it necessary to consider how far this rule is applicable to cases of convictions in another country, though I concede that it is possible that, where the Criminal law of the two countries differs, in respect of the matters charged, or in a case where it is alleged that there had not been a fair trial in some foreign country, the rule might be held not to be applicable. But, in this case, the law of the two countries is the same, and it is quite clear that the Advocate received a full and fair trial at the hands of the English judge and jury. Indeed, his own submission to the contrary is based on the admission of certain short-hand-notes of his cross-examination, as evidence of answers given in respect of which the charge of perjury was brought. He suggested that such short-hand notes were inaccurate and that the inaccuracy was intentional and due to corruption of the short-hand-writers by Horotio Bottomley. It is a matter for regret that, in the stress of argument, he should have chosen to make such allegations, which are entirely unsupported by evidence and which, I am quite clear, are unfounded. I am satisfied that he was rightly convicted, and it is therefore immaterial to consider whether or not we are bound, without enquiry, to accept the conviction as correct. If it is a matter upon which it is open to me to express an opinion, I must also say that I am quite satisfied as to the propriety of the decision of his Benchers and of His Majesty's Judges. If an application had been made soon afterwards, in my judgment, on the facts of this case, no other order could have been properly made than that his name should be struck off, from the roll of Advocates. I wish to guard myself from saying that this Court is bound to follow the decision of the Benchers of the Inns of Courts. I think it has, by the Letters Patent, a discretion vested in it, and it must in every case exercise that discretion itself, giving, of course, due weight to the views of the Benchers of Lincoln's Inn in England.

But this case has not come before us immediately, but after the lapse of some years, and, in my judgment, it is open to this Court to consider the matter, as it now stands and to take into consideration such matters, as would be relevant on an application to reinstate a man who has been disbarred. The law, I think, is quite clear that an order of disbarment is not necessarily final or conclusive for all time and that it is open to the court to readmit a practitioner, after the lapse of time, if it is satisfied that the practitioner has in the interval conducted himself honourably and that the sentence of exclusion has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, so that he may be safely entrusted with the affairs of his clients and admitted to an honourable profession, without its suffering degradation; and in such a case, it is open to the proper tribunal to restore a man to the rolls, whether he be a Barrister, Advocate or Attorney—See *Ex parte Pyke* (1) and the judgment of Mookerjee, J., in *In re Abiruddin* (2). In this case we might strike off the name from the rolls and leave it to the practitioner to qualify himself again for admission, by applying to his Inn for reinstatement. But the Advocate is here and not in England. He desires to practise here and not there and I do not think it would be right for us to avoid the responsibility of considering the matter for ourselves, by leaving the burden of the decision to the Benchers of his Inn. We have before us a considerable body of testimony that the Advocate has led an honourable and reputable life, since his return to this country. I think too we may take into consideration the fact that, although this crime of perjury did involve moral turpitude as a practitioner, at the time he was young, and that he swore falsely under the stress of his severe cross-examination and that in a case where he was in fact defending himself from a very

(1) [1865] 6 B. and S. 703=34 L.J. Q.B. 121=11 Jur. (N.S.) 504.

(2) (1910) 38 Cal. 309=12 C.L.J. 625=15 C.W.N. 357=12 Cr. L.J. 22=8 I.C. 1108.

serious attack upon his character, and that he probably became somewhat unbalanced, by reason of his matrimonial affairs in a foreign country, and his being involved in a mass of personal litigation resulting therefrom.

On the whole, the justice of the case will be met by ordering that the Advocate shall be suspended from practice as Advocate, for a period of 12 months, such time to run from the 26 February, 1923, the date when he first appeared before this court to show cause. The order will not be retrospective in effect and his suspension will be from now, until 26th February, 1924.

Coutts-Trotter, J.:—My Lord the Chief Justice has set out the facts in relation to this gentleman, and I need not repeat them. But I think it is right that I should state in my own words my reasons for concurring in the course he has proposed, and I fully realise the serious responsibility which is cast upon us in this matter. It was at one time suggested that we were relieved of that responsibility, on the ground that one of the qualifications necessary for the enrolment of an Advocate in this Court was that the applicant should be a member of the English Bar, and that as it is not suggested that the Advocate has or had any other qualification, on ceasing to be a member of the English Bar, he must *ipso facto* be removed from the roll of Advocates of this Court, as being a person without qualification. I do not think that we are entitled so to evade the responsibility of determining for ourselves, whether reasonable grounds exist for taking the step that we are invited to take by the Advocate General, in the name of the Bar, and I think that we are invested with a discretion, which, however reluctantly, we must exercise for ourselves.

I agree that the actual conviction of the Advocate for perjury is a thing, which we cannot allow him to go behind, and we must take it that he committed the crime for which he was tried and convicted. But I think we are entitled, indeed are bound, to look into the facts in order to form an opinion as to the degree of moral turpitude involved in a conviction on those facts. In doing so, I am not called upon to express any opinion as to his relations with the two women in whose lives he involved himself. With regard to the first, there seems reason to believe that he infected her with gonorrhoea, soon after their marriage. There also seems reason to think that at the time of the marriage, he quite honestly believed himself to be free from taint. With regard to Miss L, I confess myself unable to see that she had any legitimate cause of complaint against him. On her own admission, she seems to have known all the facts relating to him and all the risks she ran, in going through a form of marriage with him, at the time when she commenced her associations with him. But there can be no possibility of doubt that when cross-examined, in the libel action, which he brought against Mr. Bottemley, he committed deliberate perjury, by swearing that he was not the father of Miss L's child. He was foolish enough in this Court to suggest that the short-hand-writers, who recorded those answers were tools in the employment of Mr. Bottomley and that he never gave the answers they swore to. Such a suggestion cannot be entertained for a moment and I think it is quite clear that he did what is sometimes spoken of as 'swearing by the card.' I entirely and respectfully agree with Avory, J., that the sooner that 'swearing by the card' is recognised and punished as perjury, the better; and indeed there is a very old instance in the books where it was so punished.

At the same time, I think that we are entitled to look at this man's position and see what he actually did. He was being persecuted by a ruffian, who conducted a black-mailing Journal, whose activities are the more revolting, because they were conducted in the hypocritical guise of a *censor morum*. The Advocate was practically a ruined man, unless he could vindicate his character in an action for libel against that Journal, or its editor, or both. He throughout maintained and maintains now that he regards Miss L, as being, according to the law of his own people and by every moral law, his wife. These are the circumstances, in which he took the foolish and wrong step of swearing, that he was not the father of Miss L's child. It was because, as he said, he regarded her not as Miss L but as Mrs. Advocate. There is this to be said in extenuation for his doing so, namely, that he was goaded and harassed by a relentless persecutor, and that so far as I can see, it was perjury committed not deliberately in furtherance of any fraudulent aim, or so as to cause any injury to

after thought and cannot in my opinion be accepted for a moment.

Finding that the Advocate did commit perjury, what action should we take against him? The learned Advocate-General in the course of his argument suggested that as the Advocate was admitted as an Advocate here, solely on the ground of his being a Barrister in England, his disbarment in England should, as a matter of course, lead to his being removed from the list of Advocates here. He contended that the continuance of his qualification as a Barrister was necessary for the continuance of his status as an Advocate, he not having any other qualification for it.

The point is an important one, but was not properly argued by either side. No authorities or precedents were cited. Giving it the best consideration I can, I have come to the conclusion that the Advocate-General's argument is not sound. No doubt it is true that it was the fact that he was a Barrister that enabled the Advocate to get enrolled as an Advocate here, and that if he were now to apply to be enrolled, he could not be admitted as he is not Barrister now. But on being enrolled here in 1913, we must hold that he obtained the status of an Advocate here; and under the Letters Patent we can interfere with that status, by removing or suspending him, only for sufficient cause shown. We have to exercise our judgment in each case, on the facts placed before us, and decide whether sufficient reason has been made out, to take action and if so what action we should take. To adopt the Advocate-General's suggestion would be to allow the Benchers in England effectively to control our discretion in the matter, though indirectly. That does not seem to me to be right. We are not bound by the action of the Benchers, any more than they are bound by ours. Though in most cases, we should and would follow the action taken by the Benchers, I cannot accede to the argument that we should do so in every case.

In the present case, we have to consider not merely the facts which existed, when the Benchers took action four years ago, but also all that has transpired since. As pointed out by the learned Chief Justice, the position now is very much the same, as if the Advocate had made an application, for reinstatement as a Barrister. It is settled that such applications are competent, even if a man has been altogether struck off the rolls: see *Re Pyke* (1), *In re Abiruddin* (2), and *In re Hara Kumar Chatterjee* (5). In that view, we must see how the matter stands. Perjury is a serious offence and undoubtedly involves great moral turpitude; it is all the greater in the case of practitioners, as it is their duty whether Englishmen or Indians, to maintain the purity of the administration of the law. There can be no difference in this matter, between the English and Indian practitioner, or between England and India. The standard of conduct expected from the practitioner is of course the same in both the countries, be he an Advocate, a Barrister, or a member of any other branch of the profession. I therefore agree with the learned Chief Justice in thinking that if the facts of this case had been brought to our notice, at the time when the Benchers took action, our proper order would have been to strike off the Advocate's name, from the roll of Advocates. But as I have already observed the position is not the same now and we have to consider whether it is necessary now to adopt the extreme measure of striking him off the roll, or whether a more lenient order will not meet the ends of justice and the exigencies of the situation.

More than four years have passed, since the advocate was disbarred in England. During all these years, there is reason to suppose that he has led an honourable life. He has been able to obtain and place before us numerous certificates from eminent persons both here and in England testifying to his good conduct. He has also produced a memorial signed by a large number of his brother practitioners saying that he is a person to continue at the Bar and asking that he may be so continued. At the end of the argument he acknowledged his error and threw himself on the mercy of the Court and it may be reasonably inferred that he can be trusted to behave honourably hereafter. In spite of all this, I should have hesitated to take too lenient a view of the case as the offence is such a serious one. But the learned Chief Justice, has taken a lenient view of the case and in a matter like this, of the exercise of our disciplinary jurisdiction, I do not feel

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(5) (1911) 14 C.L.J. 113 = 16 C.W.N. 237 = 12 Cr. L. J. 461 = 11 I.C. 997.

called upon to differ from his Lordship and to insist on more drastic action being taken. I therefore concur in the order proposed by my Lord the Chief Justice.

1924 Madras 271.

(FULL BENCH).

SCHWABE, C.J., COUTTS-TROTTER AND KRISHNAN, JJ.

The Vizagapatam Sugar Development Company, Limited, by its reputed Secretary, Sukhavasi Brahmanda Naikulu Patrulu Garu and another—Defendants-Appellants.

v.

T. Muthuramareddi and others—Plaintiffs-Respondents.

A. S. No. 106 of 1921, decided on the 2nd August, 1923.

(a) *Transfer of Property Act, S. 54—Part performance—Specific performance of agreement to sell—Doctrine of part performance is unaffected by Transfer of Property Act, S. 54, or Registration Act, S. 17.*

Neither the provisions of the T. P. Act nor those of the Registration Act preclude a suit for possession by transferor of an unregistered deed or by oral sale. The pleas of a valid contract enforceable by specific performance or that of the doctrine of part performance is a valid defence and neither Transfer of Property Act, S. 54, or Registration Act, S. 17, affect the question.

What S. 54 of the T. P. Act enacts is that a document of title to land—a conveyance in short—can only acquire validity, can only in fact be proveable, on registration. So far from forbidding unregistered contracts for the sale of land, it expressly recognises their existence, denying to them only the creation of an interest in or charge upon the land itself—and therefore leaving their contractual effect as between the parties to the contract unimpaired. The section prohibits unregistered conveyances, and does not, expressly or impliedly prohibit unregistered contract. (29 Mad. 336 and 40 Mad. 1134, *Overruled.*)

(b) *Civ. Pro. Code, S. 17.*

Contract of sale of immoveable property requires registration.

(c) *Practice—Procedure—Hypothetical question should not be referred.*

The practice of submitting a hypothetical question of law to a Full Bench before the Divisional Bench has satisfied itself that the facts really exist which would necessarily raise that question was deprecated.

A. Krishnaswami Ayyar and *K. Aravamudu Ayyangar*—for Appellants.

P. Narayanamurthi—for Respondents.

Order of Reference to a Full Bench.

PHILLIPS AND DEVADOSS, JJ.:—In this case one Basivi Reddi, of whose property plaintiff is the Receiver, agreed to take 200 shares in 1st defendant's Company, and in lieu of paying cash put them in possession of certain lands and go-downs. The plaintiff now sues to recover this property on the ground that title had not passed to 1st defendant as no registered document was executed by Basivi Reddi, and the Lower Court has decreed the suit and has given a personal decree against 2nd defendant, the secretary of the Company. This personal decree is clearly wrong and must be set aside.

Defendants appeal and raise various contentions, the chief of which is that the case is governed by the doctrine of part performance, as laid down by the Privy Council in *Mahomad Musa* v. *Aghore Kumar Ganguli* (1) and *Venkayyamma Rao* v. *Appa Rao* (2). Before dealing with this, some preliminary objections may be considered. In the first place, we agree with the Subordinate Judge on the question of limitation. It is then contended that the document relating to the purchase of the shares and the sale of the lands and go-downs does not require registration by reason of section 17 (2) (ii) of the Indian Registration Act, XVI of 1908. We, however, agree with the learned Subordinate Judge that this contention is not valid. No doubt in so far as the document relates to the purchase of shares it does not require registration, but it also contains a contract for sale of immoveable property worth over Rs. 100 and as such must be registered.

It is next argued that the transaction does not come within the definition of sale in section 54, Transfer of Property Act, IV of 1882, as the immoveable property was to be transferred in consideration of the allotment of shares and consequently it was not a transfer for a price. The correspondence, especially

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(1) (1914) 42 Cal. 801=42 I.A. 1=28 M.L.J. 548=17 Bom. L.R. 420=2 M.L.W. 258=17 M.L.T. 143=(1915) M.W.N. 621=19 C.W.N. 250=21 C.L.J. 231=13 A.L.J. 229=28 I.C. 930 (P.C.).

(2) (1915) 39 Mad. 509=43 I.A. 138=20 C.W.N. 1054=14 A.L.J. 797=31 M.L.J. 58=(1916) 2 M.W.N. 23=20 M.L.T. 137=4 M.L.W. 58=18 Bom.L.R. 651=24 C.L.J. 279=34 I.C. 921 (P.C.).

2nd defendant's letter of 7th June 1907 (Exhibit XVII), shows that the price of the property was fixed at Rs. 10,000 whereas the cost of the shares was Rs. 10,200, of which the Rs. 200 was paid in cash. The fact that the defendants accepted the immoveable property in lieu of Rs. 10,000 cash does not prevent the transaction being one of sale, for the price of the latter was clearly fixed at Rs. 10,000. The transaction was therefore one to which the provisions of the Transfer of Property Act apply. If, then, we apply the Full Bench ruling in *Kurri Veerareddi* v. *Kuri Bapireddi* (3), followed in *Ramanathan* v. *Ranganathan* (4), it is clear that plaintiff is entitled to succeed and that the doctrine of part performance cannot be relied on by defendants. The Full Bench ruling in *Kurri Veerareddi* v. *Kuri Bapireddi* (3) was delivered before the pronouncements of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (1), and *Venkayyamma Rao* v. *Appa Rao* (2), and it is contended that the latter have overruled the former. This contention was found against in *Ramanathan* v. *Ranganathan* (4), where the decision was that of a majority of three Judges in a Letters Patent Appeal, when two Judges had already differed. This case was followed in *Subramania Iyer* v. *Kalyanasundaram Iyer* (5). Since then the question has been considered by the other High Courts in India, and Calcutta, Allahabad, Bombay and Patna have all held the view opposed to the decision in *Ramanathan* v. *Ranganathan* (4), vide *Khagendra Nath Chatterjee* v. *Sonatan Guha* (6), *Syamkisor* v. *Dines Chandra* (7), *Shafikul Huq Chowdhury* v. *Krishna Gobinda Dutt* (8), *Meher Ali Khan* v. *Aroatannessa Bibi* (9), *Salamat-uz-zamin Begam* v. *Masha Allah Khan* (10), *Bapu Apaji* v. *Kashinath Sadoba* (11), *Hiralal Ramnarayan* v. *Shankar Hirachand* (12), and *Deb Lal Jha* v. *Baldeo Jha* (13).

In view of the fact that the decision of this Court is only that of three Judges out of five, in view also of the unanimity of the other Courts, and as we also feel some doubt as to the correctness of the Madras decision, we refer the following question for decision by a Full Bench :—

Do the provisions of the Transfer of Property Act or of the Registration Act preclude the application of the doctrine of part performance laid down by the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (1), and *Venkayamma Rao* v. *Appa Rao* (2) ?

Opinion :—The facts relevant to the answer of the question propounded to us in this case can be very briefly stated. The predecessor-in-title of the plaintiff, in return for the allotment to him of a number of shares in the Vizagapatam Sugar Development Company, Limited, handed over certain lands, theretofore his property, to the company for the purpose of their business in the year 1907. No registered sale deed was ever executed embodying the transaction, but the company has been in possession of the lands ever since that date. It is now sought to recover these lands on the ground that no title passed to the company in the absence of a registered document. Two main answers were made : first, that as the defendant company had a valid contract enforceable by specific performance, they could rely upon that by way of defence to the suit ; secondly, that they could rely on their possession as such part performance of the contract as would take it out of the operation of the statute. There can be no doubt that the latter question has been directly referred to us ; as to the former, it is more doubtful, though the reference of the learned Judges to *Kuri Veerareddi* v. *Kurri Bapireddi* (3), would seem to suggest that it was in their minds.

On the question of part performance, there can be no doubt that there is an

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(3) (1906) 29 Mad. 336=1 M.L.T. 153=16 M.L.J. 395 (F.B.).

(4) (1917) 40 Mad. 1134=33 M.L.J. 252=6 M.L.W. 300=22 M.L.T. 173=(1917) M.W. N. 757=43 I.C. 138.

(5) (1918) 53 I.C. 283.

(6) (1915) 20 C.W.N. 149=31 I.C. 987.

(7) (1919) 31 C.L.J. 75=24 C.W.N. 463=55 I.C. 154.

(8) (1918) 23 C.W.N. 284=28 C.L.J. 77=47 I.C. 428.

(9) (1922) 25 C.W.N. 905=67 I.C. 167.

(10) (1917) 40 All. 187=16 A.L.J. 98 = 43 I.C. 645.

(11) (1916) 41 Bom. 438=19 Bom. L.R. 100=39 I.C. 103 (F.B.).

(12) (1921) 45 Bom. 1170=23 Bom. L. R. 506=62 I.C. 637.

(13) (1919) 1 Pat. L.T. 354=56 I. C. 277.

express authority of this Court in *Ramanathan* v. *Ranganathan*(4) to the effect that section 54 of the Transfer of Property Act (IV of 1882) by implication excludes any right to set up an equity, such as possession in pursuance of a subsisting and enforceable contract of sale, against a registered title, even as between the parties to such contract.

With respect, we think that such a construction involves a confusion of thought between two essentially different conceptions. What the statute enacts is that a document of title to land—a conveyance in short—can only acquire validity, can only in fact be provable, on registration. So far from forbidding unregistered contracts for the sale of land, it expressly recognizes their existence, denying to them only the creation of an interest in or charge upon the land itself—and therefore leaving their contractual effect as between the parties to the contract unimpaired. Were there is no other guide to us we should be prepared on principle to hold that the decision of the majority of the learned Judges in I.L.R. 40 Mad. 1134 was erroneous. In fact our opinion is fortified by two other considerations. In the first place without saying that the decision under review is definitely and necessarily in conflict with the two rulings of the Privy Council that have been cited to us [*Mahomed Musa* v. *Aghore Kumar Ganguli* (1) and *Venkayamma Rao* v. *Appa Rao* (2)], it is clearly contrary to the indicated trend of their Lordship's opinion. In the next place, every other Court in India has taken the opposite view and we cannot but attach great weight to that fact.

It is unnecessary to set out the cases, which are all cited in the Order of Reference. Our answer to the question propounded to us is therefore in the negative, and it is so because we are satisfied that 40 Mad. 1134 was wrongly decided.

We have already intimated that we do not feel clear whether the question has been definitely referred to us as to whether the possession of a proved right to specific performance would afford a good defence to a suit such as the present. Here again, there is an express ruling of a Full Bench of this Court in 29 Mad. 336, to the effect that it cannot. Notwithstanding our view that the two defences, though sometimes they may coincide, are in essence logically distinct, and that only one has been categorically referred for our opinion, it falls to be observed that the learned Judges who referred this case to us conceived I.L.R. 29 Mad. 336, to be an authority on the question referred, unless it was supposed to be overruled by the subsequent pronouncements of the Privy Council. Moreover, the learned Judges who gave the prevailing opinions in I.L.R. 40 Mad. 1134, expressed themselves as following the Full Bench decision and treated it as a relevant authority. We therefore, think it right to say that the learned Judges who decided the earlier case laboured under the same misconception as those whose opinion prevailed in the later one. They treated a prohibition of unregistered conveyances as being a prohibition of unregistered contracts, and neglected a very clear expression of opinion to the contrary in the Privy Council in the case of *Immudipattam Therugnana S. O. Kondama Naik* v. *Periya Dorasami* (14), as being an *obiter dictum*. Strictly speaking, that may be so; it is sufficient for us to say that we respectfully agree with it, and consider that the case in I.L.R. 29 Mad. 336 was wrongly decided. We desire to add that if the learned referring Judges are to be taken as having impliedly referred this point to us, we are not clear whether they have determined that the facts exist which would make good that plea, or whether they are only inviting an expression of our opinion as to whether if substantiated by the facts such plea would in law be a good answer to the suit. If the latter course was intended to be adopted, we deprecate the practice of submitting a hypothetical question of law to a Full Bench before the Divisional Bench has satisfied itself that the facts really exist which would necessarily raise that question. That would no doubt entitle us to refuse to consider this matter without a direct finding that on the facts the plea, if valid in law, is established. However, the inconvenience caused to the parties by a fresh reference back is very great, and Mr. Narayanamurti was content to argue the point before us, provided it was left open to him to contend before the Divisional Bench that the facts do not show that the Appellant Company now possess an enforceable equity to specific performance. On this understanding we have no hesitation in

(14) (1900) 24 Mad. 377=28 I. A. 46=5 C.W.N. 217=7 Sar. 811 (P.C.).

saying that in our opinion the decision in I. L. R. 29 Mad. 336 is contrary both to principle and authority and should no longer be followed in this Court.

1924 Madras 274.

KUMARASWAMI SASTRI, J.

In the matter of *the Arbitration Act* and in the matter of reference to arbitration by *Messrs. M. Narasimhulu Chetty & Co.*, and *P. S. Subramania Aiyar.*

Decided on the 5th April, 1922.

(a) *Arbitration—Award—Statement of arbitrators as to the details of the proceedings is* prima facie *conclusive.*

In cases where the parties are at variance on the question as to what took place before the arbitrators, the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of the enquiry unless there is very strong reason for doubting the accuracy of their statement. [P. 276, C. 1.]

(b) *Arbitration Act, S. 11—Receiving fees by arbitrators beforehand is within the scope.*

There is nothing in the section which precludes the arbitrators from either fixing the fees or receiving the fees beforehand. The section only lays down that in case the award is given, the arbitrators shall state in the award what amount is payable to them for their fees. That assumes that the fees were not paid beforehand, and, to hold that the arbitrators are bound to conduct the arbitration on the off chance of their being paid or not at the end of the enquiry would be going beyond the provisions of S. 11.

In India at least the arbitrators would not be guilty of misconduct in getting payment of a reasonable fee beforehand. [P. 277, C. 1.]

(c) *Arbitration Act, S. 14—Acts of arbitrators in the absence of parties are valid if not judicial.*

Where the act done by arbitrators is not of a judicial nature but merely ministerial in its character, it is competent to one of the arbitrators or all the arbitrators to have those acts performed in the absence of one or more of the parties. (3 Cl. and F. 26, *Ref.*) [P. 277, C. 2.]

Receiving statements and documents before the enquiry commences are acts purely ministerial in their character. [P. 277, C. 2.]

V. V. Srinivasa Aiyangar—for the Petitioner.

T. L. Venkatarama Aiyar—for the Counter-petitioner.

Judgment:—This is an application by one of the parties to a reference to arbitration to set aside the award which was passed by the arbitrators in pursuance of the submission. The petitioner entered into certain contracts with the counter-petitioner who was acting as agent of an English firm, *viz.*, Messrs. Johnstone Kelly and Macdona. Disputes arose between the parties as regards four indents and after some preliminary correspondence between the parties the matter in difference was referred to the arbitration of Mr. Bradshaw of Messrs. Tetley and Whitley and Mr. Jackson of Messrs. Beardsell & Co., under the terms of the arbitration clause in the indents. The case for the petitioner is that the arbitrators acted improperly and he states:

(1) that one of them Mr. Bradshaw who was appointed at the instance of the petitioner insisted on payment to him of Rs. 400-0-0 as fees for the arbitration which sum he paid, (2) that the arbitrators gave notice on the 10th January, 1922, fixing 15th January, 1922, for the enquiry and calling upon the parties to be present and produce their evidence before them, that on that date he presented himself before the arbitrators at the appointed time and place and they asked him to hand over copies of correspondence, samples, etc., which he did and they asked him what his case was and he explained his case to them, that sometime afterwards the counter-petitioner sent in his chit and the arbitrators asked him to wait and after hearing what the petitioner had to say they asked him to go out and send for the counter-petitioner, that he does not know what took place between the arbitrators and the counter-petitioner and that there was no enquiry held by the arbitrators and in any case there was no enquiry in the presence of both parties, (3) that the arbitrators subsequently went to the Bank to see the goods and when going asked the petitioner if he wished to follow them to the Bank and whether he had not sufficient confidence in them and he thought that if he accompanied them to the Bank it might be suggested that he had no confidence and therefore he did not insist on following them to the Bank, (4) that nothing further took place till 27th January, 1922, when he received by post a letter purporting to be signed by Mr. Jackson one of the arbitrators enclosing a copy of the award, that he had considerable evidence to adduce regarding the matters in difference between the parties and expected that in due course the arbitrators would fix another date after examining the goods in the Bank and hold enquiry for adducing evidence on his behalf and for meeting the case of the opposite side and that no such opportunity was given to him, (5) that as the result of the arbitration the arbitrators found in his favour as regards the three minor contracts but that as regards the important contract relating to 20 cases of crimps they held that he was bound to take the goods on an allowance of 25 per cent. being given while even before the arbitration the counter-petitioner had agreed to give a discount of 35 per cent., and (6) that the award is invalid because there was no proper inquiry by the arbitrators because the arbitrators misconducted themselves by receiving fees beforehand and by not enquiring into the case of the parties in the presence of each other, because there was misconduct and

irregularity on the part of the arbitrators in that no opportunity was given to the petitioner to place his evidence before them and put forward his case after inspection of the goods in the Bank, because no notice of the making or signing of the award was given as required by law and because the award was also opposed to natural justice and equity.

The counter-petitioner files a counter-affidavit in which he states that on the date fixed for hearing he came a little late, that the petitioner having come earlier was called by the arbitrators to state his case and file the evidence in support of it, that he appeared while this was going on and sent his card and he was asked to wait and told that he would be sent for, that the petitioner came out and he was asked to appear and when he went in he was asked to state his case and file documents, that after some consultation the arbitrators sent for both parties and after stating the points of difference between them asked them what they had to say in support of their respective cases, that the enquiry then went on in the presence of each other and when it was concluded the arbitrators told them that they had finished the case and it only remained to compare the goods with the samples and that they would go to the Bank for the purpose and that Mr. Bradshaw turned to the petitioner and asked whether he wished to accompany them to the Bank and the petitioner said he had sufficient confidence in them whereupon they said they would inspect the goods and pronounce the award. The counter-petitioner denies the various charges against the arbitrators as not being true. He states that it was not true that the enquiry was not held in the presence of the parties and what was really done was preliminary work before the parties were called in and he also says that if there was any irregularity the petitioner did not take the objection in time and must be deemed to have waived it. As regards the complaint of the petitioner that he was not given an opportunity to place his case before the arbitrators, he says that all the correspondence and samples were filed by the petitioner and he never said that there were other documents to file or witnesses to examine, that the arbitrators said they had finished the case and no suggestion was made that any further enquiry was to be held. As regards the allowance which he had offered to the petitioner of 35 per cent., he states that the consideration for that was the acceptance of all the contracts whereas the arbitrators directed the cancellation of three out of four contracts and gave allowance only as regards one contract. According to the counter-petitioner there was a full enquiry by the arbitrators which took place from 9-45 a.m. to about 12-30 noon. Both the arbitrators have filed an affidavit in which they set out what took place before them. They state that the petitioner came in first on the appointed day of hearing and they asked him to state his case and file any statement that he might like to file and he then filed a statement and also filed all the documents and samples in his possession, that the counter-petitioner was sent for and asked to file his documents and samples which he did and that after perusing the statements and the correspondence they commenced the hearing of the case which was done in the presence of both the parties. They then state that they took the evidence of both the parties that they confronted the petitioner with the documents which were filed in the case and that he made certain admissions and that there were also other questions on which they examined both the parties. They state that after they heard all that the parties had to say and after reading all the correspondence they told the parties they had done with the case and proceeded to examine the goods in the Bank, that the petitioner agreed to their examining the goods and he never told them that he had any further evidence to let in or ever complained about the procedure adopted; and that after comparing the shipment samples with the originals they came to the conclusion that as regards one contract the differences in quality, colour, finish and design were not substantial enough to have the contract cancelled and compensation would be sufficient relief, but that as regards the other three contracts the differences were substantial and so they cancelled them. They state that the case was fully and properly heard by them and there could be no objection to that enquiry.

It seems to me that having regard to the fact that the allegations before me consist of (1) the allegations of the petitioner as regards certain irregularities which he says took place and (2) the allegations of the counter-petitioner that everything was regular and proper, I should act upon the evidence of the two arbitrators, Messrs. Bradshaw and Jackson. So far as it appears

they had no interest in the matter in dispute, and they belong to firms which have been doing large business in piecegoods. Nothing is suggested as regards their competency to try the matters in dispute. In

> cases where the parties are at variance on the question as to what took place before the arbitrators, it seems to me that the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of the enquiry unless there is very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence.

The statement of a Judge holding an enquiry as to what took place before him is treated almost as conclusive as regards those facts, and I do not see why as regards a statement before arbitrators appointed by the parties themselves there should be any less rigid standard applied when dealing with questions of fact as to facts, which are asserted by one side and denied by the other. Adopting therefore this criterion as regards the finding of facts, it seems to me that I must accept the statement made by the arbitrators in their affidavit and the statement made by the counter-petitioner in so far as his statement tallies with that of the arbitrators. On these facts it seems to me that the only points on which there can be any question as regards setting aside the award are (1) whether the taking of fee by both arbitrators before the enquiry commenced would vitiate the award, and (2) whether the fact that the statements were recorded in the absence of the parties during what may be called spade work, before the enquiry, was such as would bring the case within the ruling cited by Mr. V. V. Srinivasa Aiyangar and thus vitiate the award as being the result of proceedings taken in the absence of the parties. Before proceeding to discuss these two points I may state that on the facts I am not satisfied that there was any imperfect enquiry or that there was any ground for holding that the arbitrators acted in a manner which was not correct. There is nothing to show that the petitioner ever told the arbitrators that he had any witness to examine or any further documents to file. It is admitted that the arbitrators required him to be present at the enquiry with all his documents and with his witnesses, and that being so if he had any further witnesses to examine it was his duty to have told the arbitrators that he wanted to examine witnesses and to ask for an adjournment or to ask that the witnesses if present be called and examined. On the contrary the arbitrators distinctly state that when they closed the enquiry they told the parties that the enquiry was closed and they would inspect the goods and pass the award. In these circumstances whatever might have been in the mind of the petitioner, it seems that he cannot challenge the enquiry on the ground that opportunity was not given to him to call witnesses when he himself did not court opportunity by asking the arbitrators to call witnesses or adjourn the enquiry; so far as regards the statement that the petitioner had no opportunity to examine witnesses. As regards the petitioner's not proceeding to the Bank when the arbitrators went there to inspect the goods, I am not satisfied that the arbitrators did anything which would have justified the petitioner in coming to the conclusion that he need not go to the Bank along with the arbitrators. The arbitrators do not say that they suggested to him that it might be left to them to inspect the goods in his absence or that anything was done by them which would lead the petitioner to believe that if he did accompany them to the Bank he would be prejudicing his case by leading the arbitrators to suppose that he had no confidence in them. It is highly improbable that the arbitrators would have made any such suggestion, especially when the counter-petitioner went with them to the Bank. I am not therefore in a position on the evidence to hold that any such statement was made to the petitioner which prevented his going along with the arbitrators to the Bank.

Turning now to the two legal objections on which it may be possible to set aside the award, I think that as regards remuneration there is nothing illegal or improper in what the arbitrators did. It is not suggested in this case, as it was in the cases cited before me, that such demand was exorbitant or improper or that there was anything in the conduct of the arbitrators in the making of the demand which would have led the parties to suppose that the arbitrators were doing something which the parties would not have done but for the demand. It is admitted that each

party had agreed to pay a fee of Rs. 400-0-0 to the arbitrators for their trouble. I think that few merchants in Madras would waste their time on arbitration unless it was worth their while to do so, so that in the present case the mere fact that Rs. 400-0-0 was fixed as payable by each party is no ground for holding that there was anything improper. Neither party demurred to make payment and it is not suggested that payment was made in such circumstances as would indicate that if payment was not made the consequences would be against the party that refused payment. I am referred to section 11 of the Arbitration Act but there is nothing there which precludes the arbitrators from either fixing the fees or receiving the fees beforehand. All that the section says is that in case the award is given the arbitrators shall state in the award what amount is payable to them for their fees. That assumes that they were not paid beforehand, and, to hold that the arbitrators are bound to conduct the arbitration on the off chance of their being paid or not at the end of the enquiry would be going beyond the provisions of section 11. Reference was made to Russel on Arbitration, page 204, and to *In re Enoch and Zaretzky Bock & Co.* (1). That was a case where there was some improper conduct on the part of the arbitrators. There the umpire made a demand which the Judge thought unreasonable and the party himself repudiated it as unreasonable. It is far from establishing the proposition that in case of a lawful and reasonable fee agreed to be paid by the parties the arbitrator is guilty of miconduct if he takes his fee in advance. In the absence of any decision I am not prepared to hold that in this country at least the arbitrators would be guilty of misconduct in getting payment of a reasonable fee beforehand, and thus avoid the alternative, if they are not paid, of suing the parties in Court, because there is no other remedy open to the arbitrators.

The next objection is that on the facts and the statement of the arbitrators a certain portion of the work was done in the absence of each of the parties. If that portion of the work which was done was judicial in its character, there can be no doubt that the authorities cited show that the award is liable to be set aside. The cases referred to by Mr. V. V. Srinivasa Aiyangar, namely, *Harvey* v. *Shelton* (2), *Dobson and Sutton* v. *Groves* (3), *Ganes Narayan Singh* v. *Malida Koer* (4), and *Cursetji Jehangir Khanbatta* v. *Crowder* (5), no doubt lay down the rule that where an act judicial in its character is to be performed, the arbitrators are bound by the same rules as bind the Courts, and that the arbitrators are not entitled to decide or to give their award in the absence of one or more of the parties to the arbitration and without notice to them. But there are also cases which hold that where the act done is not of a judicial nature but merely ministerial in its character, it is competent to one of the arbitrators or all the arbitrators to have those acts performed in the absence of one or more of the parties. I need only refer to *Anderson* v. *Wallace* (6), and *Manindara* v. *Mahenanda* (7). In the present case what happened was that both the parties did not turn up together, the petitioner turned up and the arbitrators asked him to state his case and file his documents and he gave a written statement stating what his case was and filed such documents as he had in his possession. While he was doing this the counter-petitioner turned up and the arbitrators sent for him, asked the petitioner to remain outside, and took from the counter-petitioner a written statement setting out his case and received his exhibits. Then the arbitrators state that after having gone through these statements and exhibits they called in both the parties and began the inquiry. It seems to me that what the arbitrators did in this case was what courts do, namely, receiving statements and documents, before the enquiry commences. These acts are purely ministerial in their character, and it is not suggested that before the filing of written statements or documents in Court the Registrar is bound to call the other party and do it in his presence. What really took place after this was the commencement of the judicial proceedings before the arbitrators, and so far as the affidavits of the arbitrators go, when that

(1) [1910] 1 K.B. 327=79 L.J. K.B. 363=101 L.J. 801.

(2) [1844] 7 Beav. 455=13 L.J. Ch. 466.
(3) [1844] 6 Q.B. 657=115 E.R. 243.
(4) (1911) 13 C.L.J. 399=10 I.C. 454.
(5) (1894) 18 Bom. 299.
(6) [1835] 3 Cl. and F. 26.
(7) (1912) 15 C.L.J. 360=13 I.C. 161.

act was done both the parties were present. I am therefore not prepared to hold on the facts of this case that the award is liable to be vitiated because there was a judicial act done by the arbitrators in the absence of the party. This disposes of the two main objections taken by Mr. V. V. Srinivasa Aiyangar on the facts as appear from the affidavits of the arbitrators.

The question of waiver has been raised by the counter-petitioner which I do not think it necessary to discuss at present. I have no doubt that it is open to the parties to waive any irregularities which have taken place in the conduct of the enquiry, so long as those irregularities are not fundamental and do not involve any prejudice or hardship to the party. The question as to whether there is sufficient reason in this case to warrant my holding that there was a waiver does not arise on the facts found by me. I find that there was no irregularity in the conduct of the proceedings before the arbitrators.

The result will be that the application is dismissed with costs of the arbitrators and costs of the counter-petitioner (2 sets).

Application dismissed.

1924 Madras 278.

PHILLIPS AND VENKATASUBBA RAO, JJ.

Kamulammal and another—Appellants.

v.

N. Chokkalingam Asari—Respondent.

A. S. Nos. 279, 280 and 291 of 1920, decided on the 27th September, 1923, against the Sub-Judge, Dindugal.

Limitation Act, Art. 12 (b)—Madras Estates Land Act, S. 131—Suit to set aside sale—Limitation runs from the date on which the period of thirty days expires.

As a sale becomes final, in the absence of any application under S. 131, Estates Land Act, within 30 days after the date of sale, a suit to set aside the sale brought more than one year after such date is barred by limitation. [P. 278, C. 2.]

K. V. Krishnaswami Aiyar, C. S. Venkatachari and *Rajagopala Aiyar*—for Appellants in all.

C. S. Venkatachariar, K. V. Krishnaswami Aiyar and *A. Ramaswami Aiyar*—for Respondents in all.

Judgment:—Respondent's Vakil reports no instructions and withdraws from the case which is therefore heard *ex parte.*

The question of limitation is first argued and on that we think appellant must succeed.

The suit is to set aside a revenue sale and limitation is governed by article 12 (*b*) of sch. I of the Limitation Act. This allows one year from the time when the sale is confirmed or would otherwise have become final and conclusive. There is no provision in the Estates Land Act similar to the one in C. P. C., Order 21, rule 92, for confirmation of sale and for the sale thereupon becoming absolute and consequently the second clause of article 12 (*b*) of the Limitation Act must be applied. Section 124 (2) of the Madras Estates Land Act provides that on payment of the purchase-money and on the expiration of thirty days the Court shall if no application has been made to set aside the sale under section 131 or if such application has been made and rejected, grant a certificate of sale to the purchaser stating the property sold, the name of the purchaser, the date of sale. From this it is clear that such a sale would become final, in the absence of any application under section 131, Estates Land Act, 30 days after the date of sale. This suit was brought more than one year after such date in the present case and is therefore barred by limitation. We are supported in this conclusion by the decision in *Karuppa Thevan* v. *Vasudeva Sasiri* (1). This was under the Madras Act II of 1864 in which section 38 provides that the Collector shall make an order confirming the sale. The absence of this provision in the Estates Land Act makes the present case so much the stronger.

We may also refer to *Bhuban Mohan Maitra* v. *Girish Narain Moonshi* (2) where a similar view prevailed. In Appeal No. 280 of 1920, there is an allegation in the plaint that a petition was put in by plaintiff to set aside the sale but Ex. F shows that this application was really a suit under section 112 and not an application under section 131. The appeals are accordingly allowed and plaintiffs' suits dismissed with costs throughout.

Appeals allowed.

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(1) (1883) 6 Mad. 148.
(2) (1911) 13 C.L.J. 339=10 I.C. 87.

1924 Madras 279.

PHILLIPS AND VENKATASUBBA RAO, JJ.

Abboy Naidu—Plaintiff-Appellant.

v.

N. Ramachandra Naidu and another—Defendants-Respondents.

Appeal No. 350 of 1920, decided on the 27th August, 1923, against the decree of the Addl. Sub-Judge, Coimbatore, in O. S. No. 26 of 1919.

(a) *Civ. Pro. Code, O. 32, r. 6—Payment to next friend without leave of the Court does not discharge debt—Such payment does not give right for contribution.*

O. 32, r. 6 contains a prohibition against a next friend receiving money without the leave of the Court under a decree in favour of the minor. Such payment cannot discharge the decree and hence one of the co-judgment debtors cannot base his claim for contribution from other co-judgment-debtor on the basis of such irregular payment to the next friend. [P. 280, C. 1.]

(b) *Contract Act, S. 43—Payment not discharging liability of co-debtors—Contribution cannot be claimed.*

Payment by one of the co-debtors which does not exonerate other co-debtors from liability does not give a right of contribution to the co-debtor making such payment.

T. Narasihma Aiyangar and *K. S. Ramabhadra Aiyar*—for Appellant.

S. T. Sreenivasagoplachariar and *T. M. Krishnaswami Aiyar*—for Respondents.

Venkatasubba Rao, J.:—This appeal may be disposed of on a point of law but it is necessary to state a few facts that gave rise to the suit.

The plaintiff, the 1st defendant and the father of the 2nd defendant borrowed from one Ramanatha Chettiar Rs. 4,000 on a promissory note and the creditor sued the executants of the note and he having died after the institution of the suit, his minor sons were brought on the record as plaintiffs with their mother as their next friend. A decree was passed in the suit against the plaintiff, the 1st defendant and the 2nd defendant who was added as a party on the death of his father. The plaintiff claims to have paid the full amount of the decree and has filed the suit for the recovery of that amount on the ground that the 1st defendant and the 2nd defendant's father are the principal debtors and he was himself a surety.

The learned Subordinate Judge has disbelieved the case of the plaintiff that the whole amount borrowed was received only by the 1st defendant and the father of the 2nd defendant. He further held that the payment alleged by the plaintiff to have been made with a view to satisfy the decree was not a valid payment which would enable the plaintiff to recover any amount from the defendants. In the result, he dismissed the plaintiff's suit.

On behalf of the plaintiff-appellant it was argued that the finding that he was not a mere surety did not entail the dismissal of the suit and as there was a presumption that each of the joint debtors received an equal share of the amount originally borrowed, a decree should have been passed in his favour for two-thirds of the amount claimed and that the presumption was not rebutted by the evidence adduced on behalf of the defendant. It was next contended that the learned Judge's view that there was no valid payment is wrong.

There may be objections to the suit being treated as a suit for contribution; the defendants having had no opportunity to refute a claim based on this footing, may be prejudiced by the nature of the suit being thus altered. But, in my opinion, it is unnecessary to deal with this aspect of the case. Nor is it necessary to decide any question of fact that arises in the appeal.

The facts bearing on the validity of the payment are these. The decree was passed on the 22nd of June 1915. The plaintiff alleges payment of the amount of the decree to one Kannuswamy Iyer who deposed that he was the agent of Ramanathan Chetty. An application was made by the vakil of the decree-holders for the recording of the satisfaction of the decree and upon it the following order was made on the 16th of July:—"Satisfaction cannot be recorded as the next friend of the minors is not entitled to receive money in their behalf without furnishing security." The learned Subordinate Judge holding that the payment was not duly recorded under Order 21, rule 2, Civil Procedure Code, decided that the plaintiff had no cause of action. I think the conclusion of the Subordinate Judge is right although I am not disposed to agree that his reason is correct. It is not necessary to decide whether the observation of Bashyam Iyengar, J., in *Putti Narayanamurthi Iyer* v. *Marimuthu Pillai* (1), that a payment

(1) (1903) 26 Mad. 322.

which is not recorded is a valid payment correctly expresses the law; nor do I think it necessary to decide the effect of payment which is certified by the party but has not been recorded by the court. For, in my opinion, the provision of law that has a bearing on the present case is Order 32, rule 6, Civil Procedure Code. It runs thus:—(1) A next friend ..... for the suit shall not without the leave of the court receive any money . . . on behalf of a minor . . . under a decree or order in favour of the minor." (2) " . . . The Court shall, if it grants him (next friend) leave to receive the property, require such security and give such directions as will in its opinion be sufficient to protect the property from waste and ensure its proper application." This contains a prohibition against a next friend receiving money without the leave of the court under a decree in favour of the minor. The decree-holders were minors and the alleged payment was made to the agent of the next friend. Can such payment discharge the decree? It seems to me that if payment is made out of Court to a next friend without the leave of the Court the minors may ignore the payment and execute the decree. They may ignore it either because the money has not been applied for their benefit or because they may intend to commit a fraud. If the decree is sought to be executed the defendant cannot rely upon the unauthorised payment made to the next friend. This is obviously the effect of the section. It is no doubt true that the section does not in terms say what is to happen if such a payment is made. But surely the payment or the receipt in contravention of the rule is not an infringement of the penal laws of the country and neither the party paying nor the party receiving becomes criminally liable. The object of the section is merely to safeguard the interests of the minor and it therefore follows that the payment does not discharge the decree. Let us look to the reason of the thing. If the defendants are now compelled to pay contribution to the plaintiff and if the full amount of the decree is again recovered from them by the minors in execution of the decree, the defendants will suffer great hardship. And why should they be prejudiced on account of the fault of the plaintiff? There is nothing in principle which requires that the co-debtor should contribute when he has not been himself exonerated from liability and when the original obligation is still outstanding. The right to contribution is not founded on contract but is the result of a general equity arising at the inception of the contract of guarantee on the ground of equality of burden and benefit". See. 15, Halsbury, page 527. Section 43, 2nd paragraph, Indian Contract Act, embodies this doctrine of English equity. It has been stated that the community of burden and benefit is the real ground of the right to contribution. *Per O'Brien, J.*, in *Gardner* v. *Brooke* (2). The mere fact that the surety has been damnified by payment cannot give him a right to claim contribution from his co-debtors. Let me take two instances. Suppose that an amount was borrowed by several debtors from A and that A died leaving B his heir. If one of the debtors paid the amount of the debt to C under the mistaken belief that he was the heir of A, would such payment entitle the man who paid the amount to claim contribution from the other debtors? Or again, suppose that the amount was due to A an infant for whom B was appointed guardian by the Court. If one of the debtors paid the amount to C under the impression that C was the guardian, would such payment give the man who paid any right of action against the other promisors? I see no difference in principle between these cases and the case on hand. It is not sufficient that the plaintiff is able to say "I have been damnified, I have suffered injury" but he must in addition satisfy the Court that his co-debtors have been exonerated from liability to the creditor, and that the parties who were equally bound to pay a common debt were relieved by the plaintiff of the burden of their debt. See *Roushah Ali Khan Chowdhuri* v. *Kali Mohan Moitra* (3). The right of contribution has its foundation in equity and it will not be just to compel the defendants to pay their share of the debt when they have not been relieved from the burden of the liability. I am therefore of the opinion that the plaintiff's claim has been rightly disallowed and I would therefore confirm the judgment and dismiss the appeal with costs.

Phillips, J.:—In the peculiar circumstances of this case I agree in the order proposed by my learned brother.

Appeal dismissed.

(2) [1897] 2 Ir. R. 6.
(3) (1906) 4 C. L. J. 79.

1924 Madras 281.

ODGERS AND HUGHES, JJ.

Sri Rajah Dantuluri Devi Prasada Satyanarayan Veerabhadra Venkata Lakshmikantaraju Garu—Plaintiff-Appellant.

v.

Sri Rajah Dantuluri Peda Venkata Jagannatharaju Garu and others—Respondents-Defendants.

S. A. No. 2031 of 1920, decided on 1st August, 1923, against the decree of the District Judge, Godavary, in A. S. No. 1 of 1918.

Civ. Pro. Code, O. 32, r. 4 (4)—Natural guardian unwilling to act—Appointment of clerk of Court valid.

O. 32, r. 4 (4) authorises the Court to appoint any of its officers as guardian where there is no other person fit and willing to act as guardian for the suit. Where the father was unwilling and neither the mother nor the uncle came forward on behalf of the minor as guardian and neither the plaintiff nor the Court had reason to believe that there was any other person fit and willing to act :

Held that the appointment of the clerk of Court as guardian was valid. [P. 282, C. 2.]

(b) *Registration Act, S. 28—Non-existent property included to effect registration at a particular place—Registration valid unless collusion between parties is proved.*

Where there was no collusion between the mortgagee and the mortgagors and there was no intention on the part of the mortgagee to include a land not belonging to mortgagors, registration is not vitiated by the fact that property not in existence was included in the deed to effect registration at a particular place. [P. 284, C. 1.]

S. Srinivasa Ayyangar, C. V. Anantha Krishna Ayyar, V. Narasimhachariar and *V. Venkatarazu*—for the Appellant.

A. Krishnaswami Aiyar, K. Ramamurthi and *T. Ramachandra Rao*—for the Respondents.

Odgers. J.:—This is a suit arising out of a mortgage effected on the 15th April, 1896, on the Gundepalli Estate. The suit on the mortgage itself was numbered as O. S. No. 25 of 1910, and will referred to in this judgment by that designation. We are also concerned with a later mortgage but an earlier suit (O. S. No. 21 of 1910) relating to the same property. The plaintiff in this suit and the defendants 1, 2 and 3 belong to the same family, *i.e.*, the family originally owning the Gundepalli Estate. 5th defendant is the decree-holder both in O. S. No. 25 of 1910 and O. S. No. 21 of 1910. 6th defendant is alleged to be the stranger auction-purchaser of the mortgaged property in O. S. No. 25 of 1910. So, as matters stand at present, as to 25 of 1910, 6th defendant is the purchaser from the decree-holder, 5th defendant; in O. S. No. 21 of 1910, 5th defendant has obtained a decree but the properties remained unsold. The suit from which this appeal arises is O. S. No. 11 of 1916 in the Temporary Subordinate Judge's Court of Rajahmundry in which the plaintiff, the son of the 1st defendant, claims a declaration that the auction-sale of the Gundepalli Estate in O. S. No. 25 of 1910 and all execution proceedings relating thereto are null and void as against him and also to declare the decrees in O. S. Nos. 21 of 1910 and 24 of 1910 (we are not concerned in this appeal with the latter) are not valid and binding against him and his share. As originally framed the suit was based for the most part on immoral consideration for the mortgages. This was found against in both the lower courts and has now been given up before us.

Three points are urged in Second Appeal,

(1) That the plaintiff who was a minor in 1910 was not properly represented in O. S. No. 25 of 1910:

(2) That the guardian *ad litem* was guilty of negligence in that the following valid defences were not set up on behalf of the minor:

(*a*) That the mortgage was not valid as not having been legally registered;

(*b*) That the Court had no jurisdiction under the circumstances to pass the mortgage decree;

(3) That an amendment should have been allowed to repudiate the 6th defendant's plea that he is a *bona fide* purchaser for value without notice.

(1) The point of representation in O. S. No. 25 of 1910: The plaintiff who was in that suit the 3rd defendant was at first sued along with his father and guardian the 1st defendant. The father was apparently unwilling to act, and the court clerk C. Gopala Rao, was appointed guardian on the 21st February, 1911. He was appointed on an affidavit sworn by one Sangavarapu Venkataratnam who said he had been conducting the suits and all other affairs of the plaintiff as his "Tanedar" or Manager: "I believe there are no other principal guardians for the said minor defendant." It is, therefore, necessary that the appeal

Clerk of this Court, Mr. C. Gopala Rao should be appointed guardian of the said minor 3rd defendant. The appeal Clerk was appointed as stated. The guardian on 30-11-1911 filed a memorandum asking that it should be recorded that he had no instructions whatever on behalf of the minor 3rd defendant. However, on the 25th November, 1911, the guardian put the plaintiff to proof of the claim. The Vakils for defendants 1, 2 and 4 said that they had no instructions. 5th defendant was absent and the result was a decree for plaintiff for Rs. 82,000 odd with costs. It is contended on this state of things that the affidavit of Venkataratnam was clearly false as the minor was living with his uncle at the time and also had a mother alive. Reliance is placed on the deposition of P. W. 2 in the suit. His name is Kapilavayapadmanabha Swami. He says he was managing 5th defendant's affairs, that he had known the uncle of the minor for some time and the father of the minor for 25 years and knew the existence of the plaintiff's mother. The point to be borne in mind is that this witness, P. W. 2 is a different person from the Tanedar who swore the affidavit that no other principal guardian was available. In the guardian's evidence as D.W. 2 in the O. S. he states that the father refused to be guardian and did not appear in response to notice. He did not try to get any information from anybody else, but sent a notice to the father, but it was not served. He did not apply for copies of the documents, etc., as he was not put in funds by anybody. It is pointed out that under rule 118 of the Civil Rules of Practice, the Court might have ordered the plaintiff to provide funds for the guardian to carry on the defence of the minor. This however was not done. Reliance is placed on *Ramanunni Kurup* v. *Raman Somayajipad* (1) where the affidavit filed stated that besides the second defendant the plaintiff had no next of kin. The statement was false as there was at least one person known to the 1st defendant and his brother who was the plaintiff's next of kin. Yet this information was suppressed. I find it extremely difficult to say that because P. W. 2 knew the mother and the uncle of the present plaintiff it must be held that the plaintiff in O. S. No. 25 of 1910 and his Tanedar who swore the affidavit must have had the same knowledge. It is nowhere alleged that either of these persons had such knowledge, and I am quite unable to see how under these circumstances it can be said to have been proved that the affidavit of Venkataratnam must have been false to his knowledge. It may here be pointed out that it is not as if the appointment of a Court guardian was *prima facie* illegal. Order 32, rule 4 (4) authorises the Court to appoint any of its officers as guardian where there is no other person fit and willing to act as guardian for the suit. Neither the mother nor the uncle came forward on behalf of the minor and it is to my mind impossible to say that either the plaintiff in O. S. 25 of 1910 or the Court had reason to believe that there was any other person fit and willing to act. In *Nachiappa Chetty* v. *Chinniah Amabalam* (2), Mr. Justice Srinivasa Aiyangar sitting alone, laid down that in the case of a contemplated appointment of a Court guardian notice must always go to the natural guardian (as it did in this case according to P. W. 2) or the person with whom he lives. It is not brought to our notice that the Court guardian knew that the minor was in 1910 living with his uncle. Another case relied on is *Bhagwan Dayal* v. *Param Sukh Das* (3), which to my mind is a much stronger case than this because the uncle who was originally named as a guardian *ad litem* in refusing to act said that the minors lived with their mother. No notice was served upon the mother and a Court guardian was appointed. The judgment seems to have relied largely on the fact that there was a decree without notice to the minors. This, as pointed out is not now necessary. [See *Ramaswami Chetti* v. *Doraiswami* (4)]. As pointed out there, the absence of notice to the father of the appointment of the Head Clerk was only an irregularity which would not affect the validity of the proceedings in the absence of fraud or gross negligence on the part of the person appointed. (See page 302). The case cited in *Rashid-un-nissa* v. *Muhammad Ismail Khan* (5) was a case

(1) 1923 Mad. 553=44 M.L.J. 515=17 M.L.W. 558 =32 M.L.T. 107=(1923) M.W.N. 301=74 I.C. 309.

(2) (1916) 4 M.L.W. 362=36 I.C. 794.
(3) (1915) 37 All. 179=13 A.L.J. 179=27 I.C. 623.
(4) 1923 Mad. 465=44 M.L.J. 299=17 M.L.W. 638=73 I.C. 409.
(5) (1909) 31 All. 572=36 I.A. 168=13 C.W.N. 1182=10 C.L.J. 318=6 A.L.J. 822=11 Bom. L.R. 1225=6 M.L.T. 279=19 M.L.J. 631=3 I.C. 864 (P.C.).

where minors were held not to have been represented at all, one being represented by a married woman, which was illegal and the other being represented by a person whose interest was manifestly adverse to that of the minor. In *Maruthamalai* v. *Palani* (6), the plaintiff asked that the father should be appointed guardian *ad litem*. He refused. The Head Clerk was thereupon appointed. The fraud charged was that the plaintiff knew very well that the minor was living with his mother under the protection of his maternal grandfather and the latter ought to have been appointed guardian. The learned judges held that the statement in the affidavit amounted to no more than that in the view of the deponent there was no fit and proper person to be appointed. They point out that the Court may have been under the duty of making further enquiry before acting on the affidavit, but that the appointment was the result of a judicial order based on evidence which the Court considered sufficient. It was not alleged that there was any collusion between the Head Clerk and the plaintiff in pursuance of which the latter applied for the appointment of that officer as guardian. Nor is there any proof of any such collusion here. In *Ramaswami Chetti* v. *Perumal* (4), the case already referred to, it was held that the plaintiff was not bound to make exhaustive enquiries. The learned Judges say at page 301: "Putting a reasonable construction on the rule we are not prepared to say that the plaintiff in this case failed in his duty, especially as there is nothing (so far as we have been shown) regarding the uncle of the minors, his residence, the plaintiff's knowledge of his existence, his interest in the minors' affairs or what is more important regarding any subsequent attempt by him to protect their interest." In *Walian* v. *Banke Behari Pershad Singh* (7), their Lordships held that although there was no formal order appointing a guardian *ad litem* and no notice to the mother who was so appointed or to an adult male member of their family, these facts were nothing but irregularities which did not affect the validity of the proceedings.

On this state of the authorities I am of opinion that the appellant has not succeeded in making out a case of non-representation in Suit No. 25 of 1910. Assuming that the same state of things prevailed in Suit No. 21 of 1910, as to which I am not quite certain for reasons to be stated later on, the same argument applies there also.

Point 2:—The case relied on with regard to the negligence of the guardian generally in this case is *Punnayyah* v. *Viranna* (8), where it was held that it was gross negligence not to defend the suit if there was a valid defence available. In that case the mortgage was by a guardian of the immoveable property of a minor for the purpose of lending money to another for carrying on a trade not ancestral on behalf of the minor. It was held that the guardian *ad litem* ought to have resisted the suit brought on the transaction on the ground that it was not for the minor's benefit. Ought the guardian *ad litem* to have set up either of the suggested defences in this case; and could he have hoped to succeed if he had done so? To consider the point of registration first:

(*a*) The mortgage, Ex. IX, comprises the whole of the estate of Gundepalli in the sub-district of Yernagudem, Yernagudem Taluq, Godavari District, to which is added one acre of wet land on the eastern side in Jiroyiti No. 458 in the village of Katrenikona in the Sub-District of Mummudivarem, Godavari District. The mortgage was registered in the Sub-District of Mummidivaram in which the one acre was situated. It is alleged that this latter was included in the mortgage for the very purpose of its being registrable in this Sub-Registry and this is very likely the fact. It turns out that the mortgagor though he owns something like 300 acres in Katrenikona does not own No. 458 and never did. It is, therefore, said that the whole mortgage is invalid as the mortgagor had no title to this Mummidivaram one acre of land. The allegation contained in para. 12 of the plaint is that the mortgagor had no interest in the said one acre, which was known to all the parties to the mortgage at the time of the registration to which the defendants 6 to 10 reply in paragraph 13 of their written statement that the one acre belongs to the mortgagors and that it was intended to be mortgaged and was not illegally included. For this part of the case, the

(6) (1912) 37 Mad. 535=16 I.C. 182.
(7) (1908) 30 Cal. 1021=30 I.A. 182=7 C.W.N. 774=5 Bom. L.R. 822=8 Sar. 512 (P.C.).
(8) 1922 Mad. 273=45 Mad. 425=42 M.L.J. 429 =(1922) M.W.N. 213=15 M.L.W. 427=70 I.C. 668.

appellant relies on *Harendra Lal Roy* v. *Haridasi Debi* (9). That was a well known case of an attempt to mortgage a property absolutely non-existent, there being no such house as 25, Guru Das Street. Their Lordships held that "that parcel was in fact fictitious entry and represented no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security." In this case the evidence is that the mortgagor himself verbally mentioned this one acre when the mortgage deed was being drawn up and that as a matter of fact it is a mistake for 548 which admittedly belongs to the family of the defendants 1 and 2 in Suit No. 25 of 1910. The cases on this subject show that in order to nullify a registration on this ground the parties must have colluded. If the cases support this view as I shall show presently, it must be said that there is no evidence whatever to show that the mortgagee knew that the mortgagor possessed no such land as No. 458. *Pahladi Lal* v. *Mt. Laraiti* (10) lays down, following the Privy Council case in *Harendra Lal Roy* v. *Haridasi Debi* (9): "It is really a question of fact whether the parties have intentionally by a mutual collusive arrangement inserted in the deed property which either does not in fact exist or which while in existence is not intended by either of the parties to the suit to be a part of the security." A Bench of the Patna High Court in *Ramedi* v. *Chunder Bali Bibi* (11), have come to a similar conclusion: "If there is no collusion, the circumstances are not sufficient to invalidate registration." In a recent case in *Biswanatha Prasad* v. *Chandra Narayan Chowdhury* (12), the defendant asserted that the statement in the bond that it comprised a certain share in property was to the knowledge of both parties, a mere fiction introduced for the purpose of getting registration in the Mozufferpore District. There it was held that "none of the parties ever intended that the share should vest in Udit, or pass by the mortgage from him to the mortgagee. This case differs *toto coelo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument, and which both parties had intended should form part of the security." It appears to me that in the absence of evidence of participation by the mortgagee either as regards the insertion of the item in the deed or of intention that the one acre should not form part of the security this point must be decided against the appellant. It was contended that the ground of mistake was not open to the defendant here as the only plea raised by the pleadings was with regard to title. It does not matter whether No. 458 was in fact a mistake for No. 548, since, as pointed out above, unless it can be proved that the mortgagee was a party to the fraud (putting it at the highest) it cannot affect the validity of the registration. It is, therefore, clear that with regard to registration no valid defence was open to the Court guardian which he could have set up in favour of the minor.

(*b*) It was faintly argued that there was no jurisdiction in the Sub-Court to pass the decree or order for sale, as Ex. IX was not validly registered, and that the Court that had territorial jurisdiction over the Gundepalli Estate was the Ellore Sub-Court and not the Godavari District Court. This can be shortly disposed of by reference to section 21 of the Civil Procedure Code which shows that it is too late to take this objection in Second Appeal.

Point 3:—When the appeal first came before the District Judge, Mr. Fernandez, that learned Judge remitted certain issues to the lower Court for findings and "such other issues as the Court may deem it necessary to frame after hearing the parties again." We are only concerned with the first, which was settled before the vacation, *viz.*, "Whether the 6th defendant is a stranger *bona fide* purchaser for value of the Gundepalli Estate in execution of the decree in O. S. No. 25 of 1910 on the file of this Court and such purchase of his is valid against the plaintiff in spite of any defects of the kind alleged attaching to the suit and execution proceedings which culminated in that purchase?" The vacation then supervened and when the appeal came on for hearing again after the re-opening of the Court this issue was modified after hearing Counsel on both sides as follows:—"In spite of any defects of the kind alleged in the plaint as attaching to the suit in which that decree was

(9) (1914) 41 Cal. 972=41 I.A. 910=1 L.W. 1050=27 M.L.J. 80=(1914) M.W.N. 462=16 M.L.T. 6=18 C.W.N. 817=19 C.L.J. 484=16 Bom. L.R. 400=12 A.L.J. 774=23 I.C. 637 (P.C.).
(10) (1918) 41 All. 22=16 A.L.J. 871=48 I.C. 200.
(11) (1917) 4 Pat. L.W. 237=44 I.C. 399.
(12) (1921) 48 Cal. 509=63 I.C. 770 (P.C.).

passed." There is thus a distinct omission in the new issue as finally settled to be remitted to the lower Court *of any defects attaching in execution proceedings*. The appellant wishes us to revise that amended issue and restore the issue as originally framed as he desires to be heard to say that it was only in execution proceedings when Ex. XX was produced (*i. e.*, the sale certificate under Order 21, rule 94, C.P.C.) that he learnt that he was described therein as being still a minor and still represented by the Court guardian. The Sub-Court on the amended issue went into the various grounds which were alleged against the *bona fides* of the purchase of the 6th defendant and found that the 6th defendant was a stranger purchaser for value but that he was not a *bona fide* purchaser, in that he was either aware or presumed to have been aware that the plaintiff was a major at the auction though not by reason of his knowledge of defects in the decree itself. As the learned Judge, Mr. Thiyagaraja Aiyar, justly observes "the lower Court was wrong in having gone into this question as the lower Court after hearing both sides clearly intended to limit the enquiry to the defects of the kind alleged in the plaint and not to extend it to an irregularity in the execution proceedings of which there is absolutely no allegation in the plaint." I entirely agree with his view. Mr. N. S. Narasimhachari who argued this part of the appeal frankly admitted that what he was asking for was really an amendment of the plaint at this stage. In this view it is not necessary and in fact it is impossible to come to any conclusion as to whether the plaintiff who became a major in 1913, the sale being in 1915, was not actually aware of what was going on. The matter was carefully gone into by Mr. Fernandez, and the question of defects in execution proceedings was expressly eliminated by him after hearing both sides. Speaking for myself I am entirely opposed to re-open this question in Second Appeal by allowing the appellant to amend the plaint in a suit of 1916. I would therefore find the third point also against the appellant.

I have assumed throughout, as stated above, that the suit No. 21 of 1910 is governed by the same consideration as 25 of 1910. As Mr. A. Krishnaswami Iyer for the 5th respondent (5th defendant) points out with regard to the mortgage involved in the former suit the question of the invalidity of the registration does not arise, so that no defence was available as to this. He contends that according to the plaint only immoral debt incurred by the 1st defendant is pleaded and this has gone. This is not perfectly clear although I am disposed to think that the learned Vakil's view is right. But if in 21 of 1910 the question of representation is involved, then in my view it stands in exactly the same position as the question dealt with above with regard to 25 of 1910.

In my view the Second Appeal fails and must be dismissed with costs, two sets (5th respondent one set and 7th and 10th respondents one set).

On the point of partition of the other properties not subject to these alienations which was raised by Mr. Anantakrishna Iyer alone, I agree with the order proposed by my learned brother.

Hughes, J.:—The suit was for partition and incidentlly for declaration of invalidity of the decrees in O. S. Nos. 25 of 1910, 24 of 1910, and 21 of 1910, on the file of the District Court of Godavari. In this appeal we are not concerned with the decree in O. S. No. 24 of 1910.

In the plaint, it is not alleged that plaintiff was not properly represented in O. S. No. 21 of 1910 and it has been suggested on behalf of the respondents that the reason is that the defence as to defective registration was not available in that suit. However that may be, I am satisfied that the plaintiff was properly represented in both the suits. The contention is that the Court guardian was appointed by reason of a false affidavit; and further that there was gross negligence on his part because he did not in O. S. No. 25 of 1910 set up the defence that the mortgage deed was invalid on account of defective registration. I do not think it can be said that there was a false affidavit. It was stated therein "I believe there are no other principal guardians for the same minor defendant." It is not clear what exactly is meant by "principal guardians" but very likely it means nothing more than "fit and proper guardians". The minor was living at the time with his uncle and there was also his mother. But the mother and uncle made no attempt to intervene at any time on the minor's behalf and never showed any interest. There is no allegation of collusion

between the plaintiff and the Court guardian. The facts of the case are similar to those in *Maruthamalai* v. *Palani* (6) where the propriety of the appointment of the Court officer as guardian *adlitem* was upheld. The case in *Ramanunni Kurup* v. *Raman Somayajipad* (1), (relied on by the appellant) was a case in which there was a deliberate misstatement of fact in the affidavit.

The plaintiff therefore was properly represented in both suits O. S. Nos. 25 of 1910 and 21 of 1910. With regard to the suit O. S. No. 25 of 1910, it has to be considered whether there was a valid defence for the minor and the guardian was therefore gulity of gross negligence in not raising it. My learned brother has dealt with this point in full and I agree with him. The finding of the District Judge is that there was no collusion between the mortgagee and the mortgagors and there was no intention on the part of the mortgagee to include a land not belonging to the mortgagors. This being so, the registration is not vitiated. This defence was not open to the minor and there was no negligence on the part of the Court guardian.

The decrees in question are binding on the plaintiff. It is, however, contended that the plaintiff became a major while execution proceedings were in progress but was still treated as a minor, and therefore the purchase by 6th defendant is invalid. This is a contention not raised in the plaint and cannot be entertained now. I should mention that this point was only raised by way of answer to the 6th defendant's contention that he was anyhow a *bona fide* purchaser. That question does not arise in view of our finding that the decrees are not liable to be set aside.

I agree that so far as the main contentions of the appeal are concerned the appeal must be dismissed with costs. It is, however, contended that in any event decree for partition must be passed with regard to properties that have not been alienated. With regard to this I find that the Subordinate Judge in para. 30 of his judgment states "no decree can be passed as the plaint has not been properly stamped, and there is no evidence to show what the stamp required is. It is not known which properties have been sold and what properties have not been sold. The plaintiff cannot get a decree. The suit is dismissed." In the ground of appeal to the District Court this point was taken; but I cannot find that the District Judge has anywhere dealt with it except that in the original judgment framing issues and calling for finding it is stated in para. 3 that the contesting respondents did not press the objection that the Court-fee paid was insufficient; and finally in para. 28 of the judgment of Mr. Thiyagaraja Iyer it is stated that "no other question was urged at the hearing of the appeal. "It is probable that he meant that no other question relating to the substantial contested matters was urged. In fact the prayer in the plaint for partition seems to have been lost sight of by everybody. There appears to be no contest so far as the partition of properties not alienated is concerned; and no objection has been raised before us. I would, therefore, send back the suit to the Original Court with instructions to take it on file again and after the enquiry to decide the claim in para. 21, clause 3 of the plaint so far as it relates to the partition of properties other than those that have been alienated. The appeal as against the contesting respondents must be dismissed with costs. I agree with the order of my learned brother as to costs.

Appeal dismissed.

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SCHWABE, C. J., AND KRISHNAN, J.

The Official Assignee of Madras—Plaintiff-Appellant.

N. Subramania Aiyar and others—Defendants-Respondents.

O. S. App. No. 22 of 1921, decided on the 22nd August, 1923, from the judgment of Coutts-Trotter, J., dated 17th January, 1921.

Limitation Act, S. 19—Non-denial of existing debt in a written statement amounts to an admission of liability.

An admission to prevent the running of the time under the Limitation Act need not be in the full sense of the word an admission of the existence of liability at the date of the admission, if the proper inference to be drawn from the admission which is made is that it was intended to represent the debt as then subsisting. (33 Cal. 1047, particularly at page 1059, 16 M.L.J. 300, 41 M.L.J. 217, *Foll.*)

For the purpose of preventing the running of the statute of limitation it would be quite enough, if there was such a passing over of a certain allegation

in silence in a written statement signed by the party making the admission which in law amounted to an admission; because he must be taken to know the law and therefore he would be making an admission at that time; for the purpose of limitation an admission made to some other person is sufficient. [P. 288, C. 2.]

In each case the Court has to consider the circumstances in which the statement was made that there was a debt and see whether it was really intended to convey an impression that that debt was subsisting at the date of the statement or not: and if it can from the circumstances infer that the intention of the person making the statement was to convey the impression that the debt was still subsisting it will be justified in holding that it is an acknowledgment of subsisting liability. [P. 291, C. 2.]

O. T. Govindan Nambiar instructed by Short Bewes and Co.—for the Appellant.

C. V. Anantakrishna Aiyar and *M. P. Sounderaja Aiyar*—for the Respondents.

Schwabe, C.J.:—This is an appeal from a judgment of Coutts-Trotter, J., on what is undoubtedly a difficult point under the Limitation Act. The case has been very clearly argued before us by Mr. O. T. Govindan Nambiyar for the appellant and Mr. Anantakrishna Aiyar for the respondent. The facts appear clearly from the judgment of the Court below and it is sufficient to state them shortly for the purpose of this judgment.

The Official Assignee is suing here as the representative of the estate of an insolvent, one K. R. Narayana Aiyar, who is since deceased. He was a mortgagee having obtained a mortgage in October, 1894, from one Narayani Ammal for Rs. 1,000. She was a dancing girl. She died in August, 1900, and she made the mortgagee the executor of her will. In that will she referred to the debt due to him, and, in applying for probate, he stated the amount of the mortgage encumbrance due by the deceased lady at Rs. 1,620. In November, 1912, a suit was brought by one T. S. Kothandarama Chetti against, among others, the mortgagee. He claimed to be entitled to the mortgagee's interest in that mortgage having as he alleged purchased that interest at Court auction and he sued the mortgagee in his capacity of executor for the mortgagor, he being as such in possession of the mortgaged property, and in February, 1913, he (the mortgagee) put in a written statement defending that suit. The Official Assignee, who is representing the estate of the mortgagee, has now found it beneficial to the estate to claim on that mortgage and he is met by a plea of limitation. According to the law of this country it is necessary for him in bringing this suit to show that his claim is not barred by limitation, and in order to do so he relies on two acknowledgments of liability by Narayana Aiyar on behalf of the mortgagor. The first acknowledgment relied upon is contained in the affidavit by the mortgagee made by him in his capacity as executor under the will in claiming probate. He sets out in that affidavit a mortgage debt of Rs. 1,620. I am quite satisfied that the mortgage debt referred to there was the mortgage debt to himself as mortgagee. I have no doubt that that is a matter which can be proved by reason of the wording of explanation (1) to section 19 of the Limitation Act. I am quite satisfied that strict proof of the fact was dispensed with in the Court below because the defendants would have been totally unable to suggest that there was any other encumbrance which he could have been referring to. In my judgment that admission is an admission which keeps the debt alive down to that date.

The second alleged admission is contained in the written statement of February 1913, and the learned trial Judge has held that that is not an admission sufficient for the purposes of section 19 of the Act. I do not agree with him. An admission to prevent the running of time under the Limitation Act need not be in the full sense of the word an admission of the existence of liability at the date of the admission, if the proper inference to be drawn from the admission which is made is that it was intended to represent the debt as then subsisting. The law on the point is stated by the Privy Council in *Maniram Seth* v. *Seth Rupchand* (1), where there was a statement of what was held to amount to an admission of a debt at a time antecedent to the date of the statement, that is to say, the statement relied upon referred to the debt as having existed at a previous date. It was held under the circumstances of the case that, as the statement did not, as it would naturally if it had been a fact, do, go on to say that the position has altered since, it must be taken that the natural presumption was that the debt still

(1) (1906) 33 Cal. 1047=33 I. A. 165=4 C. L. J. 94=8 Bom. L.R. 501=10 C.W.N. 874=1 M. L. T. 199=3 A. L. J. 525=16 M. L. J. 300=2 N.L.R. 130 (P.C.).

continued down to the date of the statement, and that was held under those circumstances to be enough. That case has been discussed in subsequent cases by Miller, J., in *Ranganayakalu Aiya* v. *Subbayan* (2), by the Division Bench of this Court, (Napier and Odgers, JJ.) in *Subbarama Iyer* v. *Veerabadra Pillai* (3) and finally in the recent case in *Kandaswami Reddi* v. *Suppammal* (4) by Ayling and Venkatasubba Rao, JJ. I think that the statement of the law as made by Ayling, J., and concurred in by Venkatasubba Rao, J., in the latter case is certainly correct. My only doubt is whether it goes far enough, but in that case, he in effect states his interpretation of the Privy Council judgment to be that you have got to look at all the facts at the time of the statement which is claimed to be an admission and then say whether the proper inference to draw is that it was the intention to make an admission of the then existence of the debt. Now in this case the plaint in answer to which the written statement relied upon was put in alleged definitely the execution of the mortgage in October 1894 and it further alleged that there was due in respect of the mortgage at that date a sum which was equal to the principal amount and a very large arrear of interest. In the written statement the mortgagee, who was contesting the action in his capacity as executor of the mortgagor and in that capacity only, in terms admits the mortgage. He then deals with the plaint paragraph by paragraph, but, when he comes to paragraph 19 in the plaint which was in these terms: "There will be now due for principal and interest in respect of the said mortgage a sum of Rs. 2,629-4-0," he passes it over in silence. He does not suggest in any part of his written statement that the amount was no longer due, that the mortgage had been discharged in any way or the debt repaid. Under the rules applicable to pleadings in this Court, *viz.*, rule 5, Order 8 of the Civil Procedure Code of 1908, every allegation of fact in a plaint not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted. The effect of that is that that written statement in law amounted to an express admission first of the existence of the mortgage debt at the date of the written statement and then that the amount due was Rs. 2,629 4-0. It is argued that the admission must be express and it is not sufficient for this purpose that it should be an admission which the law implies under the rules by reason of the absence of any denial in the written statement. Speaking for myself I do not agree. I think that for the purpose of preventing the running of the statute of limitation it would be quite enough, if there was such a passing over of a certain allegation in silence in a written statement signed by the party making the admission which in law amounted to an admission; because he must be taken to know the law and therefore he would be making an admission at that time; for the purpose of limitation an admission made to some other person is sufficient. But, if I am wrong about that, I am quite clear that applying the test stated by Ayling, J., in the case referred to above, that one of the circumstances to look at is to see what was being pleaded and what was being denied in the defence, it can hardly to my mind be open to doubt that the intention of the person who signed the written statement in February 1913 was to admit the continuance of the mortgage debt at the date of that document. That being so the case is taken out of the Statute of Limitation. In my judgment, the judgment appealed against is wrong, and the plaintiff is entitled to succeed.

I think the question remains as to how much he is entitled to succeed for and I think the amount that he would be entitled to take is proved here as the amount shown in the first of the admissions *plus* interest since that date. As a result there will be the usual mortgage decree for the Official Assignee for Rs. 3,450 with costs here and in the Court below. Time for payment is six months. Interest will be at 9 per cent. till then and 6 per cent. thereafter.

Krishnan, J.:—The decision of this appeal turns purly upon a question of law, namely, one of limitation. The suit is brought to enforce a mortgage executed by one Narayani Ammal, to whom the suit property originally belonged, mortgaging

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(2) (1909) 5 M.L.T. 71=2 I.C. 522.
(3) (1921) 41 M.L.J. 217=14 M.L.W. 148=(1921) M.W.N. 475=70 I.C. 593.
(4) 1922 Mad. 104=45 Mad. 443=42 M.L.J. 268=15 M.L.W. 325=(1922) M.W.N. 168=32 M.L.T. 166=70 I.C. 576.

the property in 1894 in favour of one Narayana Iyer. In 1900 Narayana Iyer became insolvent and whatever rights he had under this mortgage passed to the Official Assignee. This suit is brought by the Official Assignee to enforce the mortgage by sale of the property as against the representatives of the original mortgagor Narayani Ammal and others. *Prima facie*, as the learned Judge remarks in his judgment, the suit will be barred, and to save it from the bar of limitation the Official Assignee relies upon two acknowledgments: and what we have to consider in this appeal is whether these acknowledgments are good acknowledgments or not under section 19 of the Limitation Act to give fresh starting points for limitation to run. One is said to be contained in Ex. IV, a petition which Narayana Iyer, as the executor and trustee appointed under the will by Narayani Ammal, filed in 1903 for the probate of that will. In the schedule of assets and liabilities attached to that petition there is an entry to the effect, "Item 3-Amount of mortgage encumbrances Rs. 1,620." The other acknowledgment relied on is said to be contained in a written statement filed in 1913 by the same Narayana Iyer in a suit brought in 1912 by one Kothandarama Chetti. The learned Judge who tried this case has considered only the question whether the second of these acknowledgments is a good acknowledgment or not, for as he came to the conclusion that it was not, the suit failed. I take, therefore, that point for consideration first.

Before dealing with the argument adduced regarding the question whether it is a good acknowledgment or not, I shall briefly state under what circumstances this written statement came to be filed, as in construing a written statement it is necessary to refer to the plaint in answer to which it was filed, and for that purpose it is necessary that we should know how the plaint came to be filed. There was one Devaraja Mudali who had a money claim against Narayana Iyer and he brought a suit in the Small Cause Court and obtained a decree against Narayana Iyer the mortgagee. He then got the decree transferred to the City Civil Court and in execution of that decree, sold the right, title, and interest of Narayana Iyer in the mortgage and purchased it himself. Subsequently he brought a suit, as mortgagee whose rights he claimed to have obtained by this auction purchase in the City Civil Court, to enforce the mortgage against the mortgagor by sale of the property. This was in 1906. By that time Narayani Ammal was dead, she having died in 1900. In bringing the suit he made one Murugammal, the legal representative of the said Narayani Ammal and conducted the suit. He obtained a decree in the City Civil Court which was confirmed in appeal, and in execution of that decree, this property was brought to sale by the Court. In that sale one Kothandarama Chetti became the purchaser in August, 1911. He tried to obtain possession through Court but failed as he was obstructed by Narayana Iyer, and thereupon he brought the suit O. S. No. 425 of 1912 in November, 1912, in which he claimed, first of all to recover possession of the property from the obstuctor after removing the obstruction and secondly, if the Court found that he had not obtained a proper title to the property, he claimed that he had at least become the owner of the mortgage interest and therefore he should be given a decree for the mortgage amount which he stated to be Rs. 2,629 odd on that date, as against the estate. He also made certain other claims against certain other persons with which we are not now concerned. In that suit Narayana Iyer was one of the parties and the Official Assignee was also added as a party—Narayana Iyer was then representing the estate of Narayani Ammal as the executor and trustee under her will and the Official Assignee was representing the mortgagee's interest that passed to him by virtue of the insolvency of Narayana Iyer. The written statement was filed in that suit by Narayana Iyer as mortgagor and it is Ex. VI in this case. It is contended for the plaintiff that there is a sufficient acknowledgment in that written statement of the liability of the estate for the mortgage debt. The clause relied upon as containing that acknowledgment is the first clause in the written statement which runs thus: "This defendant admits that Narayaniamma referred to in para. 3 of the plaint, was the owner of the plaint property and that she mortgaged the same in favour of this defendant on or about the 6th October 1894, as alleged in the said paragraph." It is contended for the other side that this is not a sufficient acknowledgment to take

the case out of the bar of limitation because it merely says that there was a mortgage in 1894 and that it makes no statement whatsoever admitting any existing liability to pay the mortgage debt. It is also contended that this statement should not be taken as having been made by Narayana Iyer as representing the estate of the mortgagor, at any rate that it is uncertain whether it was made by him in his capacity as the representative of the mortgagor or in his own capacity as mortgagee, and it is argued that this is also one reason for refusing to accept the statement as a sufficient acknowledgment of the liability under section 19 of the Limitation Act, under which the acknowledgment must be made by the debtor or on behalf of the debtor by a person duly authorised to make the same. These two arguments have been supported by the learned Judge who tried the case, but after hearing the arguments in appeal, I agree with the learned Chief Justice that there are not sufficient grounds for refusing to accept this statement in the written statement as constituting a proper acknowledgment under section 19.

As regards the objection, that it is not clear that this acknowledgment was made by Narayana Iyer in his capacity as representing the mortgagor's interest and not in his own capacity as mortgagee, it must be remembered that he was made a party in that suit mainly as representing the mortgagor's interest, because the mortgagee's interest had already passed to the Official Assignee. No doubt there are certain statements in the written statement wherein he does refer to his interest as mortgagee also ; nevertheless I think in the main he was in the suit as representing the estate of the mortgagor ; and I think we are bound to give effect to any statements made by him apparently in his capacity as the mortgagor's representative and not say that it is doubtful whether he made it in one capacity or other and reject it. Where it is clear from the context, that any statement in the written statement is made by him in his capacity as mortgagor, of course we must take it that it refers to his capacity as such and not to his capacity as mortgagee though the written statement as a whole is a combined one. I have no doubt, therefore, that this argument fails, as I have come to the conclusion that the statement in paragraph (i) of the written statement may very reasonably be attributed to him as being made on behalf of the mortgagor of the estate which he was representing in that suit.

As regards the second argument, which is a little more difficult to deal with, there can be no doubt, as pointed out by the learned Chief Justice, that there is an implied admission if not an express admission in the written statement that the mortgage debt on the date of the written statement was standing at the figure of Rs. 2,629 or thereabouts ; it was so expressly claimed in the plaint against the estate. There is no denial whatever of that in the written statement, and that being so, it certainly can be inferred that the amount was admitted under Order 8, rule 5 of the Civil Procedure Code. I think the same inference may be drawn in this case also in construing the written statement for the purpose of seeing whether the acknowledgment in the first paragraph was that of a dead mortgage or of a mortgage that was then subsisting, and that we are justified in holding that he was there referring to a subsisting mortgage. The learned Judge has referred to certain other paragraphs in the written statement as showing the contrary, namely paragraphs 6, 8 and 15, but they do not seem to me to refer to the subsisting character of the mortgage at all. All that is said in those paragraphs is that the plaintiff was not entitled to claim anything under the mortgage because Kothandarama Chetti had not got a proper title as the person who was added as the legal representative in the suit by Devaraja Mudaliar had never occupied that position at all.

Our attention has been called to the case of *Maniram Seth* v. *Seth Rupchand* (1). In that case an acknowledgment was made by a person as the representative of a deceased person called Motiram, that Motiram had an open and current account with the defendant at the time of his death. This was treated as a sufficient acknowledgment of a subsisting liability although the acknowledgment itself was made only about a year after he died. At page 1059 their Lordships say this : "The acknowledgment, to which attention has been directed, is followed in the same paragraph by the following sentence : "The alleged indebtedness does not affect his (the respondent's) right to apply for probate." Stress was laid by the Civil Judge upon the word 'alleged.' He was

of opinion that the word 'had' in the sentence 'for the last five years he had open and current accounts with the deceased' and the word 'alleged' were fatal to the validity of the acknowledgment. Their Lordships cannot share this opinion. The first sentence shows that there were open accounts at the death of Motiram. If nothing further is alleged the natural presumption is that they continued unsettled at the time the statement was made. The sentence which follows is perfectly consistent with this admission. The meaning is 'even if there is a balance against the respondent that does not disqualify him from fulfilling the duties of an executor' and it has been pointed out that what is relied upon here is an acknowledgment subject to the condition that an adverse balance really exists, and the condition is fulfilled in fact." In this paragraph the sentence occurs, "If nothing further is alleged, the natural presumption is that they continued unsettled at the time the statement was made." As at present advised I am not prepared to go so far as Miller, J., in thinking that their Lordships have laid down a general rule that whenever a debt is said to have been incurred at an anterior date and no statement is made that it has been paid off, we must necessarily draw an inference that that debt is admitted to be still subsisting at the date of the acknowledgment. I am prepared to accept the interpretation put by the ruling of this Court of Ayling and Venkatasubba Rao, JJ., in *Kandaswami Reddi* v. *Suppammal* (4), where Ayling, J., who delivered the judgment in which Venkatasubba Rao, J., concurred says: "I can see no ground whatever for holding that their Lordships were considering anything but the circumstances of that case or intended to lay down any rule of legal inference. The presumption in that case was very strong." Then he considers how the presumption arose from the facts of that case, and then his Lordship says: "That is the meaning of the paragraph quoted taken as a whole. If the defendant had been in a position to say that the account had been settled between the 6th October, 1898, and the 20th September, 1899, he would certainly have said so; for this would have been a much better answer to the plaintiff's objection. As he did not say so, the inference that the accounts still remained unsettled is natural and obvious." It follows then that in each case we have to consider the circumstances in which the statement was made that there was a debt and see whether it was really intended to convey an impression that that debt was subsisting at the date of the statement or not: and if we can from the circumstances infer that the intention of the person making the statements was to convey the impression that the debt was still subsisting we will be justified in holding that it is an acknowledgment of subsisting liability. I do not think that a mere statement that a debt existed at one time without anything further, as was the case in Second Appeal No. 52 of 1921 to which our attention has been drawn, a decision to which I was a party—is sufficient to enable the Court to say that there is an acknowledgment of a subsisting liability even though the person who makes the statement does not go on to say that the liability has ceased. In that Second Appeal a man was being examined as a witness and he had to answer questions put to him. He had no opportunity of saying anything further than that he had executed a mortgage bond for a prior debt and he therefore said nothing; and Spencer, J., and I held that there was no acknowledgment of a subsisting liability there. I adhere to that opinion. But in this case, as I have already pointed out, the circumstances are perfectly clear to show that when, Narayana Iyer made his statement in paragraph 1 of the written statement, he really meant to say not only that there was a mortgage created in 1894 but also that that mortgage was subsisting on the date of the written statement. That being so, I think it complies with the requirements of law contained in section 19 of the Limitation Act. One other case cited to us is *Subbarama Aiyar* v. *Veerabhadra Pillai* (3). In that case and also in the case decided by Miller, J., there were circumstances from which the inference was drawn in those cases that the acknowledgments were of subsisting debts.

I shall now deal with the other acknowledgment pleaded. In order to show that the acknowledgment in the written statement is effective in saving limitation the plaintiff has to show that it was made at a time when the mortgage debt was subsisting and for that purpose he has to rely on another acknowledgment because the second acknowledgment was made more

than 12 years from the date of the mortgage itself. The first acknowledgment is in Ex. IV. I have already stated its character, and there can be no doubt whatever that that acknowledgment refers to this mortgage debt. It is said by the learned Counsel for the Official Assignee before us that there was no other mortgage encumbrance which Narayani Ammal had created on any part of her property; and the amount of the mortgage encumbrance mentioned in Ex. IV is certainly over the amount of the suit mortgage and probably represents the amount then due, of principal Rs. 1,000 and interest thereon; possibly some interest had been paid off. Had the other side objected to our identifying this mortgage encumbrance as the plaint mortgage one it would have been necessary to allow the plaintiff to adduce evidence to prove the identity of the two as he could be allowed to do under section 19, Explanation I of the Limitation Act; but apparently the point was not pressed in the lower Court and therefore I agree with the learned Chief Justice that it is not necessary to send the case down to have the matter cleared up.

In the view I take the plaintiff's suit must be held to be in time, and there being no other defence of any importance or value in the case and as the parties are not in dispute with regard to the amount of the mortgage, I agree with the learned Chief Justice that we should give a mortgage decree for the amount due with costs in both Courts.

Appeal allowed.

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* * 1924 Madras 292.

RAMESAM, J.

N. Appamma and others—Defendants-Appellants.

v.

S. Chinnaveadu (dead) and others—Plaintiffs-Respondents.

A. A. O. No. 56 of 1921 decided on 17th August, 1923, against the order of the Sessions Judge, Vizagapatam, in O. S. No. 607 of 1917.

(a) *Registration Act, S. 49—Collateral purpose—Unregistered mortgage cannot be basis for redemption though defendant admits relationship, as terms have to be proved—Deed is admissible to prove character of defendant's possession.*

If one party to a suit sets up a title based on adverse possession, his opponent may show by means of an unregistered mortgage deed that the nature of the possession was permissive. An unregistered document which cannot be used as evidence of a transaction requiring registration, such as a gift, may yet be looked at as explaining the nature and the character of a person's possession. But a plaintiff who sues for redemption on strength of an unregistered mortgage deed can never succeed, because for obtaining a decree to redeem it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself. This is the effect of the Ss. 17 and 49 of the Registration Act read with S. 91 of the Evidence Act. Even if the defendants were to admit in their written statements that the relations between themselves were those of the mortgagors and the mortgagees the plaintiffs could not on the strength of that admission be given a decree for redemption, as for redemption they must prove what sum is due. 18 M. 462; 5 M.L.J. 187, 28 M.L.J. 266; 7 M.H. C.R. 13, *Foll.*) [P. 293, C. 1.]

(b) *Civ. Pro. Code, O. 6, r. 17—Pure redemption suit cannot be turned into ejectment suit but redemption of a usufructuary mortgage is a suit for possession.*

Where plaintiffs sued for redemption, which could not be granted as the mortgage deed was unregistered and could not be admissible to prove the terms, but which was admissible to prove the nature of possession, *held* that plaintiffs could have applied for amendment to convert the suit into one to recover possession as owners but they cannot be allowed to so amend in appeal. [P. 293, C. 2.]

(c) *Adverse possession—Limited interest could be got by adverse possession and is a defence to ejectment suit.*

Per Venkatasubba Rao, J.:—A mortgagee to whom possession has not been transferred suing for sale of the mortgaged property cannot establish his right by relying upon an unregistered mortgage deed and his suit will necessarily be dismissed, but where there is a transfer of possession other considerations will arise. 9 M. 244; 13 Mad. 467, 21 Bom. 509, 24 Mad. 471, F.B., *Foll.*) [P. 294, C. 2.]

Per Ramesam, J:—To prove the extent of interest acquired by the defendants by adverse possession, the terms of the mortgage asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the unregistered deed of mortgage; for the asserted mortgage need not necessarily be, though very often it will be identical with the mortgage attempted to be created by means of the unregistered deed of mortgage. [P. 296, C. 1.]

V. Suryanarayana—for the Appellants.

P. Narayana Murthi—for the Respondents.

Spencer, J.:—The plaintiffs sued to enforce in this suit the terms of a usufructuary mortgage deed praying in their plaint for a decree for redemption and alleging that plaintiffs 1 to 5 had mortgaged the suit property to the deceased husband of 1st defendant who was the brother of defendants 5 to 8.

The defendants did not admit the existence of any mortgage. The plaintiff did not set up a title to eject the defendants otherwise.

The mortgage deed produced, being unregistered, could not under section 49 of the Indian Registration Act be admitted as evidence of plaintiff's right to redeem. The Subordinate Judge was of opinion that it could be looked at for the collateral purpose of showing the nature of defendant's possession. But no question arises as to the nature of that possession until the plaintiffs first establish that they have a right to recover possession. The purpose for which they wish to have the document admitted is not a collateral purpose, but the direct purpose of proving the basis of their title.

I do not for an instant wish to question the proposition that if one party to a suit sets up a title based on adverse possession, his opponent may show by means of an unregistered mortgage deed that the nature of the possession was permissive.

There is the high authority of the Privy Council in *Varada Pillai* v. *Jeevaratnammal* (1), for holding that an unregistered document which could not be used as evidence of a transaction requiring registration, such as a gift, may yet be looked at as explaining the nature and character of a person's possession.

But a plaintiff who sues for redemption on the strength of an unregistered mortgage deed can never succeed, because *for obtaining a decree to redeem it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself.* This is the effect of sections 17 and 49 of the Indian Registration Act read with section 91 of the Indian Evidence Act. If we were to allow unregistered documents to be used as evidence of title by a mere device of pleading, we should be defeating the purpose of the Act [Vide *Varada* v. *Krishnaswami* (2)]. Even if the defendants were to admit in their written statements that the relations between themselves were those of mortgagors and mortgagees, the plaintiffs could not on the strength of that admission be given a decree for redemption as for redemption they must prove what sum is due; see *Krishna Pillai* v. *Rangaswami Pillai* (3) and *Mutta Venkatachalapathy* v. *Pyinda Venkatachalapathi* (4), *Seetamma* v. *Krishnaswami Rao* (5), *Kaliani Amma* v. *Narayana Nambiyar* (6), and *Somu Gurukkal* v. *Rangammal* (7). In *Ananda Hait* v. *Khudiram Hait* (8), the plaintiff proved a title paramount to the land, and the defendant while admitting possession under a usufructuary mortgage took the objection that being a verbal mortgage it was void. The decision was that of a single Judge. The learned Judges who heard the Letters Patent Appeal give no reasons for their decision. In the present suit the defendant deny the plaintiff's mortgage and set up an independent title and the plaintiffs have not applied to amend the plaint so as to convert the suit into one to recover possession on their title as owners. Even if they now applied to amend their plaint so as to make it a suit on a different cause of action, I do not think we could properly permit this to be done (See S. A. No. 880 of 1912).

In these circumstances the appeal in my opinion should be allowed and the suit dismissed with costs throughout. But as my learned brother is in favour of dismissing the appeal we refer the question on which we differ to a third Judge under section 98 of the Code of Civil Procedure.

Venkatasubba Rao, J.:—The suit is brought for redemption. The plaintiffs allege that they were the owners of the property, that they executed about 15 years previous to the suit a usufructuary mortgage deed in favour of the defendant's predecessor-in-title that the latter was put in possession of the property which continues to be in possession of the defendants, that the mortgage deed was not registered and that the defendants refused to receive the amount due and deliver possession of the property to the plaintiffs. As is usual in such a plaint, the prayer is for possession of the property, the plaintiffs offering to pay the amount due on the footing of the mortgage.

(1) (1919) 43 Mad. 244=46 I.A. 285=38 M.L.J. 313=27 M.L.T. 6=22 Bom. L.R. 144=18 A.L.J. 274=24 C.W.N. 346=(1919) M.W.N. 724=10 M.L.W. 679=53 I.C. 901 (P.C.).

(2) (1882) 6 Mad. 117.

(3) (1895) 18 Mad. 462=5 M.L.J. 187.

(4) (1912) 23 M.L.J. 652=12 M.L.T. 579=17 I.C. 987.

(5) (1916) 31 M.L.J. 240=(1916) 2 M.W.N. 33=20 M.L.T. 44=35 I.C. 18.

(6) (1915) 28 M.L.J. 266=17 M.L.T. 170=(1915) M.W.N. 105=28 I.C. 69.

(7) (1871) 7 M.H.C.R. 13.

(8) (1918) 19 C.L.J. 532=25 I.C. 558.

The defendants in effect claim that the property is theirs and deny the existence of the mortgage. The District Munsif dismissed the suit holding on a preliminary issue framed that the suit does not lie on an unregistered mortgage bond. He pronounced judgment on the 10th November, 1917, and relying on *Subbayya* v. *Madduletiah* (9) and *Yuruva Venkata Reddy* v. *Maddi Veranna* (10), overruled the contention on behalf of the plaintiffs that the mortgage deed may be referred to, to explain the nature and character of the possession held by the defendants. The Subordinate Judge reversed the decision of the District Munsif and remanded the suit for disposal in accordance with law. His judgment is dated 26th August, 1920, and as by that time the Judicial Committee of the Privy Council in *Varada Pillai v. Jeevaratnammal* (1), had decided that an unregistered deed of gift could be admitted in evidence for the purpose of ascertaining the character of the possession of the alleged donee, the Subordinate Judge following the decision came to the conclusion that the unregistered bond was admissible for the limited purpose stated and observed as follows :—

"When once the document proves the nature of the defendant's possession to be that of the mortgagees they cannot prescribe for an absolute title but they can prescribe for mortgagee's rights after the lapse of 12 years from the date of the deed."

The suit being for redemption of a usufructuary mortgage, it is in substance a suit for possession of the property. The fact that the plaintiff while asking for possession has offered to pay the amount due on the mortgage to the defendant, does not render it any the less a suit for the possession of the property. What the plaintiff has to do in the suit is to prove his title. Having proved it he may rely upon the mortgage deed itself to show that the defendants have not acquired a title by adverse possession. I may observe that the title of the plaintiff to the property has not been determined, the case having been disposed of on a preliminary point. The plaintiff may adduce evidence to prove his ownership to the property. As a piece of evidence he may even rely upon an admission of his title, if any, made by the mortgagees in the unregistered deed in question. It is not necessary to pursue this matter further, because, when the plaintiff proves his title, it will be for the defendants to make out their claim to the property. If they succeed in showing that they have been holding the property asserting the title of mortgagees for over the statutory period, they will then have shown that they have acquired by adverse possession the limited interest of mortgagees in the property in question.

It has been contended on behalf of the defendants that to take this view, will be tantamount to permitting the plaintiffs to convert their suit from one of redemption into one of possession. This argument is untenable. The precise point was raised and determined in *Ananda Hait* v. *Khudiram Hait* (8). The case was first decided by Harrington, J., and his judgment was approved in Letters Patent Appeal by Sir Lawrence Jenkins, C. J., and Mookerjee, J. The following observation in the judgment of Harrington, J. disposes of the argument advanced before us on this point on behalf of the defendants. "The argument that has been addressed to us is that if the plaintiff is given possession in this suit, it would be substantially altering the character of the suit. I do not agree with this. It appears to me that a suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land. If the plaintiff establishes his title and the only answer the defendant has is that the mortgage is void in point of law, still nevertheless the plaintiff would be entitled to get the land, because the defendant on his own showing has no title."

The next argument that the defendants' learned Vakil advanced before us is that the suit is to enforce the terms of the mortgage deed which was unregistered, and that, as the mortgage cannot be proved, the suit must fail. It is perfectly true that a mortgage over immoveable property to secure a sum of Rs. 100 or upwards cannot be created by an unregistered deed. It follows that a mortgagee, to whom possession has not been transferred, suing for sale of the mortgaged property cannot establish his right by relying upon an unregistered mortgage deed and his suit will necessarily be dismissed but, where there is a transfer of possession, other considerations will arise. The interest which a man can acquire by adverse possession may be limited by the nature of his possession ; and adverse

(9) (1907) 17 M.L.J. 469=3 M L.T. 187.
(10) (1914) 15 M.L.T. 192=23 I.C. 376.

possession of a limited interest for the statutory period is a good plea to a suit in ejectment to the extent of that interest. In *Madhava* v. *Narayana* (11), it was held that the kanomdars who held the land under an invalid kanom for more than 12 years acquired by adverse possession the limited interest for which they prescribed. Again in *Sankaran* v. *Periyasami* (12), it was held that the payment of Poruppu did not prevent the possession of the defendants from being adverse to the plaintiff, as the possession of a limited interest in immoveable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is the adverse possession of a complete interest in the property, to bar a suit for the whole property."

In *Bude Sab* v. *Hanumantha* (13), the two Madras cases referred to above were cited with approval, and it was held that a tenant may, after the statutory period, acquire the right of perpetual tenancy. It was pointed out that under article 144 of Act XV of 1877 a suit for possession of immoveable property or any interest therein is barred after the lapse of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff, and that in a suit in ejectment it is the tenant's interest in possession of the tenant that the landlord seeks to recover.

I may also refer to *Manavikraman* v. *Ammu* (14), which I think, has a very material bearing on the present case. In 1864, A mortgaged certain lands to B for Rs. 750. In 1881, B professing to act as the absolute owner, mortgaged the same lands to C for Rs. 5,000, and C enjoyed possession of the lands for a period exceeding 12 years from the date of his mortgage. A then instituted a suit for redemption. It was held that A was bound to redeem C's mortgage before he could recover his possession of the property on the ground that C's mortgage which but for the law of limitation, would have been invalid as against A, had become good by C's possession for 12 years.

From these authorities it is clear that the defendant in the present case can acquire the title of mortgagee by adverse possession for the statutory period. The deed of mortgage being invalid, it confers upon him no right and it cannot be relied upon as the source of the mortgagee's title. On the contrary, his right is based solely upon the fact that he has been in adverse possession of the limited interest for the statutory period. Under the decision of the Privy Council in *Varada Pillai* v. *Jeevaratnammal* (1), the mortgage deed may be referred to for ascertaining the character of his possession. It may be referred to for determining the *quantum* of interest for which the defendants prescribed claiming as mortgagees. When it is said that a mortgagee's interest may be prescribed for, the statement implies that the mortgagee's interest is definite and precise. If the question is, has a person prescribed for a mortgagee's interest in respect of Rs. 100 or Rs. 10,000, the document may be looked at for ascertaining the *quantum* of interest which the adverse possessor has been claiming or has prescribed for.

This case is the converse of *Varada Pillai* v. *Jeevaratnammal* (1). In the latter the defendant who claimed title by adverse possession sought to rely upon the unregistered documents referred to in that case for proving the character and nature of his possession. In this case it is the plaintiff that desires to prove by referring to the unregistered deed, that the defendant's possession has not been adverse. Again in the Privy Council case the defendant wanted to make out his adverse possession of, and title to, the property by relying upon the unregistered documents. In the present case, the plaintiff seeks to disprove the allegation of adverse possession on the part of the defendant by relying upon the deed which has not been registered. In principle the two cases are identical.

As regards the defendant's right to be paid the amount of the mortgage no difficulty does however arise in the present case as the plaintiff has admitted that an amount is due to the defendant on the footing of the mortgage and offers to pay it.

I am therefore of the opinion that the judgment of the Subordinate Judge is correct and that the order of remand must stand.

[This appeal against order coming on for final hearing in pursuance of the above order of reference to a third Judge (*Ramesam, J.*)]

(11) (1885) 9 Mad. 244.
(12) (1890) 13 Mad. 467.
(13) (1896) 21 Bom. 509.
(14) (1908) 24 Mad. 471 (F.B.).

Ramesam J. :—The facts are stated by my learned brothers. It is sufficient to add that defendants 1 to 4 represent the original mortgagee who is dead and defendants 5 to 8 are their relations and friends who got into possession of the suit property within 12 years prior to suit.

It is true that the unregistered deed of mortgage mentioned in the plaint is inadmissible in evidence to prove the mortgage. It is also true that a mortgage of immoveable property to secure a sum of Rs. 100 or upwards cannot be created otherwise than by a registered deed. There is therefore no mortgage of 1902 to redeem.

But it does not follow that there was not, at the date of plaint, the relation of mortgagor and mortgagee between the plaintiff and defendants 1 to 4. It is too narrow reading of the plaint which is a bare narration of the facts, to construe it as seeking to redeem only a mortgage of 1902 and no other. The decision in *Krishna Pillai* v. *Rangaswami Pillai* (3) does not apply. If the defendants who remained in possession for 15 years prescribed for and acquired the interest of a mortgagee by adverse possession, the relation between the plaintiff and the defendants is that of a mortgagor and mortgagee. The limited interest of a mortgagee may be acquired by adverse possession [*Madhava* v. *Narayana* (12)]. To prove the extent of interest acquired by the defendants by adverse possession, the terms of the mortgage asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the mortgage of 1902 or to adduce secondary evidence of the terms of the unregistered deed of mortgage; for the asserted mortgage deed need not necessarily be, though very often it will be, identical with the mortgage attempted to be created by means of the unregistered deed of mortgage.

The case has not been tried. One cannot now know what evidence the plaintiffs are going to adduce to prove the mortgage acquired by the defendants by adverse possession. The unregistered deed of mortgage (which ought to be in the defendant's possession), if forthcoming, can be admitted in evidence to show the character of the defendant's possession, *Varada Pillai* v. *Jeevaratnammal* (1). It cannot be assumed at this stage that no other evidence will be forthcoming.

Even if the defendants acquired no mortgage or other limited interest by adverse possession, the plaintiffs can succeed if they are able to prove their title. It cannot be said that the character of the suit is changed. In the first place, even as the suit is framed, it is a suit for possession based on title, as against defendants 5 to 8 and the suit is not a suit for mere redemption. But, apart from this, I agree with the decision in *Ananda Hait* v. *Khudiram Hait* (8), where it was held that a suit to redeem a usufructuary mortgage is substantially a suit for possession. [See also *Sesha Naidu* v. *Periyasami Odayar* (16)].

I agree with Venkatasubba Rao, J., that the appeal must be dismissed. Costs of the High Court to abide the result.

Appeal dismissed.

(16) (1921) 44 Mad. 951=14 M.L.W. 116=41 M.L.J. 163=1921 M.W.N. 465=63 I.C. 734.

1924 Madras 296.

PHILLIPS AND VENKATASUBBA RAO, JJ.

The Vizagapatam Sugar Development Co., Ltd., by its reputed Secretary, Sukhavasi Brahmanda Naikulu Patrudu Garu and another—Defendants-Appellants.

v.

Muthurama Reddi and others—Plaintiffs Respondents.

Appeal No. 106 of 1921, decided on 12th September, 1923, against the decree of the Sub-Judge, Vizagapatam, in O.S. No. 19 of 1919.

Part performance—Doctrine is not limited to cases where suit for specific performance is not barred.

The applicability of the doctrine of part performance is not limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit. [P. 296, C. 2 and P. 297, C. 1]

A. Krishnaswami Aiyar and *K. Aravamuthu Aiyangar*—for Appellants.

D. Appa Rao, P. Narayanamurthi and *B. Satyanarayana*—for Respondents.

Judgment:—It is now contended by Mr. Narayanamurthi that the applicability of the doctrine of part performance is limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit and he relies

on *Gazendranath Dey* v. *Moulvi Ashraf Hossain* (1) and *Shyam Kishore* v. *Dineschandra* (2).

In neither case was this question specifically considered whereas in *Mehar Ali* v. *Khan Aratunnessa Bibi* (3) there is a decision of a single Judge to the contrary. We can find no such limitation in any of the judgments of the Privy Council cited, and to impose such a limitation would in effect, confine the equity to cases in which the party had a subsisting legal right, which he could enforce, and consequently be a denial of justice in other cases. This is hardly consistent with the doctrines of equity and we are not prepared to accept this plea.

In the result this appeal is allowed and plaintiff's suit dismissed with costs throughout.

Appeal allowed.

(1) 1923 Cal. 130=27 C.W.N. 159=36 C.L.J. 48 =69 I.C. 707.
(2) (1919) 31 C.L.J. 75=24 C.W.N. 463=55 I.C. 154.
(3) (1919) 25 C.W.N. 905.

* * **1924 Madras 297.**

ODGERS AND HUGHES, JJ.

Sellappa Goundan—Appellant.

v.

Masa Naicken and others—Respondents.

S. A. No. 368 of 1921, and A. A. O. No. 348 of 1921, decided on the 24th July, 1923, against the decree of the Sub-Judge, Coimbatore, in A. S. No. 80 of 1920.

Civ. Pro. Code, O. 32, r. 4—Minor—Guardian not putting vital defence commits gross negligence —Guardian with adverse interest is no guardian— Decree is a nullity in both cases.

Where the debt not being antecedent, and the money having been borrowed for the purpose of buying new lands, and the defence that the minors' shares were not liable ought to have prevailed if it had been set up on their behalf.

Held, that the father as guardian showed gross negligence in not setting up this defence. A minor represented by a guardian whose interest is adverse is not legally represented at all. [P. 298, C. 2.]

A. Krishnaswami Aiyar, *K. S. Desikan* and *T. M. Ramaswami Aiyar*—for Appellant.

T. Narasimha Ayengar—for Respondents.

Odgers, J.:—This was a suit shortly for a declaration that the decree in O. S. No. 156 of 1915 on the file of the Sub-Court of Coimbatore is not binding on the plaintiffs in the suit. The lower Appellate Court has found that the decree is not binding on the ground that the minor plaintiffs were not properly represented in that suit by their father as guardian *ad litem*, as the interest of the latter was adverse to theirs. I think the lower Appellate Court further intended in para. 21 of the judgment to find that the guardian did not raise the proper defence to the suit on the minor's behalf thus imputing negligence to him in the conduct of the suit. The appeal is by the 1st defendant as purchaser in 1918 from the decree-holder in O. S. No. 156 of 1915 and the plaintiffs are the sons of the 2nd defendant. The suit O. S. No. 156 of 1915 was in respect of a mortgage (Ex. C.), and the money advanced was utilized for the purchase of new lands—this is admitted. The suit was brought in 1915 and the final decree (Ex. E.) was passed in February, 1917. It was against the father and his minor sons (*inter alia*) and directed sale of the property and if necessary a personal decree against the father, the 1st defendant in that suit. The written statement of the 1st defendant (Ex. B.) settled by his Vakil N. Ramaswami Iyer alleged discharge and points as to payment of interest. The point made against defendant No. 1 is that he ought to have pleaded that the mortgage was not binding on the minors—not being for an antecedent debt. Leading up to the appointment of the father as guardian we have (Ex. F.) the plaintiff's affidavit asking for the appointment of himself and stating that he had no interest adverse to that of his minor sons. He was duly appointed by the Court. On 19th December, 1915, the defendant on behalf of himself, and his minor sons, appointed Vakil, N. Ramaswami Iyer to appear for him. The present suit was filed on 5th July, 1918, by the minors through their mother, none of them having yet attained majority. Mr. A. Krishnaswami Iyer's first point for the appellant is that there was no disability on the part of the father and that, even if he was not a proper person to be appointed on the ground of interest, his appointment was a mere irregularity. Some of the cases cited for appellant turn on the distinction as to whether the proceedings against minors where their guardian's interest is adverse are mere nullities or only voidable. (See *per Sadasiva Iyer, J.*, in Appeals No. 347 and

348 of 1919 (unreported) and *Kuppuswami Iyengar* v. *Kamalammal* (1), *Mannu Lal* v. *Ghulam Abbas* (2).) This distinction is without importance in the present case.

In S. A. No. 407 of 1919 to which my learned brother was a party it was held on the facts that there was no divergence of interest and in S. A. No. 1092 of 1918 to which he was also a party, it was held relying on *Rashid-un-nisa* v. *Muhammad Ismail Khan* (3), that representation by a guardian whose interest is adverse is no representation at all. It is true that the Privy Council in *Valian* v. *Banke Behari Pershad Singh* (4) decided that defects in procedure are mere irregularities. In that case there was no formal order of appointment and neither the minors nor their mother were served with notice and in *Mannu Lal* v. *Ghulam Abbas* (2) the absence of an affidavit was held not sufficient to render the proceedings illegal and void. In *Beni Prasad* v. *Lajja Ram* (5) it was held that a decree against the minor properly represented cannot be set aside save on proof of fraud or collusion by the guardian. See also *Raghubar Dyal Sahu* v. *Bhikya Lal Messer* (6). Here in my opinion we have much more than a mere irregularity. It was improper and in fact illegal to appoint the father guardian at all . . *cf. Murlidhar* v. *Pitambar Lal* (7) and *Ranjiban Saha* v. *Dhiku Singh* (8). It was manifestly to his interest to throw as much of the burden of the mortgage debt as he could on the minors' shares and to exonerate his own share proportionately. It is difficult to imagine a case wherein defendant's interest could not be more adverse to that of another than the present case. The debt not being antecedent, and the money having been borrowed for the purpose of buying new lands, the defence that the minors' shares were not liable ought to have prevailed if it had been set up on their behalf. The father and his vakil must have known that this defence was open, and I am prepared to hold if necessary that the guardian showed gross negligence in not setting up this defence, within the decision in *Punnayyah* v. *Viranna* (9). However a decision as to this may be unnecessary as I hold that the law goes to this length that a minor represented by a guardian whose interest is adverse is not legally represented at all. This is I think the result of the decision in 31 All. 572 as followed in S. A. No. 1092 of 1918 (*supra*) in this Court. In the former case the Privy Council laid down that as the guardian *ad litem* had an adverse interest to that of the minor, "the latter was never a party to the suit in the proper sense of the term." In that case the so-called guardian *ad litem* bought up the decree obtained against the estate of his deceased brother, whose daughter he represented as guardian *ad litem*. He thus appeared as the representative of the debtor and as the sole creditor of the estate in his own right. Their Lordships thereupon held that daughter was never represented at all. This disposes of the main point argued before us. There are two other points which may be briefly disposed of:

(1) That the District Munsif's Court had no jurisdiction to entertain the suit. Mr. A. Krishnasawmi Iyer admitted we were bound by the ruling in *Arunachellam Chetty* v. *Rangasawmi Pillai* (10) but desired to keep the point open in the event of a further appeal.

(2) Appellant may ask for partition without being driven to a fresh suit in order to secure at least the share of the father 2nd defendant here *Davud Beevi Ammal* v. *Ramakrishna Iyer* (11). This is not resisted by T. Narasimha Iyengar for respondents and will be decreed.

The appellant has failed on the main question raised before us and I would dismiss the appeal with costs. The decree of this Court will contain a provision

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(1) (1920) 43 Mad. 842=39 M.L.J. 375=12 M.L.W. 243=59 I.C. 662.
(2) (1910) 32 All. 237=37 I.A. 77=11 C.L.J. 557=12 Bom. L.R. 439=14 C.W.N. 744=8 M.L.T. 57=20 M.L.J. 591=13 O.C. 123=6 I.C. 788 (P.C.).
(3) (1909) 31 All. 572=36 I.A. 168=10 C.L.J. 318=13 C.W.N. 1182=6 A.L.J. 822=11 Bom. L.R. 1295=6 M.L.T. 279=19 M.L.J. 631=3 I.C. 864 (P.C.)
(4) (1903) 30 Cal. 1021=30 I.A. 182=7 C.W.N. 744=5 Bom. L.R. 822=8 Sar. 512 (P.C.).
(5) (1916) 38 All. 452=14 A.L.J. 438=35 I.C. 63.
(6) (1885) 12 Cal. 69.
(7) 1922 All. 91=44 All. 525=20 A.L.J. 329=66 I.C. 372.
(8) (1912) 16 C.L.J. 264=16 I.C. 264.
(9) 1922 Mad. 273=45 Mad. 425=15 M.L.W. 427=42 M.L.J. 429=(1922) M.W.N. 213=70 I.C. 668.
(10) (1915) 38 Mad. 922=28 M.L.J. 118=17 M.L.T. 154=(1915) M.W.N. 118=28 I.C. 79 (F.B.).
(11) 1923 Mad. 467=44 M.L.J. 309=17 M.L.W. 332=32 M.L.T. 263=(1923) M.W.N. 202=72 I.C. 81.

to carry out the effect of the preceding paragraph of this judgment. The Civil Miscellaneous Appeal is therefore allowed but there will be no order as to costs.

Hughes, J.:—I agree. The interests of the father and the sons in O.S. No. 156 of 1915 were divergent. A defence was open to the sons which was not open to the father and could not be pleaded by the father for himself, and the father would profit at the son's expense, if that defence were not raised in the suit as in fact it was not. The question therefore is whether the decree passed in that suit, in which the father represented his sons as their guardian *ad litem* is a nullity so far as the sons are concerned and I think it is. In S.A. No. 407 of 1919 (unreported) there was as a matter of fact no adverse interest and that settled the question there. In the case in *Kuppasawmi Iyengar* v. *Kamalammal* (1) it is not clear there was any adverse interest on the part of the mother. In S.A. No. 1092 of 1918, in the judgment to which I was a party, it was held that the appointment of a guardian whose interests were adverse, gives no legal representation at all and the decision obtained in such proceedings is null and void. That decision is based on *Rashid-unnissa* v. *Muhammad Ismail Khan* (3), was discussed in *Payidanna* v. *Lakshminarasamma* (12), and Wallis, J., (as he then was) appears to have thought that a decree passed against a minor, not properly represented, was a nullity, whereas Sadasiva Iyer, J., was of opinion that the Privy Council did not definitely decide whether the sales in that case were void or merely voidable.

In S.A. Nos. 347 and 348 of 1919 (unreported) Sadasiva Iyer, J., expressed the opinion that the view taken in S.A. No. 1092 of 1918 (referred to above) is erroneous and Napier, J., agreed with him. But both the learned Judges in that case found that there was as a matter of fact no adverse interest on the part of the guardian appointed. So the further discussion was really unnecessary.

In the case *Rashid-un-nissa* v. *Muhammad Ismail Khan* (3), in the application for execution Mauladad was the real applicant and yet he was the guardian *ad litem* of the minor respondent. It was held that the minor was not a party to the proceedings in the proper sense of the term. It is true that Mauladad was apparently not appointed guardian *ad litem* by the Court, but I do not think that affects the question. A plaintiff cannot represent a minor defendant as guardian *ad litem*. That is an extreme case. But the same disability exists to a less extent when the interests of a guardian are in other cases adverse to those of the minor.

In the present case the debt was not an antecedent debt and in the plaint it was alleged that the transaction was not binding while in the written statement there is no allegation that there was any prior contract such as would make the debt antecedent, though it has been suggested in arguments before us that such a contention might possibly have been raised.

It is clear therefore as already stated the interests of the father were adverse to those of his sons and the sons were not legally represented in the suit and the decree does not bind them, and this appeal fails; but provision may be made for partition as this has been agreed to.

I agree with the order proposed in the last part of the judgment of my learned brother.

Appeal dismissed.

(12) (1914) 38 Mad. 1076=28 M.L.J. 525=29 I.C. 314.

1924 Madras 299.

SPENCER AND KRISHNAN, JJ.

P. Varada Reddi and others—Defendants-Appellants.

v.

Srinivasa Mudaliar—Plaintiff-Respondent.

S. A. Nos. 379 to 383 of 1921, decided on the 12th February, 1923, against the decrees of the District Court, Chingleput, in A. S. Nos. 82, 84, 85, 95 and 96 of 1919.

(a) *Madras Estates Land Act, S. 52 (3)—Rokkam rates fixed by contract—Contract providing for revision to waram rates.*

Where the muchilikas executed by tenants for the period 1314 to 1323 Fasli contain a provision by which after the expiry of the period fixed under it the ryots undertake to cultivate the land under "pathukattu muchilikas according to the Amani Rules."

Held, that the ryots agreed to revert to the waram system after the period fixed in the contracts and therefore it is not necessary for the landholder to rely on the first part of cl. 3 o

S. 52 to regulate his relationship with his tenants for Fasli 1324 and thereafter, the contract in the muchilika itself regulating it. [P. 301, C. 1.]

(b) *Madras Estates Land Act, S. 13 (3)—Does not apply to double crops.*

As regards the 2nd crop on lands raised by the tenants with the aid of their own well water without taking the landholder's water, *Held*, that section 13 (3) does not apply as it cannot be said any higher rate of rent is being claimed on account of increased production in consequence of the tenants' improvements. Under the waram system the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop and his claim to share in all the crops cannot be looked upon as an enhancement of rent. [P. 301, C. 2.]

S. Varadachariar and *B. Somayya*—for Appellants.

L. A. Govindaraghava Aiyar—for Respondent.

Krishnan, J.:—These second appeals arise from suits brought by the plaintiff landholder under section 77 of the Estates Land Act for the rent of Fasli 1325 alleged to be due to him from his permanent occupancy tenants, the defendants. He claims rent according to the waram system but the tenants plead that they are bound to pay only money rents as fixed in their muchilikas (Exhibit O series). The lower Courts decreed the landholder's claim as brought and hence these appeals by the tenants.

The main dispute between the parties centres round the first issue whether the tenure is rokkam or waram. The landholder is entitled to revert to the waram system unless the ryots establish that it has been superseded permanently by the cash system by contract, express or implied, between them and the landholder. See *Ayyaperumal Odaiyan* v. *Ramaswami Chettiar* (1) and *Muthiah Chettiar* v. *Periyan Kone* (2). Now in this case there is an express finding by the lower Courts that the waram system was the prevailing tenure in the estate. It is however contended that this finding should not be accepted as it is based on recitals in pattas (Exhibits A, C and E) which as admissions in his own favour by the landholder cannot be relied on by him and on statements in muchilikas (Exhibits B, D and F) which have not been proved. These muchilikas were taken to be more than 30 years old by the lower Courts and as coming from proper custody their proof was dispensed with. The lower Courts are shown to have gone wrong there as the dates on the exhibits show that they were not really 30 years old when tendered in evidence. But apart from these documents there is evidence to show that the tenure was a waram tenure to start with and, that also being the presumption, evidence is not necessary to prove it unless the presumption is rebutted, to do which the burden is on the ryot. In this case there is some evidence that for several years the ryots paid money rents but such payments were made under specific contracts in term pattas for stated periods and the rates varied from time to time. They only show the existence of special contracts remaining in force in particular years and no inference can be drawn from them that the waram system was permanently given up. The last of such contracts is evidenced by Exhibit O series which provided for a money payment for 10 years from Fasli 1314 to 1323; by its own terms the contract came to an end in fasli 1324 and from that fasli the landholder was entitled to revert to the waram rates.

It is next argued that even assuming that the plaintiff was entitled to revert to waram rates he is nevertheless disentitled to enforce those rates, in Fasli 1325 without properly tendering a waram patta in Fasli 1324 by reason of the provision in the latter part of clause (3) of section 52 of the Estates Land Act and such a tender has not been made out. Before dealing with the applicability of the section it may be stated that waram pattas were attempted to be tendered to the ryots by the plaintiff in Fasli 1324 in which year he distrained the crops for rent. But in the ryot's suit to set aside the distraint, it was held by the courts that the tender was not proper as regards the present defendants and in consequence the distraints were set aside. That finding in Exhibit X is clearly *res judicata* and the question cannot be re-agitated and we must take it that there was no proper tender of any patta in Fasli 1324.

The question then is whether the landholder is precluded from claiming waram rates in Fasli 1325. As already stated up to the end of Fasli 1323 money rents were paid by the ryot and the argument for them is that under the first part of clause (3)

(1) (1915) 29 M.L.J. 362=2 M.L.W. 650=(1915) M.W.N. 614=30 I.C. 983.

(2) (1920) 11 M.L.W. 311=(1920) M.W.N. 15=55 I.C. 78.

of section 52 that arrangement should be treated as remaining in force for subsequent years and that to introduce a change the landholder was bound under the second part to tender a new patta in the fasli prior to one in which he proposed to enforce the new terms. The lower Appellate Court has held that clause (3) does not apply to this case and we think that view is right. In the muchilikas (Exhibit O series), there is a provision by which after the expiry of the period fixed under it the ryots undertake to cultivate the land under "pathukattu muchilikas according to the Amani Rules". These words have been understood by the lower Courts as meaning that the ryots would cultivate under the waram system. No doubt the learned District Judge seems to have erroneously thought that the word varapathu was in the covenant but that mistake however does not affect the meaning he attributed to the clause. "Amani" has been treated as meaning waram system in our judgment in *Muthiah Chettiar* v. *Periyan Kone* (2) and as regard this very estate by the District Munsif in his judgment (Exhibit W) of 1887 when the landholder brought suits against the ryots to compel them to accept waram pattas. The lands are described in an earlier part of Exhibit O series as "Varapathu and Kaipathu" lands. That also supports the view taken by the lower Appellate Court. The meaning of the covenant thus seems to be clear that the ryots agreed to revert to the waram system after the period fixed in O series was over. It is therefore not necessary for the landholder to rely on the first part of clause (3), section 52, to regulate his relationship with his tenants for Fasli 1324 and thereafter, the contract in the muchilika itself regulating it. In fact in the face of that covenant the arrangement to pay money rent cannot be held to continue in force after Fasli 1323. The second partis only a corollary to the first part of clause (3) and as the latter does not apply it must be held that the former also does not apply to this case. As under the present Act no prior tender of exchange of patta and muchilika is necessary to entitle a landholder to sue for rent, the present suit is clearly maintainable as brought and the plaintiff is entitled to the waram rates decreed to him.

The only other question argued is as regards the 2nd crop on these lands raised by the tenants with the aid of their own well water without taking the landholder's water. It is contended that the plaintiff is not entitled to waram on that crop under section 13 (3) of the Act. That provision does not seem to apply as it cannot be said that any higher rate of rent is being claimed on account of increased production in consequence of the tenants' improvements. Under the waram system the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop. His claim to share in all the crops cannot be looked upon as an enhancement of rent. The lower Appellate Court is therefore right in giving a share to the plaintiff in the 2nd crop also.

The second appeals thus substantially fail but the decrees of the lower Appellate Court must be modified by striking out the declarations embodied in them and by confining them to decrees for rent as the suits are purely suits for rent. With this modification the second appeals are dismissed with costs. Vakils fee Rs. 10 in. each case.

Appeals dismissed.

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* * 1924 Madras 301.

SPENCER AND VENKATASUBBA RAO, JJ.

P. Rajagopalam and others—Defendants-Appellants

v.

V. Ramamurthy and others—Plaintiffs-Respondents.

A. A. O. No. 35 of 1922, decided on the 14th November, 1922, against the order of the District Court, Kistna, in Appeal No. 135 of 1920.

(a) *Compromise—Doubtful claims—Even limited owner representing estate can validly compromise so as to bind reversioners.*

Where the defences raised by a limited owner while to a certain extent personal to him were in a large measure inseparable from the estate which he represented, and the claim that was put forward was a claim against the estate and if the claimant succeeded in making out that the family was undivided, the limited owner would get nothing.

Held, that the limited owner can validly compromiee claims of this nature. (38 I. A. 87; 33 All. 356 (P.C.), 49 I. A. 342 (P.C.), *Foll.*) [P. 304, C. 1.]

(b) *Civ. Pro. Code, S. 11—Limited owner—Judgment to which limited owner is party binds reversioners if contest is fair and* bona fide *and limited owner represents estate though litigation may have arisen out of his own action.*

Where the widow was quite competent to represent the estate and from the nature of the defence put forward and the questions tried, it was abundantly clear that not only she represented the estate but the trial was fairly and honestly conducted :

Held, that the result of the litigation was binding on the reversioners. (40 All. 593 (P.C.), *Foll.*). [P. 304, C. 2.]

If a Court is satisfied that the former trial was fair and honest, the mere fact that the reversioner considers that the evidence adduced by the widow in the previous action is insufficient, or that he would have in similar circumstances produced more or better evidence, does not in the least, affect the question. (40 All. 593 (P.C.), *Foll.* ; 42 Bom. 69, *Dist.*)

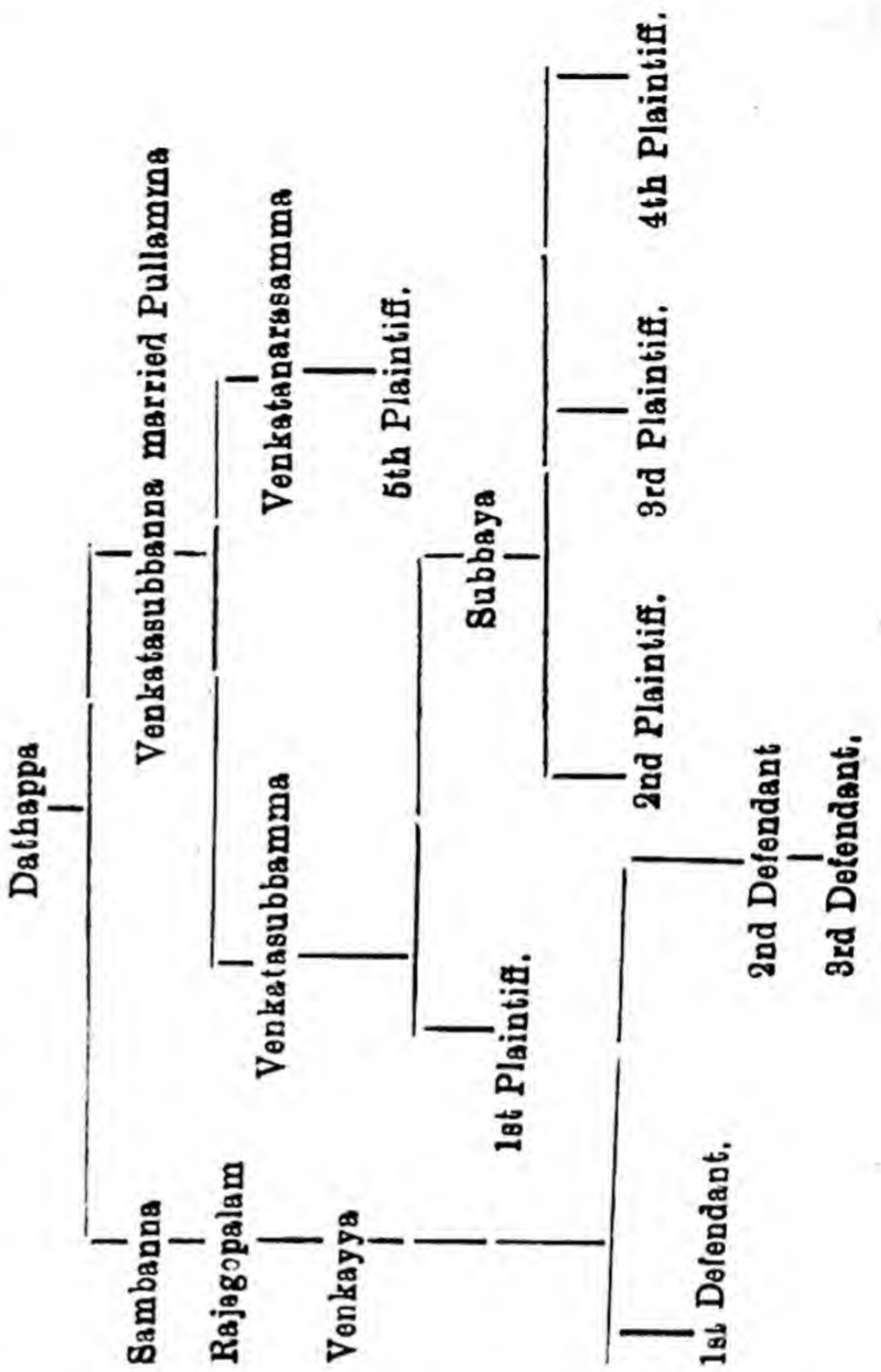
Before applying the principle of *res judicata* to judgments to which limited owners are parties, the Court should take care to be satisfied that the decrees relied on are untainted by fraud or collusion and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. (42 B. 76 *Dist*).

Whether the widow represented the inheritance, may be gathered from the nature of the defence put forward, and the issues raised, tried, and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in the previous suit? Was it a claim by or against the widow personally or the inheritance which she represented? To decide these questions the Court must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them, the widow must be held to be representing the estate even though litigation may have arisen out of her own acts ; if not the litigation must be deemed personal to her and not binding upon the reversioners.

A. Krishnswami Aiyar—for Appellants.

P. Narayanamurthi—for Respondents.

Venkatasubba Rao, J:—The question to be decided in this appeal is, whether a decree obtained against the daughters of the last male-holder operates as a bar to the present suit filed by the plaintiffs after the death of the surviving daughter, as reversioners to the estate. The following pedigree will elucidate the facts :—



After Venkatasubbanna's death, Pullamma was in possession of the property. She died about the year 1866 and there were disputes in regard to the right to the estate of Venkatasubbanna between Rajagopolam on the one hand and Venkatasubbamma and Venkatanarasamma on the other. The disputes were settled by the intervention of mediators in 1872 and Ex. A called *Farikkat* bearing the date 5th June, 1875, was executed embodying the terms of the settlement. According to Ex. A each of the daughters was to take 14 acres of land and Rajagopalam 38 acres and odd. Notwithstanding this arrangement, Pullamma's daughters obtained an entry in their names in the Revenue Registers. Rajagopalam instituted O. S. No. 87 of 1885 on the file of the District Munsif's Court of Ellore for possession of the 38 acres and odd. Venkatasubbamma was impleaded as the 1st defendant, and Venkatanarasamma having died, her son the present 5th plaintiff was made the 2nd defendant. As he was a minor, his father was appointed his guardian *ad litem*.

Venkatasubbamma contested the suit. The District Munsif dismissed it. Rajagopalam appealed. The Appellate Court allowed the appeal and passed a decree in his favour. Venkatasubbamma preferred a second appeal and the High Court confirmed the decree of the first Appellate Court.

In 1890, the father of plaintiffs 2 to 4 instituted O. S. No. 107 of 1890 on the file of the District Munsif's Court of Ellore, against Rajagopalam's son Venkayya, against Venkatasubbamma and the present plaintiffs 1 and 5, for a declaration that the alienation of the aforesaid 38 acres and odd, by the daughters of Venkatasubbanna in favour of Rajagopalam was invalid after the death of the daughters. The District Munsif found that the *Farikkat* was supported by consideration, that it was a fair compromise, but dismissed the suit on the ground that the suit was barred by limitation. The Appellate Court upheld the dismissal on the ground of limitation but gave no finding on the question whether the *Farikkat* was binding upon the plaintiff in that suit and the other reversioners. A second appeal was preferred and the High Court also dismissed the suit on the ground of limitation.

The present suit was filed by the plaintiffs for the establishment of their right to the same property, for a declaration that it belonged absolutely to Venkatasubbamma and that the alienation of the same in favour of Rajagopalam on 5-6-1875, by the daughters of Venkatasubbanna is illegal and not binding on the plaintiffs and for other reliefs. The defendants contended *inter alia* that the transaction evidenced by Ex. A was a *bona fide* settlement of family disputes and that the suit was barred by *res judicata*, by reason of the decisions in the previous suits. Several issues were framed; but the Subordinate Judge heard the case only with reference to the preliminary issue of *res judicata* and holding that the previous suits operated as a bar dismissed the action. The District Judge reversed the Subordinate Judge's decision and remanded the suit for disposal on the other issues.

I may state at the outset that the whole of the argument before us was directed only in regard to the effect of the decision in the earlier of the two suits, namely, O. S. No. 87 of 1885. It was argued for the appellant that the plaintiffs are bound by the result of that suit, whereas for the latter (the respondents), it was contended that the decision is not binding on them. I may also state that it has not been argued before us that the decree in that suit is binding in any event on the 5th plaintiff, who was impleaded as the 2nd defendant in O. S. No. 87 of 1885. The only question that has, therefore, to be considered is whether all the plaintiffs as a body are bound by the result of O. S. No. 87 of 1885.

To decide this question, it will be necessary to examine with some care the contentions of the parties in that suit and the judgments of the Court of first instance and the higher Courts.

As already observed, the plaintiff in O.S. No. 87 of 1885 sued Venkatasubbamma and the present 5th plaintiff for possession of the 38 acres and odd referred to above. The defence of the 1st defendant was that the *Farikkat* was obtained by misrepresentation and fraud, and that it was unenforceable, for want of consideration. The District Munsif, in a long judgment found that no fraud was proved but that the document was not supported by consideration. In arriving at the latter conclusion he discussed the question as to whether Sambanna and Venkatasubbanna had or had not been divided. He apparently was of the opinion that in fact the brothers had been divided and there was no justification for the compromise and a large portion of his judgment was devoted to the consideration of the probabilities in favour of, or against partition. There was no oral evidence on this point and his conclusion was based on the recitals in the *Farikkat* and the inferences drawn from them. He observed in his judgment that there was no distinct issue raised as to division, but that the determination of the point was necessary for deciding whether the document was supported by consideration. I may observe, however, that the issue whether the partition was valid and binding on the parties was wide enough to cover the point whether the deed was supported or not by consideration and this in turn involved the consideration of the question whether the two branches of the family were or were not divided. The Munsif in the result dismissed the plaintiff's action.

Rajagopal filed an appeal. The Subordinate Judge concurred with the District

Munsif that the deed was not obtained by fraud and he further held that there was consideration for the *Farikkat*. On the question of division, he observed that the presumption was that the parties were undivided, and that the circumstances relied on by the District Munsif did not establish that there was a partition and that though he was inclined to the view that the two branches were joint, he considered it sufficient to hold that the claim put forward by Rajagopal was *prima facie* valid and the compromise entered into amounted to a settlement of a doubtful claim. On this footing, he reversed the District Munsif's judgment and passed a decree in favour of Rajagopal.

Venkatasubbamma filed a second appeal and the High Court confirmed the judgment of the Subordinate Judge, on the ground that Venkatasubbamma failed to show that the compromise was invalid by reason of misrepresentation and fraud. From the judgment of the Munsif, it is clear that the only misrepresentation in regard to which parties went to trial, had reference to the state of the family, whether it was divided or undivided. If Rajagopal, for the purpose of inducing consent to the arrangement, had stated to the daughters, that the family was undivided, while, in fact it was divided, the statement would amount to a misrepresentation. The judgment of the High Court was very short and the effect of it is that the findings of the Subordinate Judge were accepted.

I must add that the father of the 2nd defendant (the present 5th plaintiff) supported the plaintiffs' claim throughout.

One perusing the judgments to which I have referred, I have come to the conclusion that the defences raised by the daughter, while to a certain extent personal to her were in a large measure inseparable from the estate which she represented. The claim that was put forward was a claim against the estate and if the claimant succeeded in making out that the family was undivided, the daughters would get nothing. It has been repeatedly held that female heirs can validly compromise claims of this nature. I need only refer to *Khuni Lal* v. *Gobind Krishna Narain* (1), and *Ramsumran Prasad* v. *Musammat Shyam Kumari* (2). In the litigation which followed the compromise, the widow was quite competent to represent the estate and from the nature of the defence put forward and the questions tried, it is abundantly clear that not only she represented the estate but the trial was fairly and honestly conducted.

I am of the opinion that the District Judge was wrong in holding that the result of this litigation was not binding on the present plaintiffs.

The decision of the Privy Council in *Raisal Singh* v. *Balwant Singh* (3), is directly applicable. After adopting a son to her deceased husband, a Hindu widow in a suit by an alleged reversioner against her to set aside the adoption, on the ground that she had no authority from her husband to make the adoption, alleged in her written statement and stated in Court, through her pleader, that she had authority to make the adoption and that it was valid. The suit was dismissed, because the plaintiff was found not to be a reversioner. The widow then brought a suit against the adopted son, to set the adoption aside, pleading that she was not vested with authority from her husband to adopt and denied having made the adoption. The adopted son contested the suit and the Courts in India dismissed it, the ground of decision being that the widow was estopped from maintaining the suit. On appeal, however, the Privy Council raised an issue as to her authority to adopt and held on the evidence on that issue that the adoption was valid. In a suit, on the death of the widow, by an alleged reversioner to the estate of her husband, against the adopted son, for a declaration that the adoption was invalid and for possession of the estate it was held by the Privy Council that notwithstanding the personal estoppel which bound her, the widow represented the estate on the question of fact as to whether the defendant (respondent) had or had not been validly adopted, and that she represented it within the meaning of the rule

(1) (1911) 33 All. 356=38 I.A. 87=15 C.W.N. 545 =8 A.L.J. 552=13 C.L.J 575=13 Bom. L.R. 427=10 M.L.T. 25=(1911)-1-M.W.N. 432=21 M.L.J. 645=10 I.C. 477 (P.C.).

(2) 1922 P.C. 356=1 Pat. 741=49 I.C. 342=31 M L.T. 200=3 P.L.T. 749=25 Bom. L.R. 634=L.R. 4 P.C 17=21 A.L.J. 18=27 C. W.N. 269=44 M.L.J. 751=16 M.L.W. 956=69 I.C. 71 (P.C.).

(3) (1918) 40 All. 593=45 I.A. 168=28 C.L.J. 519 =24 M.L.T. 361=9 M.L.W. 52=23 C.W. N. 326=(1919) M.W.N. 155=36 M.L.J. 597 =21 Bom. L.R. 511=43 I.C. 553 (P.C.).

laid down in *Katama Natchiar* v. *The Rajah of Shivagunga* (4), and under the circumstances the decree against her would bind the reversioners. It seems to me that I may usefully refer to one very important circumstance in connection with the case. It was contended before the Privy Council that the decision of the Board in the previous litigation did not operate as a bar to the maintenance of the later suit, on the ground that evidence to show that the widow had no authority to adopt had been excluded in her suit and that there were no materials before the Board, which justified a finding that the adoption had been validly made.

Their Lordships of the Judicial Committee deal with this contention thus:

"It is true that Rani Dharam Kunwar applied to the Subordinate Judge that evidence should be taken; but it does not appear that she ever applied to have witnesses summoned, or tendered any evidence which was rejected. It is difficult to conceive what oral evidence Rani Dharam Kunwar could have produced, except her own personal evidence to prove that she had received from Rajah Raghubir Singh no authority to adopt, and if she had given evidence that she had no authority to make the adoption, such evidence, having regard to her own acts and documentary evidence on the record could not have been accepted as true."

Their Lordships continue:

"The Board in 1912 were satisfied, and rightly satisfied, that no further evidence as to the authority, or absence of authority to adopt could be expected to be produced by anybody, beyond the evidence then already taken."

I refer to the above, because it follows from this, that if the Court is satisfied that the former trial was fair and honest, the mere fact that the reversioner considers that the evidence adduced by the widow in the previous action is insufficient, or that he would have in similar circumstances produced more or better evidence, does not in the least affect the question.

It was further contended before their Lordships that the widow laboured under a personal estoppel and therefore she could not have represented the estate, on the question of fact as to whether the adoption was or was not valid. This argument is dealt with in the following passage:

"In the absence of all authority, their Lordships cannot decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified, merely owing to personal disability or disadvantage as a litigant, although the merits are tried and the trial is fair and honest."

The learned District Judge has relied upon *Subbi* v. *Ramkrishna Bhatta* (5), in support of his view. The facts are entirely dissimilar and the case does not seem to have much bearing. A widow consented to a gift, and 24 years later filed a suit to recover the property gifted, alleging that she had consented to and approved of the gift, upon certain conditions, which were not complied with by the donees. The defendants resisted the suit, on the ground that they held the property adversely to any estate which she represented. The suit was dismissed as barred by limitation. It was held that on her death a suit by her daughter as heir and reversioner of the estate of her father was not barred by the previous action. The learned Judges held that a special article like 141 of the Limitation Act must be taken to override the more general articles such as articles 142 and 144 and that limitation could not begin to run against the reversioners during the widow's life.

The act of gift was an act personal in its nature and had no relation to the inheritance which the widow represented. The claim in the suit by the widow was based upon the ground that certain conditions had not been complied with by the donees. It is difficult to imagine how the widow can be said to have represented the estate, either in making the alienation or in instituting the suit. The ground alleged in the suit was one personal to the female heir. Having regard to the facts stated, the decision cannot be said to be an authority for the wider proposition that a widow in the enjoyment of a life estate can never fully represent the estate in any litigation arising out of acts of her own. There are no doubt some passages in this judgment which state the principle in wide and general terms. At page 79 the learned Judges say:

"Nor will litigation by the widow in the enjoyment of such a life estate, whether she be plaintiff or defendant, represent the estate fully, so as to give rise to a bar of *res judicata* against reversioners, if such litigation is qualified and personal to the widow, *or has arisen out of acts of her own, affecting the estate during her own life estate therein.*"

The latter part of the proposition that the widow cannot represent the estate in any case, when the litigation has arisen out of her own acts, seems to be directly

(4) (1863) 9 M.I.A. 539=2 W.R. 31=1 Suther. 520=2 Sar. 305 (P.C.).

(5) (1918) 42 Bom. 69=19 Bom. L.R. 919=43 I.C. 233.

opposed to the principle laid down in *Raisal Singh* v. *Balwant Singh* (3), already referred to. In this case, the act of adoption was the act of the widow and she had challenged the adoption in the previous litigation. The reversioners were bound by the result of the suit, to which the widow was a party.

I may also refer to another decision of the Judicial Committee, *Prosunno Coomaree Debia* v. *Golab Chand Babu* (6), which relates to the case of a shebait of an idol. The principle laid down however is equally applicable to the case of a Hindu widow. The appellants as shebaits sued to set aside decrees obtained by the respondent against their immediate predecessor, the Shebait Rajah Baboo. The latter had borrowed monies from the respondent to defray the expenses of the idol and of repairing the temple. Suits were brought by the respondent and issues were raised, and evidence gone into, upon the question of fact, whether the monies were *bona fide* borrowed and expended for the service of the idol. The issues were found in favour of the respondents and it was decided that the debt should be realised from the profits of the *devattur mahal*.

Were these decrees binding upon the succeeding shebaits, the appellants? It will be noticed that the litigation arose out of the acts of the Raja Baboo himself and that he, as shebait, had defended the suits brought upon bonds executed by him in favour of the respondent. Nevertheless their Lordships held that the decrees were binding upon Rajah Baboo's successors and they observe:

"Judgments obtained against a former shebait, in respect of debts so incurred, should be binding upon the succeeding shebaits, who in fact form a continuing representation of the idol's property".

They lay down that before applying the principle of *res judicata* to judgments of this character, the Court should take care to be satisfied that the decrees relied on are untainted by fraud or collusion and that the necessary and proper issues were raised, tried, and decided in the suits which led to them.

The learned Judges of the Bombay High Court place reliance upon *Ranchordas* v. *Parvatibai* (7), and *Braja Lal Sen* v. *Jiban Krishna Roy* (8). In *Runchordas Vandrawandas* v. *Parvatibai* (7), a testator died in 1869 leaving two widows, one of whom died in 1871 and the other in 1888 and devised the whole residue of his estate to trustees for a charity and shortly after the death of the surviving widow the heir-at-law sued to declare the devise to charity void and for administration. It was held that article 141 applied, that the suit was not barred and that article 144 did not apply. There is no reference in the judgment to the principle in support of which this case was cited as an authority in the decision of the learned Judges of the Bombay High Court.

In *Braja Lal Sen* v. *Jiban Krishna Roy* (8), it was held that the dismissal of a previous suit filed by a female heir which was for recovery only of her limited estate would not be a bar to the subsequent suit by the reversioner which was for the recovery of the absolute estate which vested in him. In the course of the judgment at page 297, it was observed:—

"But if a suit though concerning the absolute estate, is determined upon a ground personal to the female heir, for instance, if a suit brought by a Hindu widow to recover possession of immoveable property appertaining to her husband's estate is dismissed on the ground of its having been alienated by her in favour of the defendant, *in the absence of legal necessity being shown*, the decree in such a case ought not to bind the reversioner."

This passage, far from being an authority for the very wide rule enunciated in *Subbi* v. *Ramkrishna Bhatta* (5), expressly states the qualification, "in the absence of legal necessity being shown." The inference is that if legal necessity had been shown the decree might be binding upon the reversioner.

I am therefore clearly of the opinion that *Subbi* v. *Ramkrishna* (5), is distinguishable on the facts and that the present case falls within the principle given effect to in *Raisal Singh* v. *Balwant Singh* (3). The learned Vakil for the respondent has relied upon *Tirupatiraju* v. *Venkayya* (9), in support of the proposition that where the transaction arises out of the act of the widow she can in no circumstances be said to represent the estate in any litigation connected with that act. In the first place I must observe that the learned Judges

(6) (1874-1875) 2 I.A. 145=14 B. L. R. 450=23 W.R. 253 (P.C.).
(7) (1899) 25 Bom. 725=26 I. A. 71=1 Bom. L.R. 607=3 C.W.N. 621=17 Sar. 543 (P.C.).
(8) (1899) 26 Cal. 285.
(9) 1922 Mad. 131=45 Mad. 504=42 M.L.J. 392=15 M.L.W. 395=(1922) M.W.N. 207=30 M.L.T. 181=61 I.C. 479 (F.B.).

were dealing with merely a question of *onus* and not with the binding character of the transaction. Secondly the case arose with reference to a compromise of a suit and not to a decree passed after contest. A Hindu widow first mortgaged her husband's estate for a debt contracted by her, then she was sued by the mortgagee and she compromised the suit by selling to him the mortgaged properties. The question to be decided was: On whom was the burden of proof that the compromise, in other words the sale, was valid and binding on the reversioners? It was held that the *onus* was upon the mortgagee-purchaser. It was conceded that the burden of proof would be upon the mortgagee, if he sought to enforce his mortgage. Did the circumstance that subsequent to the mortgage she entered into a compromise and made an out and out alienation of the property, dispense with the necessity on the part of the alienee, to prove in the first instance that the alienation was binding on the estate? The learned Judges held that it did not; but I am unable to regard the decision as containing any pronouncement on the question at issue.

Whether the widow represented the inheritance, may be gathered from the nature of the defence put forward, and the issues raised, tried, and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in the previous suit? Was it a claim by or against the widow personally or the inheritance which she represented? To decide these questions you must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them, the widow must be held to be representing the estate; if not, the litigation must be deemed personal to her and not binding upon the reversioners. I conceive this to be the effect of *Katama Natchiar* v. *The Rajah of Shivagunga* (4), and *Raisal Singh* v. *Balwant Singh* (3). I pointed out already that in O. S. No. 87 of 1885 the defence put forward by the daughter, that the *Farikkat* was not supported by consideration, necessitated the determination of the question, whether there had been a partition or not between the two branches of the family. I further pointed out that there was a fair and honest trial of this question. The contention referred to was not personal to the widow but was intimately connected with the estate which she represented.

Applying the principles of law which I have set forth above, to the facts of the present case, I have no hesitation in holding that the decision in O. S. No. 87 of 1885 does operate as a bar to the suit and I would therefore allow the appeal with costs.

Spencer, J.:—I entirely agree that the decision in O. S. No. 87 of 1885 binds the reversion, as there was a *bona fide* contest and a final decision by a competent Court. The appeal is allowed with costs and the decree of the Subordinate Judge is restored.

Appeal allowed.

1924 Madras 307.

KRISHNAN AND ODGERS, JJ.

Vedachari—Petitioner-Appellant

v.

Narasimha Mudali and others—Respondents.

A.A.A.O. No. 53 of 1922, decided on 4th October, 1923, against the appellate order of the Sub-Judge, Chittoor, in A. S. No. 272 of 1921.

Transfer of Property Act, S. 52—Lis pendens—*Applies to suits for specific performance.*

The doctrine of *lis pendens* applies as regards suits for specific performance of agreements to sell immoveable properties. [P. 307, C. 2.]

K. S. Jayaramaier—for Appellant.

S. A. Seshadri—for Respondents.

Judgment:—Following the ruling in *Matilal Pal* v. *Preo Lall Mitra* (1) and *Jahar Lal Bhutra* v. *Bhupendra Nath Basu* (2), we hold that the doctrine of *lis pendens* applies as regards suits for specific performance of agreements to sell immoveable properties just as much as to suits for possession of immoveable properties. As observed by Mookerjee, J., in the latter case, "The obvious reason for this is that if when the jurisdiction of the Court was once attached, it could be ousted by the

(1) (1911) 13 C.W.N. 226=9 C.L.J. 96=3 I.C. 696.
(2) 1922 Cal. 412=49 Cal. 495=67 I.C. 108.

transfer of the defendant's interest, there would be no end to litigation and justice would be defeated." That the principle underlying the doctrine applies to Court sales such as we have to deal with here, has also been held. The decision of the lower appellate Court is therefore right; and the Civil Miscellaneous Second Appeal is dismissed with costs.

Appeal dismissed.

1924 Madras 308.

PHILLIPS AND VENKATASUBBA RAO, JJ.

Vedala Venkata Subbamma—Appellant

v.

Vedala Venkamma (dead) and others—Respondents.

A. S. No. 201 of 1921 decided on the 5th October, 1923, against the decree of the Sub-Judge, Bezawada, in O. S. No. 68 of 1919.

Evidence Act, S. 115—Widow recognising adoption by conduct cannot dispute its validity, though it may be really invalid for want of her husband's consent.

When plaintiff's husband, a boy, was adopted his name and his house name was changed, he took the house name of the first defendant's husband and the name of his adopted father's father, and immediately after the adoption the first defendant performed his Upanayanam ceremony. Some years later the first defendant performed his marriage and also Grahapravesam ceremony and the adopted boy performed the shraddha for the first defendant's husband, and did not receive any of his natural family property, and the first defendant also asserted that she had her husband's authority to adopt at the time of the adoption.

Held, that these circumstances are quite sufficient to constitute an estoppel and therefore first defendant is estopped from denying the adoption. (34 A. 389 P. C., *Foll.*) [P. 308, C. 2, and P. 309, C. 2.]

Judgment:—The plaintiff in this case is the widow of one Vedala Janakiramayya who is said to be the adopted son of the first defendant's husband. The first defendant has denied both the *factum* of the adoption and also its validity. The Subordinate Judge has found that the ceremony of adoption did actually take place and that the plaintiff's husband has been treated as an adopted son by the first defendant, but he has held that, the first defendant, not having had authority from her husband or from the sapindas to make the adoption, the adoption is invalid; and he has further found that the first defendant is not estopped from raising the plea of the invalidity of the adoption. In appeal, the *factum* of the adoption is not disputed and the only point which is seriously argued is that the authority given by the husband has not been actually proved; but it is contended that the first defendant, by her conduct and acts from the time of the adoption until the present day, is estopped from denying that plaintiff's husband was really her adopted son.

There are many facts proved which we think may be referred to in detail as the question of estoppel must depend upon the evidence and we will proceed to mention the chief circumstances which would lead to an inference in coming to a decision. In the first place, when this boy was adopted his name and his house name were changed. He took the house name of the first defendant's husband and the name of his adopted father's father. Immediately after the adoption the first defendant performed his Upanayanam ceremony. Some years later, the first defendant performed his marriage and also Grahapravesam ceremony. The adopted boy performed the shraddha for the first defendant's husband and it also appears that he had no share in the property belonging to his natural family. The partition in the natural family has not been actually proved but, from the only evidence available it seems clear that Janakiramayya did not receive any of his natural family's property. There is the further circumstance that, when Janakiramayya's natural mother died, the plaintiff did not observe pollution and, if Janakiramayya had been a member of that family he must undoubtedly have done so. These circumstances are all very strong evidence that the first defendant did adopt the boy and treated him as a lawfully adopted son; his performance of the ceremonies mentioned was one that could only be done by an adopted son, and, therefore the whole course of the conduct of the first defendant and, as far as we know of other people, showed a recognition of the validity of Janakiramayya's adoption. In this connection, we may refer to the case decided by the Privy Council in *Dharam Kunwar* v. *Balwant Singh* (1)

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(1) (1912) 34 All. 398=39 I.A. 142=16 C.W.N. 675=9 A.L.J. 730=14 Bom. L.R. 485=(1912) M.W.N. 64=12 M.L.T. 95=16 C.L.J. 60=23 M.L.J. 200=15 I.C. 673 (P.C.).

which in many respects resembles the facts here. It is suggested in *Ramachari* v. *Saraswathi Ammal* (2), that the remarks of the Privy Council in this case are mere *obiter dicta*, but we think that is hardly so, although they decided the question in issue in two ways: once as a question of fact and again on the question of estoppel, which had been the only one decided, by the Allahabad High Court. In that judgment we find the following passage relating to the widow who was held to be estopped from disputing the validity of the adoption which she had made. "She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after that assertion has been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family, he has undergone a change of social status which may or may not be beneficial to him but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of his privileges with which the Rani purported to endow him. He married on the faith of his adoptive mother's word, and no doubt his creditors who have sold him goods or lent him money in like reliance on her good faith". Many of these facts we find in the present case and we think that they are sufficient to constitute an estoppel. It was contended by Mr. Krishnaswami Iyer for the Respondent that the representation by the first defendant that the boy had been adopted was nothing more than a representation that the ceremony of adoption had taken place and that it could not be treated as a representation that ceremony was validly performed. In the circumstances of this case we are not prepared to accept that plea. It would be very difficult at this late stage to prove the authority considering that the adoption took place as long ago as 1897; and, while the first defendant by her words and acts held out the boy as her adopted son, it is difficult to restrict that representation to a mere assertion that the ceremony of adoption had taken place. In addition to her conduct we have the deliberate statement made by her in Ex. K which is the earliest opportunity afforded to her to make a representation in public, that she had her husband's authority to adopt. There is also evidence that she asserted this authority at the time of the adoption, which we see no reason to discredit. This coupled with her conduct is quite sufficient to constitute an estoppel and we must hold accordingly that she is estopped from denying the adoption.

A further question is raised by the respondents as to item 3, which the second defendant claims to have detained under some arrangement with the first defendant in 1897. The second defendant has not been examined and the first defendant does not support his case, and we have only very vague indications from the evidence to enable such a case to be put forward. It certainly has not been proved.

The appeal will be allowed and the plaintiff will have a decree for possession of the suit property and for mesne profits at the rate of Rs. 250 per annum from the date of plaint. As the first defendant is now dead, the mesne profits will be payable by the second defendant and defendants 3 to 6. The question of their respective liabilities will be determined in execution. The plaintiff will have her costs throughout against the second defendant and the second defendant will pay Government the court-fees on the plaint and the appeal memo.

Appeal allowed.

(2) (1920) M.W.N. 721=12 M.L.W. 544=60 I.C. 246.

1924 Madras 309.

OLDFIELD AND DEVADOSS, JJ.

Lakshmi Ammal alias *Pichaimmal*—Defendant-Appellant

v.

Alamelu Ammal and another—Peticioner-Plaintiff and second Defendant-Respondents.

A.A.O. No. 220 of 1922, decided on the 13th March, 1923, against the order of the Sub-Judge, Madura, dated 20th February, 1922.

Civ. Pro. Code, O. 22, r. 1—Suit for partition by joint tenant.

Defendant co-tenant being dead after preliminary decree, his personal legal representative could be

brought on record though plaintiff alleges his right to whole by survivorship but plaintiff cannot get whole property in the same suit.

C. Krishnamachariar—for Appellant.

K. Rajah Iyer—for Respondents.

Oldfield, J.:—The facts are that the plaintiff sued her sister and also the latter's husband, although he need not be further referred to, for partition and possession of a moiety of a certain property alleged to be stridhanam property of their mother. The suit eventually reached the stage of a preliminary decree, recognizing the plaintiff's right to half the property; and it is now pending for the passing of a final decree after ascertainment, by metes and bounds, of the plaintiff's share. The present proceedings have arisen from the death of the plaintiff's sister. Thereupon the plaintiff has moved in one application to have her sister's daughter, respondent, impleaded as legal representative of the deceased and in another for an amendment of the plaint to enable her to obtain a decree in these proceedings not merely for the moiety of the property, from which she alleges she was wrongfully excluded during her sister's lifetime, but also for the other moiety, on the ground that by survivorship she is entitled to the whole.

The lower appellate Court has granted both these applications; and we think that it was justified in granting the first. The plaintiff's right to a half-share of the property has been finally established, and nothing more remains to be done except to ascertain that half-share and make a final decree for the delivery to her of possession of it. That can be done against any person, who (like the respondent) has come into possession in succession to the deceased. It is suggested that the plaintiff is now no longer entitled to the benefit of the decree she has obtained because she has lost the character of a joint tenant and has acquired in its stead a right to the whole estate. That we do not think is sufficient to deprive her of her original cause of action, when the proceedings have been instituted and have resulted in recognition of her right in a preliminary decree. Taking this view we confirm the lower appellate Court's decision, so far as it relates to I.A. No. 741.

Turning to I. A. No. 740 for the amendment, we observe that the lower appellate Court can hardly be regarded as having exercised judicial discretion. For it made its order simply on the ground that it was not sure that the lower Court was right in passing the contrary order. We are unable to see in the present case any reason for departing from the ordinary rule that an amendment should not be made to introduce a new cause of action. The cause of action assumed in the amendment is the death of the plaintiff's sister; and that of course was not available, when the original plaint was presented. There is however no reason that we can see why the plaintiff should not take the ordinary course of suing on the cause of action, which she has acquired and which, unless some objection is established, will entitle her to the other moiety of the property. We therefore modify the lower appellate Court's order by dismissing I. A. No. 740 of 1920. In the circumstances of the case each party will bear his costs in this and in the lower appellate Court. In the District Munsif's Court the respondent will pay the plaintiff's costs in I. A. No. 741 and obtain costs from the plaintiff in I. A. No. 740.

Order modified.

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*1924 Madras 310.

DEVADOSS, J.

R. M. P. Perianan Chetty—Petitioner-Plaintiff

v.

Mariappan Asari and others—Defendents-Respondents.

Civil Rev. Petition No. 295 of 1922, decided on 11th April, 1923, from the Decree of the District Munsiff, Madura, in Small Cause Suit No. 1420 of 1921.

Limitation Act, Arts. 74 and 75—Instalment bond providing for whole payment in case of default—Time runs from each default separately.

Where an instalment bond provided for full payment in case of default and the creditor sued for whole only when the last instalment fell due, *Held* that the claim for nine instalments was barred.

The plaintiff has an option till the last instalment falls due to claim the whole amount including the last instalment. But where the last instalment fell due the option was gone. Where the option is given to obligee to claim the whole amount on default of payment of an instalment without reference to subsequent instalments, the provision cannot be held to extend the period of limitation to three years from the date the last instalment fell due. On the making of a demand the whole amount becomes due and time would

begin to run from the date of the demand. If no demand is made the option given to the plaintiff is gone and time begins to run in respect of each instalment as it becomes due. That which was optional on the part of the plaintiff would not affect the right of the defendant. He might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The statute of limitation runs from the time the plaintiff might have brought his action unless he was subject to any disabilities specified in the statute and as the plaintiff might have brought his action upon the first default, the defendant is entitled to the verdict upon the plea of limitation. (1919 M. W.N. 82 and 1919 M.W.N. 185, *Dist.* ; 8 Bom. 561, *Dist.*, [1843] 4 Q.B. 419, *Foll.*) [P. 312, C. 2.]

C. S. Venkatachariar—for the Appellant.

Respondents unrepresented.

Judgment :—This is an application to revise the decree in S. C. S. No. 1420 of 1921 on the file of the District Munsifs Court, Madura Town. The plaintiff brought the suit for Rs. 90 due on an instalment bond, dated 11-9-1917 executed by the 1st defendant and the father of the defendants 2 and 3 for Rs. 50 payable in ten monthly instalments of Rs. 5. The District Munsif dismissed the suit in respect of nine-tenths of the claim as being barred by the law of limitation and gave a decree only in respect of the last instalment.

The respondents do not appear here. It is urged that time did not begin to run against the plaintiff till 11-7-18, the date on which the last instalment fell due by reason of the provision in the bond that the whole amount shall be payable on demand if any one of the instalments was not paid on the due date, and that article 75 of the Limitation Act is applicable to the case, and the suit filed on 4-7-21 is within time.

Reliance is placed on two decisions reported in *Ramadh Bibi Ammal* v. *Kandaswamy Pillai* (1), and *T. V. Seetharama Iyer* v. *Munuswamy Mudaliar* (2). In the first case the suit was upon a hypothecation bond in which there was a provision that interest should be paid every six months and the principal before a fixed date and in default " we shall pay, whenever you require, the interest accruing due for the days overdue at the aforesaid rate, and the principal amount." The mortgagor committed default in paying interest. Spencer and Krishnan, JJ., held that no demand was made for payment of the principal and therefore time did not begin to run from the date of the default of payment of interest. In the second case Seshagiri Aiyar, J., sitting as a single Judge made the following observation in regard to a provision in the bond that if there was a default in the payment of any instalment the whole money would be payable on demand : " I think that the parties deliberately used the expression, because, although there was a liability to pay each of the instalments separately, they intended to make it a condition precedent that a demand should be made if the whole amount is to be asked to be paid at once. It is open to the obligee of a bond to waive his right to claim the whole amount in default of payment of an instalment. Where the provision is that the whole amount is payable on demand in case of default, time does not begin to run against him unless and until he exercises his option."

In this case the suit was brought nearly three years after the last payment fell due. The plaintiff has an option till the last instalment falls due to claim the whole amount including the last instalment. But since the last instalment fell due the option was gone. To uphold the contention of the petitioner would be giving a longer period of limitation than that prescribed, in article 74 of the Limitation Act. Article 75 is quite clear in its terms. It gives an option to the promisee of a note or the obligee of a bond to waive the consequence of a default. Where no option of waiver is given, time begins to run from the date of default. My attention has been drawn to a recent decision of Phillips, J., in C.R.P. No. 139 of 1922 in which he held that "It is open to plaintiff to waive the payment by instalments and in that case the principal would only be payable on 24-2-1918 and the suit is then within time." With great respect I am unable to follow the decision. The provision in the bond here is " In the course of such payment should there be any default of payment on the due date in any month as aforesaid, interest at one pie per rupee per day shall be charged for the entire amount remaining due from the date of default without reference to the subsequent monthly instalments and the aggregate sum of principal and interest so accruing due shall in cash be paid in lump by me to you on demand without any apportionment of

(1) (1919) M.W.N. 82=25 M.L.T. 154=9 M.L.W. 479=51 I.C. 724.
(2) (1919) M.W.N. 185=37 M.L.J. 613=9 M.L.W. 427=50 I.C. 87.

liability being pleaded by us." The option is given here to the obligee to claim the whole amount on default of payment of an instalment without reference to subsequent instalments. Such a provision cannot be held to extend the period of limitation to three years from the date the last instalment fell due. The petitioner's vakil relied upon *Hanmantram Sadhuram Pity* v. *Arthur Bowles* (3) as supporting his contention. But I do not think it helps him. Birdwood, J., observes at page 568: "The plaintiff could under the bond have exercised the option of delaying his demand for payment of the whole sum remaining due under it at any time so long as any monthly instalment remained in respect of which default could be made; and it is not alleged that at the time when demand was made in January 1884 the last instalment had become already overdue for more than a month, and that the whole amount had therefore become payable irrespective of any demand; for the making of which, indeed, no opportunity would thereafter have remained. Assuming, therefore, that so late as in January 1884, an instalment was payable an assumption which can safely be made, without entering into an exact calculation of the time when the last instalment would become due, inasmuch as 50 monthly payments would be required to clear off the principal debt alone, I hold that it was only in January 1884 that cause of action was given. The plaint was admitted on the 28th April, 1884." In the present case there is no evidence that any demand was made before the last instalment fell due. In paragraph 7 of the plaint the cause of action is said to have arisen on 11-7-18, the date on which the last instalment fell due. I think the observations of Lord Denman in *Hemp* v. *Garland* (4), are applicable to the present case. "In this case there was default more than six years ago; and upon that the plaintiff might, if he pleased, have signed judgment and issued execution for all that remained due, or he might have maintained his action. If he chose to wait till all the instalments became due, no doubt he might do so. But that which was optional on the part of the plaintiff would not affect the right of the defendants. He might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitation runs from the time the plaintiff might have brought his action unless he was subject to any disabilities specified in the statute and as the plaintiff might have brought his action upon the first default if he did not enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the statute of limitations." According to the terms of the bond, on the making of a demand the whole amount becomes due, and time would begin to run from the date of the demand. If no demand is made the option given to the plaintiff is gone, and time begins to run in respect of each instalment as it becomes due. The District Munsif has rightly given a decree in respect of the last instalment which became due within three years of the date of plaint.

The petition is dismissed.

Petition dismissed.

(3) (1884) 8 Bom. 561.

(4) [1848] 4 Q.B. 519=3 G. & D. 402=7 Jur. 302=12 L.J.N. S. Q.B. 134=114 E.R. 994=62 R.R. 423.

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* * 1924 Madras 312.

COUTTS-TROTTER, J.

Jayammal—Plaintiff.

v.

M. & S. M. Ry. Co., Ltd.—Defendants.

C. S No. 465 of 1922, decided on the 20th April, 1923.

Railway Company—Liability exists for negligence in not preventing a dangerous short cut across the lines which children are known habitually to resort to though in case of adults 'trap' by Railway is necessary for liability—Negligence of parent is not contributory negligence.

A little girl of 7 years in India, where children are called upon at a very early age to take a share in such outdoor duties of a village household as tending cattle and the like, is not of an age and understanding to have contributory negligence imputed to her directly. ([1909] A.C. 229 at 238, *Foll.*) [P. 314, C. 2.]

The doctrine of allurement is really equivalent to justifying the presence of the injured plaintiff not merely on the landowner's premises in general but on the particular portion of it at which he received the injury complained of. The familiar term a 'trap', has been frequently defined as a danger which is known or ought to be known to the owner of the premises and is not known or could not reasonably have been known to licensee. A Railway Company which invited persons of ordinary intelligence to cross its lines of rails

cannot be supposed to have invited or licensed them not to look and see whether there was an approaching engine or train before they step on the track, but if a Railway Company impliedly licenses children of tender years to cross their lines, they must exercise a degree of care sufficient to counteract the necessary heedlessness of such children. Whereas, in the case of a licensee who is an adult, the owner of the premises will only be liable if he has on those premises what the cases call 'a trap', in the case of children he will be liable not merely if he maintains a trap but if he is guilty of ordinary negligence. Or perhaps what in the case of an adult would be merely negligence, in the case of children may be regarded as a trap. The view that any negligence of the parent or guardian in allowing a child to get into danger zone can be imputed to the child as something in the nature of contributory negligence, is exploded by the decision of House of Lords in *Cooke's* case. [P. 315, Cs. 1 and 2.]

Nugent Grant, T. S. Ramaswami Aiyar and *V. Sundaram Aiyar*—for Plaintiff.

Vere Mockett instructed by *Brightwell and Moresby*—for Defendants.

Judgment:—This is a suit brought by a little girl aged 7 called Jayammal for damages for personal injuries against the Madras and Southern Mahratta Railway Company, Limited. I confess that I have felt little difficulty about the facts which I may briefly summarize as follows. The village of Amoor lies on both sides of the defendant's railway line and the Wallajah Road Railway Station is in the middle of the village. To the north of the line lie most of the inhabited houses which make up the village, and in one of those the plaintiff lived with her father, a toddy contracter named Jayamuni Naidu. The Post Office and certain shops lie to the south of the line. On the 15th June, 1921, the plaintiff went on an errand from the nothern to the southern part of the village, and for that purpose she would have to cross the line. There are two recognised level crossings with gates where Railway servants are stationed to look after the public, one considerably to the east and the other considerably to the west of the station platform; but the evidence is that it is the habit of people who go from one part of the village to the other to cross the line at the point where the accident happened. It happened when the child was on her return journey, and the route which she took is quite clear from the plan. There is a wicket-gate close by the Assistant Station Master's house on the extreme south side of the line. It is said that it is only meant to be used by the Assistant Station Master as a means of reaching his house, but it is clear that no attempt was made to keep it locked with a key for his exclusive use. The plaintiff went through this gate and walked westwards along the side of the line until she got opposite to the platform which she desired to reach in order to cross the bridge and so go home. She then turned sharply to the right and stepped on to the track and was immediately knocked down by a locomotive of the defendant company. The locomotive had brought in the train from Ranipet (from the west) and the evidence is that as soon as the train comes into the station the engine is uncoupled and runs eastwards down the line, until it comes to some point; then it changes its direction and is brought back along the loop-line (the southernmost of all the lines of rails) on which the child stepped when she was hit, to reach an engine-shed to the west of the Station for the purpose of watering. The evidence is that as soon as the engine was uncoupled the whistle was sounded. That would obviously not have helped the little girl, because, if the whistle had directed her attention and caused her to turn her head, she would have seen the engine going away from her and not approaching her. It is further said, though this is disputed, that the engine whistle was sounded again after it got on to the loop-line at the southernmost end of the two sets of rails and when it was 70 yards away from the scene of the accident. I am not convinced that the witnesses who speak to this were speaking with a definite recollection on the particular incident on this day rather than of the general practice which might have been omitted on any particular occasion. When the engine returned and came along the loop-line the driver was on the right-hand side of the foot-plate. I am satisfied that those of the plaintiff's witnesses who suggest that he stayed on the platform and left the engine to be reversed and taken to the shed by the fireman, are giving evidence which is either untrue or mistaken. I am quite satisfied that he was in charge of the engine; but I am equally satisfied that, standing on the right-hand side of the foot-plate, he could not have seen this little girl walking along side the loop-line as soon as the engine got at all near to her, for the intervening body of the engine would obviously have

obstructed his view. The two firemen were also in the cab, and I think it is quite clear that they kept no sort of look-out on the left side of the engine, for one of them, Manikkam, the first fireman, saw nothing and Doraiswami, the second fireman, only saw the child when she was 4 or 5 feet away from the engine.

I have no difficulty in holding on the evidence before me that the practice of the villagers was to take the short-cut across the line which the little girl was taking when she met with her injuries and that no serious steps were taken by the Railway Officials to prevent either adults or children from going that way. The Station Master no doubt has tried to say that when he saw people doing it he prohibited them, but I do not believe him, and Johnson, the Engine Driver, frankly admitted that he tried to keep a special look-out when he neared the wicket-gate, because he knew that people did take this short-cut habitually. I entertain no manner of doubt that if a proper look-out had been kept on the left-hand side of the foot-plate, that on the side of wicket-gate, this accident could almost certainly have been avoided. A second whistle might have been given to warn the child if she had been seen and, if it were observed to be unheeded, the Engine could have been stopped as soon as it got into dangerous proximity to the child. I take it that Johnson, the Engine Driver, who admits that he knew that the villagers used this short-cut habitually so as to put him on his guard to be careful at that spot, must be taken to have known if he had seen the child that she would be morally certain to attempt to cross the line at exactly the point where she did cross it, and that it was incumbent upon him, if he had seen her to take measures to avoid an accident. The result seems to be (1) that the Railway Officials connived at the practice of the villagers in crossing the line at this point and (2) that the Engine Driver and firemen were negligent in not keeping a proper look-out on the left side of the Engine at a point where they knew that there was special danger to be apprehended from people crossing the line, both adults and children.

Such being my findings of fact, I have to apply the law to it as enshrined in numerous reported decisions. My findings amount to this, that the plaintiff was not a trespasser but at least a licensee, and that the Company through their servants were guilty of negligence. The question is whether that negligence gives a remedy to the plaintiff in law. After a long and instructive argument in the course of which almost every reported case which could conceivably have any bearing on this matter was cited to me, I am still in considerable doubt as to what is the real legal position. I do not think it can be reasonably expected that a Judge of first instance in this country should go through in review all the cases which were cited to him, but rather that he should summarise the conclusions which he reaches as the result of his perusal of those cases and leave it to a Court of Appeal to put him right if he is wrong. Two considerations appear to me to be capable of being dealt with at the outset. I make no question but that if this had been a case of an adult, the Railway Company would have been entitled to rely upon a plea of contributory negligence. And there is an expression of opinion by Fry, L.J., in the case of *Stiefsohn* v. *Brook Bond & Co.* (1), that contributory negligence can be imputed to a child. It is urged upon me that in the case of a little girl of 7 years in this country where children are called upon at a very early age to take a share in such outdoor duties of a village household as tending cattle and the like, I might reasonably find that this child was of an age and understanding to have contributory negligence imputed to her directly. My own opinion is that the later dicisions of the English Courts have left no room for such a doctrine, and I would especially refer in this connection to the words of Lord Atkinson in *Cook's case* (2). He says "The duty the owner of the premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities and propensities of those persons." For the purposes of this case I translate that to mean that if the owners of premises like a railway line allow children to take short-cuts across the line, they must be taken to know that a child of seven is likely to cross the rails heedlessly without looking to see whether there

(1) 5 T.L.R. 684. (2) (1909) A.C. 229.

is a dangerous object such as a train or an engine approaching. Two other phrases which occur in the cases also, I do not think I am called upon to consider here. The one is 'allurement' and the other is 'trap'. The doctrine of 'allurement' as I understand it, is really equivalent to justifying the presence of the injured plaintiff not merely on the land owner's premises in general but on the particular portion of it at which he received the injury complained of. *Lynch* v. *Nurdin* (3) is familiar instance, and the doctrine is further illustrated by *Cooke's case* itself and by the case of the *Corporation of Glasgow* v. *Taylor* (4). The only thing that could possibly be described as an allurement here is the mere invitation to take the short-cut by leaving the wicket-gate unlocked which gave access to the company's premises. A short-cut is in a sense an allurement to every one; but, I doubt if it is so in the sense in which that phrase is used in the cases. The other doctrine that figures prominently in the English cases is expressed in the familiar term a 'trap,' which has been frequently defined as a danger which is known or ought to be known to the owner of the premises and is not known or could not reasonably have been known to the licensee. Once more, if this had not been the case of a child, it would be impossible to say that this was a trap. A Railway Company which invites persons of ordinary intelligence to cross its lines of rails cannot, I think, be supposed to have invited or licensed them not to look and see whether there was an approaching engine or train before they step on to the track. The difficulty arises in this case because the licensee was a child of tender years; and the way in which the case is put to me is this, that, if a Railway Company impliedly licenses children of tender years to cross their lines, they must exercise a degree of care sufficient to counteract the necessary heedlessness of such children. After much hesitation, I have come to the conclusion that that argument is sound and that I must accept the proposition that if a Railway Company allows children to stray over its lines, it has to take all the precautions which would be unnecessary in dealing with an adult but which are required to protect children against their own thoughtlessness. That, I think, amounts to this and I do not shrink from it that, whereas, in the case of a licensee who is an adult, the owner of the premises will only be liable if he has on those premises what the cases call 'a trap', in the case of children he will be liable not merely if he maintains a trap but if he is guilty of ordinary negligence. Or perhaps one may say that what in the case of an adult would be merely negligence, in the case of children may be regarded as a 'trap.' If I am to put it in words, I would endeavour to phrase it thus:—to invite children to cross lines of Railway over which trains run is to expose them to the danger of being run over by a passing train or engine which must be apparent to the Railway authorities and is not apparent to a child, and the scale appears to me to be turned when you have this added factor which to my mind is clearly revealed by the facts of this case, that the conduct of those in charge of the engine on this occasion was palpably negligent.

One last point was taken by the Railway authorities which I think I can deal with very shortly. It was suggested that if there was an invitation to children to cross the line, it could only be taken to be an invitation to them to do so when accompanied by an adult capable of looking after them, and for this proposition reliance was placed on the case of *Burchell* v *Hickisson* (5)

That was a case of a defective staircase and I think it is obvious that totally different considerations apply on the question of license or invitation to a thing like a staircase and a thing like a short-cut across a set of Railway lines. The case has been invoked to establish a sort of dilemma that there is either no invitation at all to a child or at most an invitation to a child when accompanied by a guardian capable of looking after it. That would seem to afford a complete dilemma, but I think the later cases negative the soundness of such a view. I also think, and I gather the same view is taken by Sir Frederick Pollock in the later editions of his standard work on the Law of Torts, that the view that any negligence of the parent or guardian in allowing a child to

(3) [1841] 1 Q.B. 29=4 P. & D. 672=5 Jur. 797.
(4) [1922] 1 A.C. 44.

(5) [1880] 50 L.J. (C.P.) 101.

get into what I may call the danger zone can be imputed to the child as something in the nature of contributory negligence, is exploded by the decision of the House of Lords in *Cooke's case*.

On the whole, I come to the conclusion that the Railway Company are liable in damages to the plaintiff for the reasons which I have given.

It only remains for me in this case to fix the amount of damages. With the consent of the parties I have discussed the matter with my learned brother Ramesam whose knowledge of the conditions of life of such people is so much greater than my own and with his help and the best consideration I can give to it myself I fix the damages at Rs. 3,500. That sum will be paid to the Official Trustee and the capital will be retained by him, pending the result of any appeal or pending the attainment of majority by the child. The funds will be invested at the discretion of the Official Trustee and the income will be paid by him to the child's father during the child's minority. The plaintiff will have her costs.

Suit decreed.

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* * 1924 Madras 316.

KUMARASWAMI SASTRY, J.

Perianayagi Ammal—Plaintiff.

v.

A. Ratnavelu Mudaliar and another—Defendants.

C. S. No. 544 of 1921, dated 22nd November, 1921.

Hindu Law—Will—Limited interest to daughter and vested interest to her children—Child dying before the daughter—Heirs of the child to succeed—Hindu Transfers and Bequests Act (VIII of 1921).

One *S* died in December, 1912, leaving a will, dated the 11th of November, 1911, whereby he bequeathed to his daughter *L* wife of the 1st defendant a house to be enjoyed by her during her life and to devolve on her children at her death. *L*, the wife of the 1st defendant gave birth to a child on the 30th of September, 1918, the child died on the 1st October and *L* herself died on the 13th October, 1918. In a suit by her sister to recover the house from the 1st defendant, *Held*: that *L* had a life estate and under the terms of the will the property was to go to her children. The moment, therefore a child was born, the estate vested in the child and succession would have to be traced through the child and not through the heirs of the testator. The 1st defendant would be the heir under the Hindu law and not the maternal aunt.

Held, therefore that *L* took a life estate under the will of *S*, that her son acquired a vested interest in the property, the gift to him being valid by reason of the provisions of Act VIII of 1921 and that on the death of this child his heirs and not the heirs of the testator were entitled to the property. [P. 321, C. 2.]

Radhakrishnayya, C. L. Nilakanta Mudaliar and *V. Sivaprakasa Mudaliar*—for the Plaintiff.

V. Ramanatha Shenai, Sanjivi Kamath and *M. Chockanatha Chetti*—for the Defendants.

Judgment:—This is a suit by the plaintiff for a declaration that she is entitled to the possession and enjoyment of house and ground No. 65, Kilava Chetti Street, Chintadripet, Madras, jointly with the 2nd defendant as daughter and heiress of her deceased father Shanmuga Mudaliar, for directing the 1st defendant to deliver possession of the said premises and to pay the plaintiff Rs. 378 for past mesne profits and future mesne profits at Rs. 10-8-0 a month, for a division of the house between the plaintiff and the 2nd defendant, for costs and other reliefs.

The case for the plaintiff is that Shanmuga Mudaliar, her father died in December, 1912, leaving a will, dated the 11th of November, 1911, whereby he bequeathed to his daughter Logambal Ammal, wife of the 1st defendant, the house specified in the plaint to be enjoyed by her during her life and to devolve on her children at her death, that the will does not contain any gift over in the case of Logambal Ammal dying without issue, that probate of the will was obtained by one of the executors, that after the death of Shunmuga Mudaliar, Logambal Ammal came into possession of the plaint house in which she had only a life estate and enjoyed the same till her death, that as Logambal Ammal died on the 13th of October, 1918, leaving no issue, the house and ground devolved in law on the plaintiff and the 2nd defendant who are the nearest heirs of Shanmuga Mudaliar, that the 1st defendant has been setting up a false claim and title to the property on his own behalf as heir to his deceased wife, and has been in unlawful and wrongful possession of the property and enjoying the rents and profits thereof and that the 2nd defendant has been residing in the house of the 1st defendant and has been colluding with him.

The 1st defendant filed a written statement admitting the will and stating that the executors distributed the estate according to the provisions of the will in the year 1913, that Logambal Ammal was in possession and enjoyment of the same till her death in the year 1918 and that he has been in enjoyment ever since. He denies the construction placed on the will by the plaintiff and states that Logambal Ammal had an absolute estate in the house under the bequest of her father, that she died on the 2nd of October, 1918, having given birth to a male child on the 30th of September 1918, that the child also died on the first of October, 1918, that he is therefore entitled to the property as heir, and that, even assuming that Logambal Ammal had only a life estate, the absolute interest vested in the child at its birth and on the death of the child and of Logambal Ammal he became entitled to all the rights.

He denies that he is colluding with the 2nd defendant but states that the 2nd defendant is colluding with the plaintiff. He denies that the plaintiff is entitled to mesne profits and states that in any event the mesne profits claimed are excessive. He also states that he improved the property and paid taxes and executed repairs.

The second defendant filed a written statement denying collusion with the 1st defendant and stating that she is entitled along with the plaintiff to the possession and enjoyment of the plaint property and to a share therein. She prays that the house may be divided and her half share given to her.

The following issues were settled :—

1. What interest did the deceased Logambal Ammal acquire in the suit house under the will of the late C. Shanmuga Mudaliar ?

2. Did the deceased Logambal Ammal give birth to a male child on the 30th September, 1918, and if so, what interest did the child acquire in the suit house under the said will ?

3. Is the plaintiff entitled to succeed to the suit house along with the 2nd defendant ?

4. Is the 1st defendant liable to pay any mesne profits ? and if so, to what amount ?

5. Is the 1st defendant entitled to any improvements ? and if so, to what amount ?

6. To what relief is the plaintiff entitled ?

When the case was taken up for trial, it was admitted that Logambal Ammal, the wife of the 1st defendant, gave birth to a child on the 30th of September, 1918, and that the child died on the 1st October. It is also admitted that Logambal Ammal herself died on the 13th October 1918. It is not disputed that the testator left a will on the 11th of November 1912 and died on the 29th of November 1912. No probate of the will was applied for till 1920 and probate was granted to Kuppuswami Mudali one of the executors mentioned in the will on the 6th of January, 1921. It is, however, admitted that Logambal Ammal was in possession and enjoyment of the property till her death even though probate was not applied for. What happened was that everything went on without probate evidently with the intention of saving stamp-duty. By his will the testator appointed five persons to be executors, and directed them to take care of his moveable and immoveable properties after his lifetime and till his first anniversary and then to divide and give his daughters the properties as per directions mentioned in the will and otherwise administer the properties. The material portion runs as follows :—

" Out of the houses mentioned in the first para *supra*, the one tiled house building built on No. 25, Agraharam Street, valued Rupees two thousand shall be taken by my first daughter Sowbhagiavathi Perianayaki Ammal and the rental income derived therefrom enjoyed (by her). The one terraced (or storeyed house) building built on No. 63 in Kilava Chetty Street, valued Rupees two thousand shall be taken by my third daughter Showbhagiavathi Loganayaki Ammal and the rental income derived therefrom enjoyed (by her). These two persons shall without fail collect the rental income of the respective houses allotted to them out of the aforesaid two houses and grounds and themselves meet the tax, repairs, etc., of their respective houses and enjoy. In the course of doing so, my three daughters shall remain jointly and perform without fail year after year the three ceremonies, namely the annual ceremonies of my wife Lakshmi (1), the annual ceremonies of my deceased eldest daughter Balu Ammal (2), and my annual ceremonies occurring after my lifetime (3), by properly

giving to not less than five Brahmins for each ceremony in the manner I have done. These have no power to make sale, gift, mortgage, etc., of these two houses and grounds, After this, their issues shall use and enjoy them from son to grandson and so on in succession as long as the sun and the moon may last, with the power of gift, mortgage, exchange and sale and they shall every year without default perform the aforesaid ceremonies." Paragraph 13 runs as follows: "After my lifetime one of my aforesaid executors, namely, V. Thangavelu Mudaliar, shall, in respect of the ceremonies to be performed until my first anniversary, take on my account, out of his pocket, Rupees two hundred and fifty and spend without stinting from the date of my death up to my first anniversary, collect the amount of rent derived from my two houses mentioned in the first para mentioned above up to my first anniversary, pay the taxes for both those houses and, according to that account, appropriate therefrom the sum of Rupees two hundred and fifty spent by him and the interest thereon and after my first anniversary is over shall pay the balance, if any, to my aforesaid two daughters, that is, deliver to them respectively the aforesaid houses and the amount of balance left after the expenses as directed above."

The first question is what is the interest taken by Logambal Ammal under this will. The will is clear. It gives Logambal a life interest in the property.

She is to enjoy the rents of the house but is given no power to sell, mortgage or give it. The property is to go to her children with absolute power of disposition so that treating the will as it stands, it is an ordinary case of a gift to a daughter for life and to her children absolutely. If she had children left at the date of her death there would have been no difficulty at all in the matter. But the whole trouble has arisen owing to her only child having predeceased her. It is contended by Mr. Shenai for the 1st defendant that, although under the terms of the will Logambal is only empowered to enjoy the rents and profits of the house and had no rights to sell, mortgage or dispose of the properties, yet by reason of the failure of the disposition in favour of her children, she has acquired an absolute interest. It is argued by Mr. Shenai that on a proper construction of the will an absolute estate has been given to the daughter, the right of alienation being void as repugnant to the estate already conferred, that, in consequence of there having been no grand-child in existence at the time of the testator's death, the bequest in favour of the childern of Loganayaki is invalid, that the effect of the invalidity is to confer on the daughter an absolute estate and that there can be no intestacy as regards the property to any extent so as to give the other daughters of the testator a reversion on the death of Loganayaki. There can be no doubt that if the gift to Loganayaki was an absolute gift in the first instance, with trusts imposed on that absolute interest which fail, the absolute gift takes effect in so far as the trusts have failed to the exclusion of the heirs of the testator. See *Watson* v. *Watson* (1). In *In re Hancock* : *Watson* v. *Watson* (2), it was held that where there is an absolute gift followed by a settlement of the subject of the gift, but the trusts of that settlement for some reason wholly or partially fail, there is, so far as they fail, no intestacy, but an interest in the nature of a reversion, to the person who is the object of the previous absolute gift. This case was affirmed by the Court of Appeal in *Hancock* v. *Watson* (2). In *Soundarajan* v. *Natarajan* (3) Sir John Wallis, C.J., and Ramesam, J, dealt exhaustively with the authorities and came to the conclusion that under the terms of the will which they were considering there was a clear intention to confer an absolute estate on the daughters followed by a settlement in favour of their children and that in consequence of the failure of the bequest to the children the original absolute gift in favour of each of the daughters remained good, the share of each daughter passing to her heirs at her death. Sections 125 to 127 of the Succession Act deal with bequests with direction as to application or enjoyment and have been made applicable to Hindu wills. If, therefore, there was an absolute estate intended to be given to the daughters there could be no doubt that the failure of the bequest to the grand-children would not cut down the absolute estate granted. But I

(1) [1901] 1 Ch. 482.
(2) [1902] A. C. 14=71 L. J. Ch. 149=85 L.T. 729=50 W.R. 321.
(3) (1921) 44 Mad. 446=40 M.L.J. 354=29 M.L.T. 210=(1921) M.W.N. 210=13 M.L. W. 662=62 I.C. 987.

am of opinion that in the present case no absolute estate was intended to be given to the daughters at all. The terms of the will are clear and specific. The daughters are only given the right to enjoy the rents. There are express words in the will preventing them from selling, mortgaging or otherwise alienating the properties. The Tamil word used is only "அனுபவிக்கிறது" that is enjoy, the words "ஆண்டு அனுபவிக்கிறது" being only applied to the grandchildren. Reference has been made to *Ramachandra Rao* v. *Ramachandra Rao* (4) where it was held that unless the grant expressly gives only a limited estate or unless there is any uncertainty or ambiguity in the grant as to the extent or interest conveyed, a grant to a Hindu female conveys an absolute estate. This case went up on appeal to the Privy Council and in *Ramachandra Rao* v. *Ramachandra Rao* (5) their Lordships of the Privy Council correct some of the misapprehensions that appeared to exist as to the effect of certain decisions of the Board and notably one in *Surajmani* v. *Rabinath Ojah* (6) to which reference was made by Sir John Wallis, C. J., and Seshagiri Ayyar, J., in *Ramachandra Rao* v. *Ramachandra Rao* (4). Having regard to the observations of the Privy Council, the rather sweeping observations made in *Ramachandra Rao* v. *Ramachandra Rao* (4) as to the effect of the decision of the Privy Council in *Surajmani* v. *Rabinath Ojah* (6) have to be considerably modified. Their Lordships of the Privy Council observe as follows: "In the case referred to, *Surajmani* v. *Rabinath Ojah* (6) when originally heard before the High Court it had been stated that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board in *Mussammat Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (7) and *Bhaidas Shivdas* v. *Bai Gulab* (8) do nothing but repeat this same proposition in other words." The effect of this decision of the Privy Council is that we have to take the words in each will and see whether the intention was to confer an absolute estate or not. The English authorities as to the rules of construction applicable to particular cases do not afford much light. In *Dinbai* v. *Nuserwanji Rustomji* (9) their Lordships of the Privy Council held following *Bhagabati Baramanya* v. *Kalicharan Singh* (10) and *Norendra Nath Sircar* v. *Kamalbasini Dasi* (11) that wills in India should not be examined in the light of the rules of construction which have been laid down in English decisions. In *Norendra Nath Sircar* v. *Kamalbasini Dasi* (11) it was pointed out that "to search and sift the heaps of cases on wills which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost

(4) (1918) 42 Mad. 283=36 M.L.J. 306=52 I.C. 94.

(5) 1922 P.C. 80=45 Mad. 320=49 I.A. 129=30 M.L.T. 154=35 C.L.J. 545=16 M.L.W. 1 =(1922) M.W.N. 359=26 C.W.N. 713=20 A.L.J. 684=24 Bom. L.R. 963=43 M.L.J. 78=67 I.C. 408 (P.C.).

(6) (1907) 30 All. 84=35 I.A. 17=5 A.L.J. 67= 12 C.W.N. 231=18 M.L.J. 7=10 Bom. L. R. 59=7 C.L.J. 131=8 M.L.T. 144.

(7) 1922 P.C. 63=1 Pat. 305=49 I.A. 25=3 Pat. L.T. 133=15 M.L.W 434=42 M.L.J. 492= 24 Bom. L.R. 576=35 C.L.J. 427=20 A.L.J. 362=(1922) M.W.N. 368=30 M.L.T. 242=26 C.W.N. 425=66 I.C. 193 (P.C.).

(8) 1922 P.C. 193=46 Bom. 153=49 I. A. 1=24 Bom. L.R. 551=20 A.L.J. 289=25 C.L.J. 314=26 C.W.N. 129=15 M.L.W. 412=42 M.L.J. 385=30 M.L.T. 149=65 I.C. 974 (P.C.).

(9) 1922 P.C. 311=49 Cal. 1005=49 I.A. 323= (1922) M.W.N. 787=31 M.L.T. 213=17 M.L.W. 174=27 C.W.N. 199=37 C.L.J. 420=25 Bom. L.R. 625=69 I.C. 323= (P.C.).

(10) (1911) 38 Cal. 468=38 I.A. 54=15 C.W.N. 393=9 M.L.T. 411=13 C.L.J. 434=21 M. L.J. 387=8 A.L.J. 433=13 Bom. L.R. 375 =(1911) 2 M.W.N. 295=10 I.C. 641 (P.C.).

(11) (1896) 23 Cal. 563=23 I.A. 18=6 M.L.J. 71= 6 Sar. 663 (P.C.).

absurd." It is, therefore, unnecessary to go into the various English decisions which have construed wills as either giving an absolute estate or a life estate. In my view the present case falls within the ruling in *Srinivasa* v. *Dandayudayapani* (12) and that the will clearly did not intend to give the daughters an absolute estate and then proceed to cut it down by limitations. On the contrary, it gave the daughters only a life estate preventing them from alienating the properties and making clear dispositions of the absolute estate not to the daughters but to their children. As *Sreenivasa* v. *Dandayudapani* (12) was decided before the passing of Act I of 1914 and Act VIII of 1921 the question arises as to the effect on the rights of the parties of the birth of a son to the daughter of the testator. Before the passing of the Madras Act I of 1914 and the Imperial Act VIII of 1921 it is clear that a gift to unborn children was invalid under Hindu Law, and there having been no grand-children in existence at the date of the testator's death the bequest in the will to the grand-children is void. In *Soundararajan* v. *Natarajan* (3) it was held that the Madras Act I of 1914 was not applicable to cases within the Presidency Town of Madras as the local legislature had no power to pass an Act so as to affect the Hindu Law rights within that jurisdiction. The Imperial Act VIII of 1921, which reproduces Act I of 1914, however, has got over the difficulty and a gift to unborn grand-children would be valid if it does not offend against the provisions of that Act. In *Kudapa Venkayamma* v. *Narasimma* (13) the testator who died in 1906 left a will which provided that his wife should enjoy all his properties for her life and that after her death the estate should be taken by his daughter's son then alive and the other sons of his daughter thereafter to be born. Subbanna the daughter's son who was alive at the time of the testator's death died in 1910. The suit was by Subbanna's widow for a declaration that her husband obtained a vested interest, that the testator's widow only took a life interest and that consequently the plaintiff was entitled to a declaration that she was solely entitled to the properties after the testator's widow. It was held by Abdur Rahim and Srinivasa Ayyangar, JJ., that under the terms of the will Subbanna the testator's daughter's son took a vested interest in the properties bequeathed, that the bequest in favour of the grandson born after the death of the testator was also valid by section 2, clause 2 of the Hindu Transfers and Bequests Act and that the plaintiffs as the widow of Subbanna, the deceased grandson, was after the death of the testator's widow, entitled to share property along with the sons who may be born to the testator's daughter after the testator's death but during the lifetime of the testator's widow. After referring to the terms of the will, the learned Judges were of opinion that the testator did not intend to benefit only the sons of the daughter who might be born at the time of his death but also the sons who might be born thereafter and that the intervention of the life estate prevented the general application of the rule that only the persons born at the time of the testator's death were intended to take. With reference to the question as to whether clause 2 of the Madras Act I of 1914 operates upon the dispositions in the will they observed as follows :—"The language is general and has the effect of validating dispositions which are to come into operation at a future date in accordance with the intention of the testator. What is argued on behalf of the appellant is that the testator cannot be said to have intended that his disposition would be valid in favour of persons who were not in existence at his death. That is the very question we have already disposed of. Clause 2 of section 2 of Madras Act I of 1914 means that if the testator intended that his disposition should take effect at a future date and that date happened to be subsequent to the passing of the Act, then by virtue of this Act, the disposition would be valid and effective. The gift, therefore, to the respondent is valid. The result will be that the plaintiff as the widow of Subbanna is entitled to the widow's interest in such shares as Subbanna would, if living, have taken along with persons who might be born to his mother at the time the distribution takes place." In *Muthusami Ayyar* v. *Kalyani Ammal* (14) the plaintiff's grandfather adopted the plaintiff and executed a

(12) (1889) 12 Mad. 411.
(13) (1917) 40 Mad. 540=4 M. L. W. 189=31 M.L.J. 33=20 M.L.T. 221=35 I.C. 150.
(14) (1917) 40 Mad. 818=5 M.L.W. 334=21 M.L.T. 93=38 I.C. 223.

deed of settlement giving certain properties to his daughter for life and after her death absolutely to her sons and daughters who may be alive. The donee gave birth to a daughter after the execution of the settlement deed and the question was whether as she was unborn at the date of the execution of the settlement deed the disposition in her favour was valid. Spencer and Phillips, JJ., held following *Kudappa Venkayamma* v. *Narasimha* (13) that the provisions of Act I of 1914 applied retrospectively to dispositions under the will in favour of persons who were not in existence at the date of the disposition. It is argued by Mr. Radhakrishnayya for the plaintiff that the retrospective operation given by Act VIII of 1921 is not wide, that, but for the Act dispositions in favour of unborn children would be invalid as the Act simply says that in the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions as are intended to come into operation at a time which is subsequent to the 14th February, 1914, that the disposition is intended to come into operation only at the death of the daughter that the object of the Act was to give property to children who are alive when the distribution takes place and that there is no necessity to give retrospective effect to the Act in cases where the object of the bounty died before the period of distribution as the intention of the testator was to give it to his grand-children and their children and not to the heirs of the grand-children to the detriment of the surviving grand-children or his own heirs. Reference was made by Mr. Radhakrishnayya to *Varadaraja Mudaliar* v. *Narayanaswami Mudaliar* (15) where I had to consider the effect of Madras Act I of 1914. In that case, the testator left a will on the 6th of August 1898 directing that the sons and daughters should have no interest in the estate and that the income should be accumulated to the benefit for the testator's grand-children who were to take the property. I was of opinion that the Madras Act has retrospective effect only to the extent that it applies to wills made before the passing of the Act where the dispositions are intended to come into operation at a time which is subsequent to the passing of the Act and it has no application when the testator died long before the passing of the Act and according to the law then in force property has vested in the heirs on the footing that the dispositions are invalid, as being in favour of unborn persons. In that case no life estate was given to anybody and I was of opinion that it could not be said on the construction of that will that the gift to the grand children was intended to come into operation after the passing of the Act. It was also argued by Mr. Radhakrishnayya that under the terms of the Imperial Act VIII of 1921 the grandchild should be in existence at the date of the termination of the life estate; but I do not see any such limitation in the terms of the section and the decision in *Venkayyamma* v. *Narasimma* (13) is clearly against that contention. The Imperial Act simply reproduces sections 2 to 5 of the Madras Act. Both the Acts provide that the provisions shall apply to such of the dispositions that are made by wills passed before the passing of the Acts "as are intended to come into operation at a time which is subsequent to that date." It is a matter for consideration whether the decisions in *Venkayamma* v. *Narasimma* (13) and *Muthusami Ayyar* v. *Kalayani Ammal* (14) do not give too wide an effect to the provisions of the Act, by making it retrospective. I find it difficult to see how a testator who died in December, 1912, intended the bequest to the grand-children to come into operation after the passing of Act VIII of 1921. Sitting as a single Judge, I am bound by the decisions whatever my own views may be. In the present case, Logambal Ammal had a life estate and under the terms of the will the property was to go to her children. The moment therefore a child was born, according to the view taken in *Venkayyamma* v. *Narasimma* (13) the estate vested in the child and succession would have to be traced through the child and not through the heirs of the testator. The 1st defendant would be the heir under the Hindu law and not the maternal aunts. I am, therefore, of opinion that Logambal Ammal took a life estate under the will of Shanmuga Mudaliar, that her son acquired a vested interest in the property, the gift to him being valid by reason of the provisions of Act VIII of 1921 and that on the death of this child, his heirs and not the

(15) (1914) 27 M L.J. 681 = 27 I.C. 298.

heirs of the testator would be entitled to the property. In the view I take, the plaintiff and the 2nd defendant have no right. It is, therefore, unnecessary to consider the fourth and fifth issues which relate to mesne profits and to the value of the improvements.

In the result, the suit fails and is dismissed but, under the circumstances, without costs.

Suit dismissed.

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* * 1924 Madras 322.

RAMESAM AND COLERDIGE, JJ.

P. Kamaraju—Appellant-Plaintiff.

v.

C. Gunnayya and others—Respondents-Defendants.

S. A. No. 609 of 1922, decided on the 5th April, 1923, against the judgment of the Subordinate Judge of Vizagapatam in A. S. No. 174 of 1921.

Minor—Sale to stranger by minor after majority on the ground that alienation by mother is not binding entitles vendee to sue without suing to set aside sale by mother.

A minor's property was sold by his mother as guardian. On attaining majority he ignored the sale by his mother and conveyed the property to the plaintiff who sued for possession. *Held* that by selling the property to the plaintiff on the ground that the prior sale by his mother was not binding on him the plaintiff's vendor had chosen to avoid the prior sale and that the plaintiff could sue for recovery of possession of the property without a prayer for setting aside the original sale by mother. (38 Mad. 867=29 M.L.J. 617, *Foll.*).

Y. Suryanarayana—for Appellant.

P. Narayanamurthi—for Respondents.

Ramesam, J.:—This second appeal relates only to item 1 out of the properties which are the subject of the original suit and it is necessary only to state the facts so far as this item is concerned. The item originally belonged to the 1st defendant's father who mortgaged it in 1907. After his death, the mother of the 1st defendant during his minority as his guardian sold the property by a sale-deed, dated 4-5-1913. After the 1st defendant attained majority, ignoring the sale-deed by his mother and on the footing that no valid title was conveyed by it to the vendee, he sold it to the plaintiff by a sale-deed, dated 8th November, 1919, and the plaintiff now sues to recover the property. The District Munsif dismissed the suit on the ground that the right of the 1st defendant to avoid the sale by the mother within three years after attaining majority was not assignable. Incidentally he also states in paragraph 9 of his judgment that the suit is not maintainable on the ground that the intention to avoid the sale as it was expressed by the 1st defendant was not enough. What he perhaps meant was that the suit is not maintainable for want of a prayer to set aside the sale. His language is not very clear. On appeal by the plaintiff the Subordinate Judge, while holding in favour of the appellant that the 1st defendant's right was assignable, held that the suit was bad for want of a prayer to set aside the sale and on this ground affirmed the decree of the District Munsif. The plaintiff files this appeal.

I am unable to agree with the ground taken by the Subordinate Judge. This ground was not taken in the written statement nor was it the subject of an issue, and, unless one can hold that it was what the District Munsif meant, it was not even before the District Munsif. The Subordinate Judge relies for his conclusion on the language of their Lordships of the Privy Council in *Malkarjun* v. *Narhari* (1). That was a case of a Court sale. A judicial sale has to be set aside so far as the persons who are parties to the sale are concerned and, if not set aside, it will be binding on them for ever. Here we have not got to do with a judicial sale but with a private sale. The 1st defendant has got the right of avoiding it. By selling the property to the plaintiff on the footing that the sale by the mother was not binding on him he has chosen to avoid it, and the result of it is that from his point of view he has got a complete title. The title no doubt will only be effective if the Court ultimately finds that the sale by the mother is not binding on him. But contingent on that event he has got a complete title and this title is not a bare right to sue and is, therefore, assignable. *Muthukumara Chetti* v. *Anthony Udayar* (2) is a case where during the minority another guardian purported to exercise his right of avoiding it and therefore has no bearing on the present case.

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(1) (1901) 25 Bom. 337=27 I.A. 216=2 Bom. L.R. 927=5 C. W. N. 10=10 M.L.J. 368=7 Sar. 739 (P.C.).

(2) (1915) 38 Mad. 867=15 M.L.T. 361=29 M.L.J. 617=24 I.C. 120.

Fitzroy v. *Cave* (3) and *Prosser* v. *Edmonds* (4) were cases of mere right *in personam*. No question of title to immoveable property was involved in them. *Krishna Dhone* v. *Bhahabam Chandra* (5) and *Ganpat Lal* v. *Bindbasini Prasad Narayana Singh* (6) do not help the respondent. If it is necessary I would even allow the plaint to be amended by adding the necessary prayer. But I do not think it necessary.

The result is that the decrees of the Courts below have to be reversed and the suit has to be remanded to the District Munsif for trial. The suit has already been remanded in respect of item 2. The result of this order will be that the whole suit will have to be tried. Costs to abide the result. The appellant will be entitled to a refund of the Court-fee paid on second appeal.

Coleridge, J. :—I concur.

Case remanded.

(3) [1905] 2 K.B. 364=74 L.J.K.B. 829=93 L.T. 499=54 W.R. 17=21 T.L.R. 612.
(4) 1 Y & C. 481.
(5) (1916) 34 I.C. 188.
(6) (1920) 47 Cal. 924=47 I.A. 91=39 M.L.J. 108 =24 C.W.N. 954=(1920) M.W.N. 382=28 M.L.T. 330=18 A.L.J. 555=12 M.L.W. 59 =56 I.C. 274 (P.C.).

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* 1924 Madras 323.

SPENCER, J.

In re *Arunachalam Chetty*.

Cr.R.C. No.774 of 1922 (Cr. R. P. No.651 of 1922), decided on 23rd March, 1923, revising the judgment of the Sessions Judge, Trichinopoly, in Criminal Appeal No. 32 of 1922.

(a) *Crim. Pro. Code, S. 4—Complaint includes oral complaint.*

The sworn statement and the written complaint of a complainant may be read together for the purpose of ascertaining what the nature of the complaint in any particular case is.

(b) *Crim. Pro. Code, S. 199.*

Absence of complaint, oral or written, that the accused's purpose was to have illicit intercourse with her daughter or the statement as to puberty, is fatal to conviction under S. 498, Penal Code.

Kutti Krishna Menon for *C. Madhavan Nair*—for the Petitioner.

The Public Prosecutor—for the Crown.

Order:—The complaint in this case was of the offences of kidnapping a minor girl and theft of her jewels. It is contended that there was no complaint of an offence of enticing away a married woman for the purpose of having illicit intercourse with her (section 498, I.P.C.) so as to give the Magistrate jurisdiction to take cognizance of that offence, as provided by section 199 of the Code of Criminal Procedure.

I am of opinion that the objection is sound and must prevail. I agree with the observations of Ayling, J., *In re Pedda Anninagadu* (1) to the effect that the sworn statement and the written complaint of a complainant may be read together for the purpose of ascertaining what the nature of the complaint in any particular case was. As "complaints" include oral allegations under the definition in section 4 (1) (*b*) it would otherwise be necessary to say that there was no complaint in cases where the complainant had no paper or was unable to write or get any one to write for him when he came to the Magistrate, and if the Magistrate took down his complaint in writing (as he would be bound to do) it would be impossible to say where the complaint ended and the sworn statement began.

I do not feel bound by the contrary opinion of Wallis, C.J., and Coutts-Trotter, J., in *In re Pedda Anninagadu* (1) as they differed in the result of that case.

But in the present case there was no allegation even in the sworn statement of complainant that the accused's purpose was to have illicit intercourse with her daughter.

There is not even the statement as to puberty that there was in *In re Pedda Anninagadu* (1). Thus there was no complaint of an offence under section 498, I.P.C., so as to give the Magistrate jurisdiction to try and convict the accused of such an offence.

The conviction is quashed and the 1st accused is directed to be released from his bond and to be entitled to receive a refund of the fine if paid by him.

Conviction set aside.

(1) (1921) M.W.N. 514.

* 1924 Madras 324.

KUMARASWAMI SASTRI, J.

R. Gopala Krishna Pillai—Petitioner

v.

M. Kunjithapatham Pillai and others—Respondents.

Civ. Rev. Nos. 907, 908 and 909 of 1922, decided on 10th September, 1923 revising the orders of the Court of the Sessions Judge, Cuddalore in O.P. Nos. 10, 11 and 13 of 1922, dated 2nd of October, 1922.

(a) *Madras Civil Rules of Practice—Rules 131, 132 and 133—Delay in payment due to no fault of applicant does not prejudice the applicant.*

It is not reasonable to hold that a person is guilty of negligence when he would, in the ordinary course of things, have arrived in time for payment and where delay of five minutes was due to an accident which he could by no means have foreseen. (46 Mad. 60, *Foll.*) [P. 325, C. 1.]

(b) *Limitation Act, S. 5—Delay due to no fault of applicant must be excused.*

Where the person who is bound to pay the money produces the money in Court and complies with the rule which requires him to take out a chellan and pay the money at a different place and there is a delay in the actual payment of the money into the treasury bank owing to reasons beyond the control of the person making the payment, the payment must be deemed to have been made on the date the money is produced and the chellan obtained. To hold otherwise would be to penalise a party for events beyond his control. (17 L. W. 197, *Appr.*) [P. 326, C. 1.]

(c) *Practice—Court—Act of Court can prejudice nobody.*

The rule of law that nobody should be prejudiced by the acts of the Court or of its officers is one of universal application. It does not depend upon any of the provisions of the Limitation Act and this rule applies to a case under O. 21, r. 89, Civ. Pro. Code, to set aside sales on depositing the money into the Court. [P. 326, C. 2.]

T. R. Ramachandra Ayyar and *S. Ramaswami Ayyar*—for Appellant.

S. Muthiah Mudaliar and *C. Padmanaba Iyengar*—for Respondents.

Judgment:—The facts in these cases are not disputed and the only question is whether on the facts the Subordinate Judge was right in dismissing the applications.

The election to the Taluk Board in question was held on the 9th of May, 1922. The Subordinate Judge's Court was closed for the summer recess on the 14th of May, 1922, and re-opened on the 17th of July. The period of 14 days allowed for the presentation of the election petitions expired during the vacation and these petitions were presented on the 17th of July the date when the Court re-opened. The case for the petitioners is that they had with them the sum of Rs. 200 each which had to be deposited and that these sums were produced before the Subordinate Judge.

Rule 131 of the Civil Rules of Practice requires a person desirous of paying money into Court to bring into Court a lodgment schedule in the form prescribed by the Rules and containing the various particulars mentioned therein. Thereupon an order for lodgment and counterfoil receipt are to be issued to the payer, Rule 132 states that the payer shall deliver the money and the order and the counterfoil receipt to the bank or treasury officer mentioned therein, who is to retain the order and return the receipt duly signed by him to the payer, which receipt the payer should return to the Court. Rule 133 provides that if the bank or the treasury is closed, the money may with the leave of the Judge, be paid to the officer of the Court and the officer of the Court will send it to the bank the next day. As the Bank was open at the time of the presentation of the petitions, the Vakil, in pursuance of the Rules of Practice obtained a lodgment.....schedule. The Judge on receipt of the petition passed an order for the issue of chellans and chellans were issued on that day. As there is a branch of the Imperial Bank of India at Cuddalore, the chellans issued by the Court had to be taken to the officer in charge of the treasury, checked by him and then taken to the Branch of the Imperial Bank. The chellans were issued at about five minutes to three and they were taken at once to the treasury but the treasury officer was not there. As the Bank would not receive the money after 3 o'clock, it was impossible to pay the money into the Bank on that day. The money was returned to the vakil for petitioners. He and the members of his family were then staying at Thiruvendipuram about four miles from the Court house and the treasury office and he took the money with him in order that it may be paid the next morning. The money was sent the next day from Thiruvendipuram to the treasury officer with the chellans and the treasury officer returned the chellans at about 2 40. As the Bank was about $2\frac{1}{2}$ miles from the treasury office, the person taking the chellans and the money to the Bank arrived at the Bank at 5 minutes

after 3 but the Bank would not receive the money and it was therefore paid the next day. On the 18th the person taking the money to the treasury officer went in a jutka. There was an accident to the horse and it was therefore about 1-50 P. M., when the person reached the treasury officer. There would have been, however, ample time to have gone to the Bank if the treasury officer had not taken nearly an hour to return the chellans to the person who brought the money. The Subordinate Judge is of opinion that so far as the 17th is concerned the delay was unavoidable but thinks that the delay on the 18th has not been properly explained.

There can be little doubt that if there was no accident to the horse, there would not have been a delay of five minutes on the 18th and that the money would have been received by the Bank. The trouble was that owing to the delay the person who had the money reached the Bank at 3 5 while according to the rules of the Bank no money would be received after 3 P.M. I do not think that the view taken by the Subordinate Judge is correct. It is not reasonable to hold that a person is guilty of negligence when he would in the ordinary course of things, have arrived in time for payment and the delay of 5 minutes was due to an accident, which he could by no means have foreseen. In this connection I need only refer to the judgment of the Chief Justice in *Arunachallam Aiyar* v. *Subbaramayya* (1). The learned Chief Justice observes: "The question to be considered by the Court is not whether by some human possibility, being wise after the event, he could have got there in time . . . . . and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment mulcting, in proper cases, the delinquent man in costs." It is no argument to say that where a man leaves in time and would in the ordinary course have reached the bank in time, he would in spite of the accident have reached before the bank was closed, if he had started earlier, or if the jutka horse had run faster. The question remains for consideration as to whether even in cases where there is no negligence and where the applicant has complied with the rules, the application should be dismissed, because the money was not paid into Court with the application whatever the reason may be.

Rule 4 of the Election Rules framed by the Government under the Madras Local Boards Act enacts that the amount should be deposited at the time of the presentation of the petition and that if it was not deposited the petition should be dismissed. The contention of the respondents is that in such cases the money should be paid in and that even if the chellans had been taken and the money paid into the bank a few minutes later, the petition would still have to be dismissed as the presentation of the petition and the payment of the money were not simultaneous. This construction, so far as I can see has nowhere been placed on the rules. In *Krishnaji Reddiar* v. *Muthu Veera Reddiar* (2), Krishnan, J., though he held that no question would arise as to the Court excusing the delay the provision in the rule being mandatory, took the view that if the failure to pay the money was due to any action taken by the Court, the petition would be proper. The Rules of Practice are binding on all Civil Courts and where the rules provide that a chellan must be obtained and money paid into the bank unless at the time of making the application to receive the money the Bank is closed, it is difficult to see how the Court would receive the money in violation of the Rules of Practice which have the force of law and are binding on all Civil Courts. The Subordinate Judge in paragraph 12 of his judgment observes that the vakil was perfectly justified in putting a lodgment schedule and taking out the chellan without tendering the money to the Judge. It cannot therefore be said that the petition ought to be dismissed because the money was not paid to the Judge in cash. It is argued that, although the vakil produced the money before the Judge, he did not formally ask the Judge to receive the money; but it seems to me that no object would be gained by making a request which under the Rules of Practice the

(1) 1923 Mad. 63=46 Mad. 60=(1922) M.W.N. 600=31 M.L.T. 257=16 M.L.W. 583=43 M.L.J. 632=68 I.C. 971.

(2) 1923 Mad. 490=44 M.L.J. 344=(1923) M.W.N. 199=18 M.L.W. 299=72 I.C. 449.

Judge is bound to refuse. I am of opinion that where a person who is bound to pay money produces the money in Court and complies with the rule which requires him to take out a chellan and pay the money at a different place and there is a delay in the actual payment of the money into the Treasury or Bank owing to reasons beyond the control of the person making the payment, the payment must be deemed to have been made on the date the money is produced and the chellan obtained. To hold otherwise would be to penalise a party for events beyond his control. In *Koil Pillai Samban* v. *Sappanimuthu Samban* (3) which was a case under section 17 of the Provincial Small Causes Courts Act the provisions of which have been held to be mandatory Ramesam, J., observes as follows :—"I hold that when the party has applied for a chellan and the delay in issuing the chellan is the delay of the officers of the Court and after the issue of the chellan he deposited the money immediately the maxim *nunc pro tunc* applies and the application for chellan (in such circumstances) is equivalent to the deposit." With these remarks I entirely agree. Whether the payment is to be made under the Small Causes Courts Act or under the Election Rules it will, in my opinion, be contrary to all principles of justice to require a man to comply with the rules which insist on the taking out of chellan and paying the money to a different officer and then to dismiss the application on the ground that the money ought to have been paid to the Judge himself or to hold that a payment to the officer contemplated by the rules would not be equivalent to the compliance with the rules where the delay in payment is entirely due to causes beyond the control of the person taking out the chellan. The Subordinate Judge finds that if the money had been paid on the 18th of July (*i.e.*) the next day, the delay would have been justified but he thinks that because it was not paid on the 18th owing to the accident which happened to the jutka which caused the person making the payment to be five minutes late in the Bank, there was no ground for excusing the payment the very next day. I have already given my reasons for holding that the accident was one which the person could not have foreseen and that there was no negligence on the part of the person making the payment.

It has been argued that the provisions of section 5 of the Limitation Act would not apply and that consequently the Court has no power to excuse the delay. The question is not one of excusing any delay. The question is whether in the present case the rule of law that nobody should be prejudiced by the acts of the Court or of its officers is one of universal application. It does not depend upon any of the provisions of the Limitation Act and this rule is applied to cases under Order 21, rule 89 of the Civil Procedure Code to set aside sales on depositing the money into Court.

In the result I set aside the order of the Subordinate Judge and direct him to restore the petition to his file and dispose of them according to law. The respondents will pay the petitioners their costs of these petitions in this Court.

Order set aside.

(3) 1923 Mad. 354=17 M.L.W. 187=44 M.L.J. 247=74 Ind. Cas. 220.

1924 Madras 326.

AYLING and ODGERS, JJ.

Srinivasa Rao—Defendant-Appellant.

v.

Rangaswami and others—Plaintiffs-Respondents.

S. A. No. 53 of 1921, decided on 25th April, 1923, against the decree of the District Judge, South Arcot, dated the 16th July, 1920.

Madras Board of Revenue—Board's Standing Orders No. 15, S. 17—Restoration of an order comes within the section—Civil Court cannot decide the propriety of Board's decision.

The Board's revisional powers are conditional on the Board of Revenue being satisfied that the decision was passed owing to the misrepresentation, or fraud or other causes and it is not open to a Civil Court to enquire into the merits of the case and to pronounce that the decision of the Board was wrong. (32 M. 300, *Dist.*) Where the Board merely directed that a grant which had been made at one stage of the Darkhast proceedings by a competent authority should be restored.

Held, that an order to this effect is covered by the words "to set aside, cancel or amend any decision in a Darkhast case". [P. 327, Cs. 1 and 2.]

S. T. Srinivasagopala Achari and *P. K. Janakiram*—for Appellant.

M. S. Venkatarama Ayyar—for Respondents.

Judgment:—This second appeal turns solely on the question, whether the order of the Board of Revenue contained in Ex. F is or is not *ultra vires*. We think that the decision of the lower appellate Court is correct. The grant of the land to the appellant was made specifically liable to cancellation, if it were found that it was made owing to misrepresentation, fraud, etc., and section 17 of the Board's Standing Orders No. 15 provides that nothing contained in that paragraph (whereby the order of the appellate authority is made final) should limit the power of the Board of Revenue to set aside, cancel, or amend any decision in a Darkhast case, on being satisfied that the decision exceeded the powers conveyed by the standing orders to the person making the order, or that it was passed under a mistake of fact, or owing to misrepresentation or fraud. It is true that the order, Ex. F, does not set out any reasons, but it was passed on allegations which are contained in Ex. E and these allegations are clearly allegations of misrepresentation and fraud, which would be sufficient to justify the interference of the Board under the revisional powers above alluded to. Applying the usual presumption, that powers are presumed to have been properly and legally exercised, we must take it that the decision of the Board was passed on its being satisfied that these allegations were correct.

It is argued that it is open to the Civil Court to enquire whether as a matter of fact these allegations were or were not correct. The Board's revisional powers are however conditional on the Board of Revenue being satisfied that the decision was passed owing to the misrepresentation, or fraud, or other causes, set out and we do not think that it is open to a Civil Court to enquire into the merits of the case and to pronounce that the decision of the Board was wrong. We think it must be taken that the order of the Board in Ex. F was *intra vires*.

Our attention has been drawn to the decision in *The Secretary of State for India* v. *Gundappa of Konakondla* (1) but that case is distinguishable; for the Board's revisional powers were not in question and the learned judges laid stress on the fact that there was no suggestion there that the patta was issued conditionally.

It was further argued by Mr. Srinivasagopalachari that the Board's revisional power did not extend to making a grant in favour of the respondent. The Board merely directed that this grant which had been made at one stage of the darkhast proceedings by a competent authority should be restored and we think that an order to this effect is covered by the words "To set aside, cancel or amend any decision in a darkhast case." The second appeal is dismissed with costs.

Appeal dismissed.

(1) (1909) 32 Mad. 300=19 M.L.J. 206=5 M.L.T. 31=1 I.C. 76.

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* * **1924 Madras 327.**

OLDFIELD AND DEVADOSS, JJ.

Konthalathammal—Appellant.

v.

Thangaswami Pillai and others—Respondents.

A. A. O. No. 66 of 1923, and C. R. P. Nos. 289, 359 of 1923, decided on the 24th April, 1923.

(a) *Guardians and Wards Act, S. 17—Failure to inquire from minor is not failure to exercise jurisdiction.*

Court is not bound to ascertain from the minor in person her wishes as to her guardianship and the proposal for her marriage, and therefore omission to do so is not a failure to exercise jurisdiction under S. 115, C.P.C. [P. 331, C. 2.]

(b) *Guardians and Wards Act, S. 24—Adverse order without notice is revisable.*

Where on the day on which an application for the removal of a guardian was dismissed, the Court on an oral application, made an order granting a permanent injunction restraining certain four persons, without notice to the persons concerned, from taking steps towards the minor's marriage against the wishes of the guardian sought to be removed, *Held* that the order was without jurisdiction and must be set aside in revision. [P. 332, C. 1.]

(c) *Guardians and Wards Act, S. 47—Refusal to remove is not appealable.*

A refusal to remove a guardian is not appealable under S. 47. (19 Cal. 487 ; 23 Cal. 201 ; 30 Bom. 667 ; 20 All. 433, *Foll.*) [P. 328, C. 1.]

(d) *Guardians and Wards Act, S. 47 (a)—Findings refusing removal on application to remove a guardian do not amount to appointment.*

Where on an application to remove a testamentary guardian the order referred to non-applicant as the testamentary guardian, affirmed her fitness for the appointment and found against the conduct alleged, as disqualifying her for it, *Held* ; that all that was relevant to the prayer for her removal

and did not amount to the making of a declaration, which was not made in terms, which neither party had asked for and which the lower Court was not conscious that it was considering. [P. 328, C. 2.]

The power to appoint a testamentary guardian and to make a will, were, as regards any demonstrable or legitimate origin and until the Hindu Wills Act in 1870, on the same footing. [P. 329, C. 2.]

A Hindu can appoint a guardian of the person and property of his child by will when the property willed is his separate property. [P. 331, C. 1]

There is nothing in law or reason or equity to prevent there being two guardians, one for person and another for the property. The Guardians and Wards Act expressly permits the appointment of more guardians than one—*vide* S. 15, cls. (4) and (5). Where it is not permissible to appoint a guardian for the property of a minor, a guardian for the person alone can be appointed by testament. (19 Bom. 309, *Foll.*) [P. 333, C. 2.]

Case-law reviewed and texts and history traced.

Per Devadoss, J. :—It is the inherent right of a father to have the custody of his minor children and that right is transmissible by will or testament, and there is nothing in the Hindu Law to prevent such transmission. [P. 336, C. 1.]

A father has power to appoint by will a guardian for the person of his minor children whether there be joint family property or not; and that right does not depend upon the father being able to devise by will any property to his children for whom he appoints a guardian. [P. 333, C. 2.]

A. Krishnaswami Aiyar and *K. Aravamudhu Aiyangar*—for Appellant.

E. L. Thornton, T. R. Ramachandra Aiyar, V. Narayana Aiyar and *T. S. Krishnaswami*—for Respondent.

Oldfield, J. :—The first and important of the two orders before us was passed by the District Judge of South Arcot on a petition for the removal of 1st respondent from her position as testamentary guardian of the person and property of a minor Thirugnanavalli Ammal, for the appointment of the petitioner, or any other fit person in her stead and for connected reliefs. Against that order there is an appeal by the petitioner and also a revision petition.

I deal first with the respondent's preliminary objection to the appeal, that this order, consisting in a refusal to remove a guardian is not appealable under section 47, Guardians and Wards Act (VIII of 1890), and is final under section 48. The order, as it stands, is certainly of that character, its conclusion being that the Court is not prepared to remove the guardian on any of the grounds stated in the petition and that the petition is dismissed; and the objection is supported by authority which I am prepared to follow, *Mohima Chunder Biswas* v. *Tarini Sunker Ghose* (1), *Pakhwanti Devi* v. *Indra Narain Singh* (2), *In re Harkha* (3) and *Imtiaz-un-nissa* v. *Anwarullah* (4). But the objection has been met by the arguments, (1) that the order is really one declaring a testamentary guardian under section 7 (1) (*b*) and, as such, appealable under section 47 (*a*); and (2) that as the right of a Hindu to appoint a testamentary guardian is not recognised by the law and 1st respondent's appointment was a nullity, there was no necessity for the Court to remove, or to refuse to remove her and its order must be regarded simply as one refusing to appoint petitioner, which is appealable under section 47 (*a*).

The first of these arguments can be dealt with shortly. It rests solely on the fact that the lower Court in its order has referred to 1st respondent as the testamentary guardian, has affirmed her fitness for the appointment and found against the conduct alleged, as disqualifying her for it. But all that was relevant to the prayer for her removal and did not amount to the making of a declaration, which was not made in terms, which neither party had asked for, which the lower Court was not conscious that it was considering, and in order to which the procedure enjoined in Civil Rules of Practice, Chapter XI, was not employed.

The second argument calls for fuller discussion notwithstanding that, as I shall hold, there is ground, in any event, for interference with the order before us in revision, because a conclusion against the legality of 1st respondent's appointment as guardian will be relevant, not only to the question whether that order is appealable, but also to the merits in the further enquiry to be held, since, if she has not been legally appointed, the question will not be of her right to retain the appointment, but only of her eligibility for it in competition with the petitioner or any other candidates. It is not disputed that by a will, dated 6-7-15 the father of the minor left her his separate property, worth (it is said) several lakhs of rupees, and purported to appoint 1st respondent guardian of her person and property. But it is argued that the terms of a decision of

(1) (1892) 19 Cal. 487.
(2) (1895) 23 Cal. 201.
(3) (1895) 20 Bom. 667.
(4) (1898) 20 All. 433 = (1898) A.W.N. 97.

a Full Bench of this Court in *Chidambaram Pillai* v. *Rangaswami Naicker* (5) require us to hold generally against the right of a Hindu to appoint a guardian of a person or property of his child by will, not only when the property is, as it was in that case, ancestral, but also when it is, as in this case, separate. It is not disputed that this is the only authority, by which the argument can be supported, and we must therefore scrutinize its terms to see whether they entail the acceptance of any principle applicable to the present case. Such scrutiny is the more clearly required, when, as appears from the fuller report of the arguments in the Madras Law Journal (34 M. L. J. 381) the experienced vakil for petitioner, who attacked the appointment, conceded that it would have been valid, if the property in question had been separate. It is further to be observed that the decision does not deal with guardianship of the person, except in the statement of Coutts-Trotter, J., that the appointment of such a guardian may be a natural right vested in the father.

What is urged, however, is that each of the judgments refers generally to the absence of any recognition in Hindu Law of the father's right to appoint a posthumous guardian for his children and that section 6 of the Guardians and Wards Act authorises only such appointments as are valid by law to which the minor is subject. If that were indeed the effect of the judgments, the argument under consideration would no doubt be established. But, to take them in order, that of Ayling, J., refers to the necessity for careful consideration, if the existence of such a power is to be recognized on the sole grounds that its exercise is not forbidden and it is expedient, and then decides against its existence on the ground, irrelevant in the case before us, that it would run counter to the conception of a Hindu joint family. Seshagiri Aiyar, J., no doubt refers first to the absence of any foundation for the existence of the power in Hindu Law or as a common law right recognized by other systems of jurisprudence. But he then enters on a survey of the case-law, to which I return, observing for the present only that many of the authorities cited dealt with the joint family property, with which he was directly concerned, that he distinguished one case on the ground that the property in question was self-acquired and that he explained the recognition of a testamentary power of appointment in certain statutes on the ground that they "referred to cases, in which such power is permissible under the law, for example, cases of self-acquired property in Madras." It may in the circumstances be doubted whether these learned Judges intended to negative the existence of a testamentary power generally or otherwise than in connection with joint family property. Coutts-Trotter, J., alone, if I understand him correctly, adhered to the argument that absence of a statutory basis for the power or of any basis for it, except natural right, was conclusive against its existence generally and in connection with separate as well as family property. We are not, in my opinion, debarred by *Chidambara Pillai* v. *Rangasawmi Naicker* (5) from scrutinizing petitioner's argument on its merits.

In doing so I make no attempt to follow the demonstration that testamentary guardianship in other systems of law has had no origin independently of statute. That demonstration before the Full Bench did not, it may be observed, include any reference to the mention of testamentary guardianship in the twelve tables (Mackledly's Roman Law ad Dropsie, section 621 note) or to the former practice of the Ecclesiastical Courts in England in respect of personal property (*vide* Simpson on Infants, 3rd Ed., page 203) and the complication of the matter in respect of real property to the existence of feudal rights which II Carl. c. 24 was passed to determine; and it is therefore doubtful whether the argument, so far as the Roman and English systems were concerned, was exhaustive. We are however on firmer ground in confining attention to India. It may be said at once that it is useless to look for this or any other testamentary power in Hindu texts, which recognise no power to make a will or execute an instrument to take effect after executor's death at all. It may in fact be suggested that the powers to appoint a testamentary guardian and to make a will were as regards any demonstrable or legitimate origin and until the Hindu Wills Act in 1870 on the same footing. The real justification for the one, as for the other, is that

(5) (1918) 41 Mad. 561 = 34 M L.J. 381 = 23 M.L.T. 266 = (1918) M.W.N. 265 = 7 M.L.W. 454 = 45 I.C. 905 (F.B.).

it has been exercised from the earliest times after the reception of English Law without objection and with the countenance of the legislature and the Courts. It is argued that this is inconclusive, when the will-making power can be explained in terms of legal conceptions always current in India, whilst the appointment by will of a guardian cannot; and we have been referred to the suggestion in *Jotendro Mohan Tagore* v. *Ganendro Mohan Tagore* (6) of a connection between wills and gifts *inter vivos*. But this suggestion, like others considered by Mr. Mayne at page 366, Hindu Law, 9th Ed., is at best conjectural; and, if conjecture as to the origin of the power in dispute is necessary, when the argument in its favour is based primarily on its exercise and recognition, it is easy in a country where the distinction between legal and beneficial ownership has always been neglected, to explain the testamentary appointment of a guardian of property in terms of the execution of a trust, the similar appointment of a guardian of the person following by mistaken analogy or on the ground of mere convenience.

The reply to the contention that such appointments have been continuously recognised by the legislature has been that such recognition is always subject, as it is under Act VIII of 1890, to their validity under the personal law of those concerned. But it is difficult to suppose that any such reservation was contemplated in sections 18 and 19, Madras Regulation V of 1804 in connection with permanently settled estates, the owners of which have in almost all instances been Hindus; and none is conceivable in connection with section 3, Hindu Widows Remarriage Act (XV of 1856). It is true that the Hindu Wills Act (XXI of 1870) did not apply section 47, Indian Succession Act (XV of 1865) to Hindu wills; but that section, evidently based on the Statute of Charles II, was framed with reference to the wills, which the Succession Act controlled; and the result of the failure to apply it to Hindu wills was only to limit the privilege of testamentary appointments to adult testators and the authority of the commentators follows the evident intention of the legislature. In a case of 1807 referred to in Strange's Hindu Law, Vol. II, page 72, the Pandit recognised apparently as a matter of course, that the father's testamentary nomination of his brother as guardian, should prevail against the claim of the natural guardian, the widow; and, if the Court's compliance with this view was, as Mr. Colebrook suggests, in the exercise of his discretion, that was natural where the testamentary power itself was still in controversy. Later on Trevelyan on Minors, 3rd Ed., page 62, and the successive editions of Mayne's Hindu Law and Usage are clear. *Chidambaram Pillai* v. *Rengaswami Naicker* (5) being referred to in the last edition of the latter as relating only to guardianship of family property.

The conclusion in favour of the right of testamentary appointment is supported indirectly by the fact that except in *Budhilal* v. *Morarji* (7), where the point was taken but not decided, we have not been shown that unless perhaps in two cases any general objection to such an appointment was even suggested before the decision of the Madras Full Bench although in several cases, for instance, *Venkayya* v. *Venkatanarasimhalu* (8), *Sami Row* v. *Elianatha Rao* (9) and *In the matter of Srishchander Singh* (10), such an objection, if sustainable would have been conclusive. Of those two cases *Alagappa Aiyangar* v. *Mangathayi Ammangar* (11) related to guardianship of the person and that of *Soobah Durga Lal Jha* v. *Rajah Neelanand Singh* (12) to guardianship of the property. There seems to be no reason in view of the considerations already referred to why the former decision should not be followed, although it appears to have been based entirely on *Dr. Albrecht* v. *Bathee Jellamma* (13), in which the validity of the appointment was, so far as appears, not disputed. The second authority calls for closer consideration, because Sadasiva Aiyar, J., in *Alagappa Aiyangar* v. *Mangathayi Ammangar* (11) understood it apparently as contemplating an appointment in respect of family property, whilst

(6) (1872) I.A. Supp. 47=18 W.R. 359=2 Suther. 692=9 B.L.R. 377=3 Sar. 82 (P.C.).

(7) (1907) 31 Bom. 413=9 Bom. L.R. 553.
(8) (1897) 21 Mad. 401=8 M.L.J. 112.
(9) (1905) 16 M.L.J. 357.
(10) (1893) 21 Cal. 206.
(11) (1916) 40 Mad. 672=30 M.L.J. 504=34 I.C. 766.
(12) (1867) 7 W.R. 74.
(13) (1911) 22 M.L.J. 247=(1911) M.W.N. 53=11 M.L.T. 53=13 I.C. 453.

Coutts-Trotter, J., in *Chidambaram Pillai* v. *Rangaswami Naicker* (5) thought that it referred only to a possibility and contains no definite decision. The answer to Sadasiva Aiyar, J., is however given in the judgment of Seshagiri Aiyar, J., in the case last mentioned, that self-acquired as well as family property was in question; and his further comment is significant. "In respect to such property which can hardly be disputed it is open to the testator to appoint a guardian to manage it." The recognition of that right in *Subbah Durga Lal Jha* v. *Rajah Neelanand Singh* (12) seems to me, with all respect for Coutts-Trotter, J., clear. No doubt the learned Judges there, as they avoided finding on the genuineness of the will relied on, were compelled to adjudicate, so far as the family property is concerned, with reference to representation and, so far as the separate property was concerned with reference to estoppel; and they conceded that the Will in respect of the family property was in any event inoperative. But their treatment of both pleas depended on their conclusion that if the will was genuine, it conferred a definite legal character and that the Courts dealing with the earlier litigations and the then respondent in connection with foreclosure were justified in assuming that it did so. No doubt the learned Judges in referring to the will as operative as regards the guardianship, said that it was not so as regards the family property. But it should be remembered that in the previous litigation relating to that property, the suit of 27-7-1848, the guardianship was in dispute only between the alleged testamentary and the natural guardian, for both of whom the separate character of the property was common ground. This decision given in 1867 has not, so far as is shown, been subjected to adverse comment until now and it in my opinion corroborates strongly the inference based on the materials already considered. I hold that a Hindu can appoint a guardian of the person and property of his child by will, that the appointment of 1st respondent is not a nullity and that therefore the present appeal does not lie and must be dismissed. No order is made as to costs.

We are however asked by a separate petition to interfere with the lower Court's order in revision on the ground that it has failed to exercise its jurisdiction in respect of its omission first to consider certain allegations that 1st respondent has alienated the minor's estate without jurisdiction. The facts are that, in paragraph 17 (*a*), (*b*), (*c*) and (*e*) there are allegations of misappropriation by 1st respondent for the benefit of or at the instance of 2nd respondent, who under the will is associated with her in the management of the minor's property, and that the lower Court dismissed them on the sole ground that under the will 1st respondent is not to be required to account in respect of her management. Whether evidence to prove these allegations was offered is not clear, but it would have been useless to offer any, when a different ground of decision had commended itself. It is not, however, possible for us to accept that ground. For, apart from the question whether the intention of the testator was that gross negligence or dishonesty by 1st respondent should be condoned, the allegations in para. 17 (*e*) and (*f*) are not, as they are stated, matters of account; the contention that those in para. 17 (*a*) and (*b*) are so, because they relate to the disposal of the collections of the estate, cannot be accepted, when the suggestion is that the investment of those collections as corpus has been made with the object of benefiting 2nd respondent. In this respect the lower Court failed to exercise its jurisdiction. We must, therefore, set aside its order and remand the petition for further enquiry. As the effect of charges, such as those in question, must be cumulative, all the allegations in the petition will be open to further consideration, before orders are passed. Costs of the Civil Revision Petition in this Court will be costs in the cause and be provided for in the lower Court's order.

This result reached, it is unnecessary for us to consider the other failure to exercise the jurisdiction relied on in the Civil Revision Petition, the lower Court's omission to ascertain from the minor in person her wishes as to her guardianship and the proposal for her marriage, on account of which the removal of 1st respondent was principally asked for. It is sufficient that neither the Guardians and Wards Act nor any authority makes such ascertainment obligatory and that the lower Court may very well have refrained from seeing and questioning the minor in the exercise of its discretion, and which in view of her tender age was very likely sound and with

which therefore we cannot interfere. In this connection however, we think it advisable to direct the attention of the lower Court to certain allegations as to the efforts by the both sides to interfere with the custody of the minor's person and to prevent her from coming from Chidambaram to appear at the hearing. Some of these allegations were made in this Court by affidavit in connection with an application for temporary injunction and it is not disputed that some of them were also made orally on the last day of the hearing in the lower Court. It will be for the lower Court to consider after obtaining any definite statement which either party may wish to make regarding the facts whether anything has been done which would constitute a disqualification for the custody and guardianship of the minor and whether the appointment of an impartial third person as guardian of either the person or the property is not advisable.

In this connection reference must be made to C. R. P. No. 289 in which we are asked to revise an order by the lower Court granting an injunction restraining four persons specified, here petitioners from taking steps towards the minor's marriage against the 1st respondent's wishes. This order was passed on the day on which the guardianship petition was dismissed on the oral application of first respondent's counsel. Whether such an oral application should have been listened to it is unnecessary to decide but it may be observed that no special reason appears for the deviation from ordinary practice involved. There are however other fundamental objections to what was done, for there was no proceeding before the Court initiated by the 1st respondent, in which even an interim injunction could have been granted, much less a permanent one, such as that before us. No notice was given to the persons, against whom the order was made; and they are not alleged to have been in fact present.

There was no evidence by affidavit or otherwise adduced for the Court to act on and the statement in the order that the facts were not disputed is futile, when the persons concerned to dispute them, those against whom the order was asked for never had an opportunity to do so. It is difficult to understand how any one concerned can have thought that a permanent injunction granted in such a way could be legal. The Civil Revision Petition must be allowed with costs against 1st respondent, the injunction being dissolved.

Devadoss, J.:—I entirely agree with the order passed by my learned brother and the reasons therefor, and I wish to add a few words of my own on the question of a Hindu father's right to appoint a guardian by will for his minor children as it is a question the decision of which, one way or other, will affect millions of His Majesty's subjects in this Presidency.

Mr. Krishnaswami Aiyar who appears for the appellant contends "that under the Hindu Law a father has no right to appoint a guardian by will for his minor son, and relies for his contention on the Full Bench ruling in *Chidambara Pillai* v. *Rangaswami Nayaker* (5). His argument is that it is settled law that a father cannot also appoint a guardian for his minor son by will when there is a joint family property, and that he cannot appoint a guardian for him if he bequeaths to him his separate or self-acquired property, for that would mean the existence of two guardians, one in respect of joint family property and one in respect of his separate property. Even if the Hindu father is the sole surviving member of a joint family he cannot appoint a testamentary guardian for his son who by birth acquires an equal right with the father in ancestral property. The right to appoint a guardian does not go with the right to make bequests. For a testator cannot appoint by his will a guardian to a minor legatee, who is not his child, and a Hindu who is not empowered by Hindu Law to appoint a guardian for his son cannot claim the right by virtue of his being able to leave his son some of his own property, and it is illogical to say that he can appoint a guardian in respect of his separate property when he cannot do so in respect of joint family property. Wills and testaments were unknown to Hindu Law and therefore a Hindu father has not, by his personal law, a right to appoint a testamentary guardian for his minor children. The right to appoint a guardian by will or testament is a creation of statutes in England, and there is no statute law in India empowering a Hindu father to appoint a guardian by will."

The real question for consideration is: Has a Hindu father the right to appoint by will a guardian for his minor son? It is considered as settled law that he cannot

appoint a guardian to manage the joint family property as the manager of the family is the guardian of all minor members. The last surviving member of joint family cannot appoint by will a guardian for his son to manage the family property as it is said to be inconsistent with theory of survivorship. If the father has not the right to appoint a guardian by will for his minor son by virtue of his being the father, he cannot acquire the right by virtue of his power of disposition of his separate or self-acquired property; for it is a well-known principle of law that a testator cannot appoint a guardian for a minor legatee only by reason of the disposition in his favour. A testator can appoint trustees to hold property for a legatee and that does not depend upon the legatee being a minor. So the right to appoint a guardian for a minor son is to be sought for elsewhere than in the power to bequeath the property to him. A father as well as a mother have obligations as well as rights in respect of their children during minority. The penal law prescribes a penalty for abandoning a child and punishes any one who kidnaps a child under a certain age from the rightful guardianship. The father has the right to the custody of the children against all the world till a court of law sees fit to take away the guardianship from him. Under the Hindu Law a father can give away a boy in adoption. The mother can give a boy in adoption only with the express permission of the father. Even where a father is a junior member of a joint Hindu family he alone has the right to give the boy in adoption. The managing member of a joint family has not the right to give in adoption any junior member who is not his own son. The Hindu law recognises the right of the father as paramount in this respect to that of the managing member of the family. The Hindu Law permitted the father to sell his son. If such is the right of the father why could he not appoint by will some one to look after the minor son during his minority? The answer is that the Hindu Law does not permit it. On a close examination, it will be found that it does not prohibit or discountenance such an appointment. Wills being unknown to Hindu Law no provision is found in the authorities as to the power of a father to appoint a testamentary guardian for his minor son. The test on which reliance is placed is No. 27, in Chapter 8 of Manu. "The property of a student and of an infant, whether by descent or otherwise, let the King hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year." The chapter is headed "on judicature; and on law, private and criminal." From the said heading, the text appears to be a direction to the King's Judges to do what is proper in the case of an infant, when his property has to be protected. There is nothing to show that in the case of infants the father could not exercise his right of guardianship. No doubt the King's power was paramount. But that is no ground for saying that the father did not exercise or could not exercise his right as guardian of his own minor son; for if he had no power over his son how did it allow a father to give away his son in adoption, thereby cutting off the son from all the benefits that would accrue to him in his natural family. Nor does the text in any way infringe or take away the right of the manager of a joint family to have the guardianship of the minor members. I take it, though not without some hesitation, that the direction is only to the Judges to decide causes that might come up before them. Whatever may be the meaning of the text, I think there is nothing in the Hindu Law to prevent a Hindu father appointing a guardian for the person of his minor son.

The argument urged against this view is that there can only be one guardian for a minor and that there cannot be one guardian for the person and another for the property. No doubt there cannot be two guardians for one and the same property of a minor. But there is nothing in law or reason or equity to prevent there being two guardians, one for the person and one for the property. The Guardians and Wards Act expressly permits the appointment of more guardians than one—*vide* section 15, clauses (4) and (5). Where it is not permissible to appoint a guardian for the property of a minor, a guardian for the person alone can be appointed by testament. The case in *Virupakshappa* v. *Nilgangava* (14), decided by a Full Bench of the Bombay High Court is sufficient authority for this position. It is sheer

(14) (1894) 19 Bom. 309 (F.B.).

pedantry to seek for texts or authority in ancient law books for giving relief suitable to the conditions now prevailing. The Code of Manu was intended for the primitive society which has long since ceased to exist. How would it be possible to enforce the law contained for instance in the following texts.

270. "A once born man, who insults the twice born with gross invectives, ought to have his tongue slit; for he sprang from the lowest part of Brahma."

271. "If he mention their names and classes with contumely, as if he say "Oh Devadatta, thou refuse of Brahmans," an iron style, ten fingures long, shall be thrust red hot into his mouth."

380. "Never shall the King slay a Brahman, though convicted of all possible crimes: let him banish the offender from his realm, but with all his property secure, and his body unhurt."

371. "Should a wife, proud of her family and the great qualities of her kinsmen, actually violate the duty which she owes to her lord, let the King condemn her to be devoured by dogs in a place much frequented."

81. In Chapter 9: "A barren wife may be superseded by another in the eighth year. She, whose children are all dead, in the tenth; she who brings forth only daughters in the eleventh; she who speaks, unkindly, without delay."

It is unnecessary to quote further examples from Manu to show the utter unsuitability of applying wholesale the directions or laws contained therein to the present society. It would be as absurd to apply the Code of Manu in its entirety to the present society as to apply the Levitical law to modern Europe. When the family or clan lived in a small village it was deemed prudent to live jointly, to have one manager and to prevent alienation. But to-day a member of a joint family may live in England or America while the other members live in this presidency. If it is said that a father cannot appoint by will a guardian for his minor son because there is some joint family property, what is to happen to a minor whose father dies in California or South Africa? If the boy happens to be a minor at the date of his death no one can take charge of him or look after the property till an undivided cousin or a distant relative in India takes steps to protect him. If a successful member of the bar or a member of the Viceroy's Council who is a Hindu sends his son for education to Eton or Harrow and dies before his son attains age, should the boy be left to the tender mercies of an ignorant co-parcener by reason of the misfortune that the family owned an ancestral hut in a small village in the presidency? The Court has to take into account the modern conditions in giving effect to ancient texts or law that was considered valid and binding once but which has been departed from generations ago. The Hindu Law, as now obtains has departed in many vital respects from the law that was codified if such an expression could be used with regard to the Code of Manu perhaps 2,000 years ago.

The law of wills has grown up quite within recent times and judicial decisions have recognised the validity of Hindu wills and Hindu Wills Act has put the matter on a satisfactory basis. The following passage from West and Buhler, page 657, illustrates the opposition to the recognition of wills by Codes. "Mr. Ellis thought that a Hindu could not make a will at all." Strange's Hindu Law, 419: "It is obviously opposed to the Brahmanical family system and to the interest of the ancestral manes in the estate out of which sacrifices to them are to be provided. A general opinion unfavourable to the testamentary power was expressed by native judicial officers consulted in Bombay in 1864. But the principle obtained early recognition, though but a qualified one, that what could be given away during life could be bequeathed by will." Whether the law of wills has grown out of the powers to make gifts *inter vivos* or not it is unnecessary to enquire. It is sufficient for the present purpose to say that the wills had come to be recognised as valid by a long course of decisions, before the Hindu Wills Act was passed. The power of a father to appoint a guardian for his minor son by will was recognised in a case reported in *Soobah Doorgah Lal Jha* v. *Rajah Neelanand Singh* (12). All writers on Hindu Law without exception have recognised the right. Writers like Mayne, Trevelyan and Gour have accepted the father's right to appoint a testamentary guardian as unchallenged. It was the consciousness of the people in this presidency that a father could appoint a testamentary guardian for his son till the decision in

Chidambaram Pillai v. *Rengaswami Nayaker* (5) was given. No one seriously disputed the right of the father to appoint a guardian for his minor son. With due respect I must observe that the decision in *Chidambaram Pillai* v. *Rengaswami Nayaker* (5) is not only against the consciousness of the people but is opposed to their notion of the law on the subject. The point that was referred to the Full Bench in *Chidambaram Pillai* v. *Rengaswami Nayaker* (5) was "whether it is competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenery properties of the minor co-parcener?" and the answer given was in the negative. Seshagiri Aiyar, J., tries to explain *Soobah Doorgah Lal Jha* v. *Raja Neelanand Singh* (12) on the ground that the property dealt with was the self-acquired property of the testator. If the father had no power to appoint a testamentary guardian he could not acquire the right merely because he had self-acquired property. There are remarks in the judgment to the effect that there is nothing in Roman Law or English Common Law which empowers a father to appoint a guardian for his minor children. Mr. Moyle in his book on Roman Law at page 13 with regard to the Twelve Tables makes this observation. "Nor did they include the *leges regaiae*, law and religion having now been differentiated. Much again relating to the effects of legal acts and dispositions which was the matter of common knowledge and formed no subject of dispute remained, as we might say, "Common Law" the familiar possession of every citizen." Liege in his book on Roman Law describes the various kinds of *tutela*. *Tutela testimentaria* was appointed by will. The duties of *tutela* are set out at page 101 of his book. Pollock and Matiland in their history of the English Law at page 314 trace the origin of wills to very early times. "We may believe that even in the first days of Christianity the Church was teaching that the dying man was in duty bound to make such atonement as possible for the wrongs that he had done and to devote to the relief of the poor and other pious works a portion of the wealth that he was leaving behind him * * * * * From the middle of the 9th century, we begin to get documents which are spoken of as the Anglo-Saxon wills and testaments." Vol. II, page. 312

With regard to guardianship the learned authors make this observation at page 445 of the same volume: "This part of our law will seem strange to those who know anything of its next of kin. Here in England old family arrangements have been shattered by seignorical claims, and the King's Court has felt itself so strong that it has had no need to reconstruct a comprehensive law of wardship. That the King should protect, all who have no other protector, that he is the guardian above all guardians is an idea which has become exceptionally prominent in this much governed country. The King's Justices see no great reason why every infant should have a permanent guardian because they believe they can do full justice to infants." The testamentary power was hotly opposed by the King and his officers while it was sedulously supported by the Church and its dignitaries. Finally the Church triumphed. Until recently the Ecclesiastical Courts dealt with all testamentary matters and granted probate. So it was necessary in the time of Charles II to have a statute empowering a father to appoint a testamentary guardian. This does not mean that under the Common Law the father had not the right of guardianship but under the peculiar tenures obtaining in England and the law of primogeniture the power of the father to appoint a guardian for his heir was resisted till the legislature had to intervene. There is nothing in the law of tenures in this country to militate against the right to guardianship of a father, and therefore it cannot be contended that that right was denied in ancient times. The decision in *Chidambaram Pillai* v. *Rengaswami Nayaker* (5) can only govern cases where a testamentary guardian is sought to be imposed upon the co-parceners of a joint Hindu family. It cannot be extended so as to take away the right of a father to appoint a guardian for the person of his minor son.

The source of law is custom, judicial decisions and statutes. The custom as now prevalent recognises the father's right as shown by the numerous wills in which a guardian is appointed for the minor children by fathers; and the judicial decisions have recognised the right at least from the time of *Soobah Doorga Lal Jha* v. *Rajah Neelanand Singh* (12): and the fact that the

correctness of that decision has not been questioned for a long number of years can only be attributed to the consciousness of the people that it was in accordance with the custom prevailing among the people. I am led to make these observations in the hope that the decision in *Chidambaram Pillai* v. *Rangaswami Nayaker* (5) will come up for re-consideration before long.

In the present case the minor is girl. She can have no community of interest in property with her father. The question of joint family status cannot come in. I hold that it is the inherent right of a father to have the custody of his minor children and that right is transmissible by will or testament, and there is nothing in the Hindu Law to prevent such transmission.

There is a further argument which I need only mention, for it has not been pressed before us, that is, the applicability of the Code of Manu to the Dravidians of this presidency. The English Judges who administered justice in the days of the East India Company took their law from the Pandits who always looked up the ancient texts for guidance. The more ancient the text the greater was its sanctity and *ergo* its binding character. This view was sedulously propagated by the Pandits, and the Judges who were ignorant of the customs of the people, naturally adopted the view of the Pandits. This question need not be pursued further. But it should be remembered when it is sought to apply wholesale what is foreign to the Dravidians to the conditions now prevailing. The Courts in India are enjoined to decide cases according to justice, equity and good conscience where no specific rule exists. There being no specific rule against the appointment of a testamentary guardian by a father for his minor children either in Hindu Law or in any valid custom, I hold that a father has power to appoint by will a guardian for the person of his minor children whether there be joint family property or not; and that right does not depend upon the father being able to devise by will any property to his children for whom he appoints a guardian.

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SCHWABE, C.J. AND KRISHNAN, J.

Anglo-Persian Oil Company, Ltd., by their Agents Messrs. Shaw Wallace & Co., Limited, Madras—Defendant-Appellant.

v.

P. S. Panchapakesa Aiyar—Plaintiff-Respondent.

O. S. A No. 59 of 1923, decided on the 20th August, 1923, from the judgment of Kumaraswami Sastri, J., dated 9th July, 1923.

Arbitration Act, S. 19—Where there is agreement to refer, party may choose the alternative in the action unless he is estopped but defendant may be mulcted in costs if he led plaintiff to file suit.

If there is a submission for reference to arbitration and a party chooses to bring his suit, the other party can then decide whether or not he will remain before the Court, which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration. If he had misled the plaintiff in some way into bringing the suit, it might be a good ground for punishing him in costs and if the misleading had been definite enough to amount to a particular statement that he would not apply to have the matter referred to arbitration and would submit to the jurisdiction of the Court, it might even amount to an estoppel, so as to prevent him from making an application thereafter. The Court, where there is a submission to arbitration, in order to refuse to stay the proceedings, must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, that is, really saying in other words, that the onus is on the party resisting the application for stay to show some sufficient reason why in the particular case the parties should be relieved from the obligation which they have contracted, namely, that their case should go before arbitrators selected by them and not before the ordinary tribunals of the land. There are certain well-defined instances where a court almost invariably refuses to stay, such as a case where there are serious allegations of fraud. There are cases where the point involved is a novel or difficult point of law which the Court is satisfied is bound to come back by way of special case to it to decide or where it comes to the conclusion that the sending of the case to the arbitrators will involve a waste of time and expense. [P. 337, Cs. 1 and 2.]

Vere Mockett instructed by *Short Bewes & Co.*—for Appellants.

T. S. Anantarama Aiyar—for Respondent.

Schwabe, C. J.:—This is an interlocutory appeal from the order of Kumaraswami Sastri, J., refusing to stay an action on an application made under the Arbitration Act, the suit being on a contract which contains

an arbitration clause referring any question or dispute which may arise under the contract to two European merchants resident in Madras and in the event of their disagreeing, to an umpire chosen by the arbitrators before commencing the reference.

The view expressed by the learned Judge in his judgment is that as the defendants had been threatened with legal proceedings for a considerable time and had not then called the attention of the plaintiffs to the arbitration clause or said that they were willing to refer to arbitration and objected to the litigation, that is a ground for refusing to stay on an application on the part of the defendants after the action was brought. I do not agree. There is no authority in support of the proposition which has been adduced before us and I am satisfied that the reason is that there is no such authority and I can see no ground on principle for so holding. The law provides that if there is a submission for a reference to arbitration and a party chooses to bring his suit, the other party can then decide whether or not he will remain before the Court, which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration. If he had misled the plaintiff in some way into bringing the suit, it might be a good ground for punishing him in costs and if the misleading had been definite enough to amount to a particular statement that he would not apply to have the matter referred to arbitration and would submit to the jurisdiction of the Court, it might even amount to an estoppel, so as to prevent him from making an application thereafter. But I can see nothing of the kind in this case.

The question then remains as to whether or not this is a case where the discretion of the Court under section 19 of the Arbitration Act should be exercised in favour of the defendants by referring to arbitration or whether this is a case which should be kept before the Court. In that matter the learned Judge has not exercised any discretion; but on appeal as we are disagreeing with the grounds which he has given, it is open to the unsuccessful party below to ask us to exercise the discretion which he could have asked the learned Judge to exercise there. We, therefore, consider it for ourselves. As I understand the principle in England and here, the Court, where there is a submission to arbitration, in order to refuse to stay the proceedings, must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, that is, really saying in other words that the *onus* is on the party resisting the application for stay to show some sufficient reason why in the particular case the parties should be relieved from the obligation which they have contracted namely that their case should go before arbitrators selected by them and not before the ordinary tribunals of the land. There are certain well-defined instances where a Court almost invariably refuses to stay, such as a case where there are serious allegations of fraud. There are cases where the point involved is a novel or difficult point of law which the Court is satisfied is bound to come back by way of a special case to it to decide or where it comes to the conclusion that the sending of the case to the arbitrators will involve a waste of time and expense.

Having considered this case, I am not satisfied this is a case which it is not proper to refer to arbitration. From several aspects of the case, it is clear that evidence will have to be gone into unless the arbitrators are persons who have knowledge of their own so as to make it unnecessary to have the whole evidence before them. The actual point of construction, as I understand it, is not a point which seems in any way beyond the powers of a commercial man to grapple with. If at any time there is a really difficult point of law in which the opinion of the Court is required, there is ample provision in the Arbitration Act for taking the opinion of the Court.

In these circumstances, this order is wrong and the appeal must be allowed with costs here and the action stayed. The costs of the application before the learned Judge will follow the event of the arbitration. Certified for Counsel in the motion before the learned Judge.

Krishnan, J.:—This case is governed by section 19 of the Indian Arbitration Act of 1899. Under that section the Court should refer in accordance with the arbitration clause in the contract a case like this to arbitrators unless it is satisfied that there is sufficient reason why it should not do so. The section puts the burden upon the person who seeks to get the stay refused to show good reason for

taking such action. The learned Judge in his judgment has given two reasons for refusing stay in this matter and for going on with the suit in Court. He says that there is no sufficient indication in the correspondence nor even in the replies to the lawyer's notices threatening legal proceedings, that the defendants were ready and willing to have the matter arbitrated upon. Apparently this refers to the last clause of section 19 which lays down as one of the conditions for the exercise of the discretion under the section that the applicant was at the time when the proceedings were commenced, and thereafter ready and willing to do all things necessary for the proper conduct of the arbitration. The mere fact that in the replies to letters sent by the opposite side threatening legal proceedings the defendant company did not write back to say " No, you cannot take legal proceedings against me " is no ground for holding that they were not ready and willing to submit to arbitration if it became necessary to do so. The plaintiff in this case never asked the defendant to nominate his arbitrator or do anything in connection with the arbitration in this case. If he had done so and if the defendant had refused to agree, it might well be said that he was not ready and willing to do all things necessary for the proper conduct of the arbitration. I am unable to accept the learned Judge's view, that in this case there is any indication either in the correspondence or in the replies to the lawyer's notices that the defendant was not ready and willing to have an arbitration.

The other ground taken by the learned Judge is that already a heavy stamp fee has been paid for the case and that it would be a waste of money if the case is sent to arbitrator. That is a matter which defendant could not have helped. If the plaintiff knowing full well that he was bound by the arbitration clause rushed into Court and spent money in Court-fee, that could not in any way affect the defendant's applying for stay under section 19, for all that he has to do under the section is to apply to the Court before filing his written statement to stay the suit. The expense of paying Court-fee would have been incurred already in every case; it cannot well be treated as a good ground for refusing to stay the case.

These are the two grounds upon which the learned Judge has based his order refusing the stay. The respondent before us has taken another ground as well in support of the order of the learned Judge. He contends that the question which has to be dealt with in the present dispute being the construction of a written contract between the parties, it is a matter more fit for the Court to dispose of, than for arbitrators and that therefore the Court should retain the case on its own file and not refer it to the arbitrators. As regards that point the learned Chief Justice has fully dealt with it and I need hardly go over the same grounds as I agree with him in what he said on the point.

The learned Judge has not put the case on that ground at all so that we cannot say that he exercised his discretion on such a ground as that. We are therefore free to exercise our own discretion on the point and in exercising that discretion I am satisfied that this is a fit case for staying the action and for sending it to arbitrators as the construction of the document as well as the facts to be found in the case seem to be more fit for two European merchants who are familiar with oil contracts to deal with.

In these circumstances I agree with the learned Chief Justice that this appeal must be allowed and that the stay applied for should be ordered. I agree also as to the order about costs proposed by the learned Chief Justice.

Appeal allowed.

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RAMESAM AND WALLACE, JJ.

Thaikkottathil Kunheen and others—Accused-Petitioners.

Cr. Rev. Case No. 66 of 1923, decided on the 2nd August, 1923.

Crim. Pro. Code, S. 223—Accused convicted under S. 126, Railways Act, on the strength of S. 149, Penal Code—No mention of charge under S. 149, Penal Code—Conviction is illegal.

The accused had been convicted, *inter alia*, of an offence under S. 126, Railways Act, the conviction being by force of S. 149, Penal Code. The charge framed against them made no mention of S. 149, Penal Code. *Held*: the conviction by force of S. 149, Penal Code, was illegal. [P. 339, C. 2.]

P. Govinda Menon—for Petitioners.

The Public Prosecutor—for the Crown.

Ramesam, J.:—The petitioners in this case (accused 4 to 9, 11, 12, 14, 15, 16, 19

to 21, 23 to 27) were convicted, along with others, under section 143, Indian Penal Code, and section 126 of the Railways Act.

The propriety of the conviction under section 143, Indian Penal Code, has not been questioned before us. As to the other, it was contended before us that the conviction is erroneous, as no specific acts on the part of the accused, in respect of the railway line have been proved. The prosecution evidence merely amounts to this, *viz.*, that the accused were members of a large mob of about 500 Moplahs, some of whom (not identified with the accused) removed rails from the line, damaged the points and signals and cut the wires of the block system.

The learned Public Prosecutor contends that the conviction is right, if considered as one under section 126 of the Railways Act, read along with section 149, Indian Penal Code. Assuming this contention may be ultimately upheld, though it is opposed to the decision in Criminal Appeal No. 191 of 1922, there is the further difficulty in this case that the accused were not charged under section 126 (Railways Act) and section 149, Indian Penal Code. No reference is made to section 149, at any stage of the proceedings in the Court below. The learned Public Prosecutor contends that it is unnecessary to mention it, that it does not create a new offence, that the application of the section is analogous to the application of sections 34 and 35 and 114 of the Code. It may be that, to a certain extent, it is analogous to section 114. But, on the other hand, it may be that the omission to refer to the section in the charge is a serious defect and considerably prejudices the accused. In Referred Trial No. 85 of 1922 Oldfield and Devadoss, JJ., held that the conviction under section 302 was bad, when it would be sustained only under sections 149 and 302, section 149 not being mentioned in the charge. I agree with this decision. In Cr. R. C. No. 662 of 1921, his Lordship the Chief Justice, dealing with the converse contention that the only charge was under sections 149, 353 and 341 and that there was no charge under sections 353 and 341 separately, says :

"It is intended to charge these persons and does charge them both with the offence under S. 149 and also separately with the offences under Ss. 353 and 341.

This language suggests that the offence under section 149 may be regarded as a separate offence. However this may be, I do not think it is necessary to lay down a different rule, from that laid down in Referred Trial No. 85 of 1922. The contention of the learned Public Prosecutor must therefore be disallowed. I agree with my learned brother in thinking that this is not a matter, in which it is necessary to order a retrial having regard to the time that elapsed.

The result is, the Revision Petition must be allowed, so far as the conviction under section 126 is concerned and the rest of it is dismissed. The accused will undergo only the sentence of six months' imprisonment, with reference to the conviction under section 143, Indian Penal Code.

Wallace, J.:—The petitioners in this case have been convicted, *inter alia*, of an offence under section 126, Indian Railways Act, the conviction being by force of section 149, Indian Penal Code. A technical plea is raised on their behalf that since the charge found against them made no mention of section 149, Indian Penal Code, the conviction by force of that section is illegal, and the point for decision is whether, when an accused person is convicted of an offence constructively, by force of section 149, Indian Penal Code, it is necessary that the charge should have set out that section.

2. It is obvious that section 149 is not a section, which creates in itself an offence. The offence committed was one under section 126, Indian Railways Act, and that offence was set out in the charge. Hence section 221, Criminal Procedure Code, has been complied with. But appeal is made, I presume to section 223 and I am of opinion that that must prevail. I think it was essential that the petitioners should have had notice that the charge under section 126, Indian Railways Act, was a charge not that they had themselves physically taken part in that offence, but they were members of an unlawful assembly, which in prosecution of its common object committed that offence, or that they, being members of that assembly, knew that such offence was likely to be committed by it in prosecution of its common object. This was, in my opinion, essential in order to give appellants sufficient notice of the matter with which they were charged. Otherwise, the

petitioners would not definitely know which of three charges, *i.e.*, the charge of the substantive offence and the two alternative charges by force of section 149, they were being called upon to meet.

3. The inclusion of section 149 in the charge also ensures that the Court has given and will give its mind to the question of the guilt of the accused from the point of view of that section. The judgment in this case shows no indication that that was done.

4. I hold, therefore, that section 223, Criminal Procedure Code, was not followed and that the charge thus was defective and erroneous. The next question will be whether the petitioners were in fact misled by such defect or error, so that it has occasioned a failure of justice (section 225). I think there can be no doubt that it has prejudiced the petitioners' defence. It may well be that the effect of section 149 may be different on different members of the same unlawful assembly (see *Jahir-ud-din* v. *Queen-Empress* (1).) So far from considering this aspect of the case, the lower Court has not even recorded a finding, as to what the common object of the unlawful assembly was, while the petitioners were members of it, or whether petitioners knew that an offence under section 126, Indian Railways Act, was likely to be committed by it in prosecution of its common object. In addition to this, the charge, as it stands, might well have led the petitioners to believe, as they plead that they were called upon to answer a charge of having themselves physically taken part, in the destruction of the railway to support which there was no evidence on the prosecution side.

5. I would therefore agree with the order proposed by Ramesam, J. Considering the time that had elapsed since the offence, I agree that this is not a case for ordering retrial, for the offence under section 126, Indian Railways Act, by force of section 149, Indian Penal Code.

6. I would add that to comply strictly with the law, a Court trying an accused person for an offence, which is an offence by force of section 149, Indian Penal Code, ought to state that fact and name that section in the charge.

Sentence reduced.

(1) (1895) 22 Cal. 306.

1924 Madras 340.

ODGERS AND HUGHES, JJ.

Mrs. K. Burke—Accused-Appellant.

v.

T. C. W. Skipp—Complainant-Respondent.

Cr. App. No. 72 of 1923, decided on the 6th September, 1923, against the order of the District Magistrate in C. C. No. 77 of 1922.

(a) *Penal Code, Ss. 499 and 500—Publication to a third person is essential—The libel should have been read by at least one other person than the defamer and the defamed—Mere communication to the person defamed is not enough—The prosecution should prove affirmatively that the accused published the libel and the fact that the accused has omitted to deny publication will not supply the deficiency—But words written outside a cover may be presumed to be published notionally.*

A letter is deemed to be published both where it is posted and where it is received. It is a question of opinion in each case whether a charge of ingratitude is defamation. [P. 343, C. 2.]

Where on an envelope sent by the accused to the complainant there is a strongly worded moral maxim against ingratitude but there is nothing in the writing to connect it with the complainant or to show that any people understood it in a defamatory light, it is not defamation. [P. 343, C. 1.]

Where A sends to the complainant a letter stating that he (A) had received it from the accused but A's covering letter is not produced and A was not examined and there was no other evidence that the accused had sent the letter except the complainant's alleged belief, *held* that there was no evidence sufficient to support complainant's case. [P. 343, C. 2.]

(b) *Criminal trial—Production of libel in original is essential.*

In case of written defamation the Court should insist on the production of the original and should not easily admit certified copies. [P. 341, C. 2.]

(c) *Crim. Pro. Code, S. 198.*

No specific reference to every exhibit need be made in a complaint of defamation. [P. 341, C. 1.]

L. A. Govindaraghava Aiyar—for Appellant.

K. S. Jayaram Aiyar—for Respondent.

V. L. Ethiraj—for the Crown.

Odgers, J.:—In this case the appellant was charged under section 500, Indian Penal Code, with having defamed the respondent. The alleged defamation falls under two heads, which have been called in this case, Ex. A (1) and Ex. B. In the complaint, Ex. B, the material portions thereof are more or less stated in detail in paragraph 4. As regards Ex. A (1), it is said that the complaint is defective, in

that there is no specific reference to Ex. A (1) in it. Paragraph 3 of the complaint runs :

"That the accused, on learning of the said marriage, *i.e.*, the second marriage of the complainant, acted maliciously, in spreading columnious reports, regarding the complainant's character, with intent to defame him and ruin his standing and position."

Several authorities were cited to induce us, to hold that, as Ex. A (1) was not specifically referred to, in the complaint, that there was no complaint at all as regards that defamation and that, therefore, the whole proceedings with regard to that item are null and void. I have carefully considered the cases cited, namely, *Empress of India* v. *Kallu* (1), *Queen Empress* v. *Deokinandan* (2) and *In re Pedda Anjinigadu* (3) and I think that they have no bearing on the present case. All that section 198 of the Criminal Procedure Code requires is that :

'no Court shall take cognizance of an offence falling under.....Chapter XXI of the Indian Penal Code.. .....except upon a complaint made by some person aggrieved by such an offence.'

In *Chidambaram Pillai* v. *Emperor* (4) it was held that it was at most an irregularity, if, in a complaint of sedition, the seditious speeches and words were not set out. The charge in the present case is quite specific and contains the words alleged to be defamatory in Ex. A (1). I am of opinion that this objection fails.

A great deal of our time and a great deal of the time and the ingenuity of the learned Vakils, who appeared before us, were wasted on account of the manner in which these proceedings had been conducted in the lower Court. The alleged libels themselves were apparently filed in the District Court in Bangalore, in connection with a suit, which the daughter of the accused had brought, against the complainant, in the present case, for breach of promise of marriage and seduction. As we hear, judgment went against the complainant in that case, for a considerable sum, and he appealed to the Honourable the Resident from that judgment. Considerable time was occupied in a discussion, as to whether or not the originals were actually in the lower Court, when this case was heard. The complainant has sworn to an affidavit, in which he says that the originals were in Court and he gave this deposition with reference to them. In this deposition, however, which he signed as correct, the reference is, with a single exception, to certified copies and not to the originals. It strikes me as an extraordinary way to proceed with either a criminal matter in defamation, or a civil action, without the alleged libels in original being not only not produced, but closely scrutinised by the Court and placed before the witnesses. The learned Vakils on either side could be of no assistance in this respect, as neither of them appeared in the Court below. Mr. Jayarama Aiyar for the respondent in this appeal argued that a further opportunity should be given to the prosecution to produce the originals ; but, for the reasons I am about to give, it seems to me that such a course would not only be unfair to the accused in the appeal in its present state, but further, that points for consideration here can be disposed of, without reference to this point.

I may perhaps usefully make some general remarks with regard to charges of defamation, before I come to the particular matters charged in the present case. It seems to me to be undoubted that the law in India demands publication, *i.e.*, that the defamatory matter was read by at least one other person than the defamer and the defamed. The words of section 499, Indian Penal Code, are :

" Makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, etc. "

To my mind, a person who makes an imputation intending to harm is not guilty of an offence, if he either makes such imputation and, for instance, locks it away in his safe, or otherwise prevents it, from getting to the knowledge of anybody except himself. The intention to harm can only be evidenced by some overt act, which in this case would be publication as it is called, *i.e.*, bringing it to the knowledge of some person other than the defamed. I think this is clear from Expln. 4 to the section, where it is pointed out that a person's reputation is not the estimation in which he holds himself, but the estimation in which he is held by others. Thus it is impossible to harm, unless

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(1) (1883) 5 All. 233 = (1883) A.W.N. 1
(2) (1887) 10 All. 39 = (1887) A.W.N. 264.
(3) (1921) 13 M.L.W. 695 = (1921) M.W.N. 514.
(4) (1909) 32 Mad. 3 = 5 M.L.T. 1 = 9 Cr. L.J. 108 = 1 I.C. 22.

these others, or at least one of them, has knowledge of the defamatory statement. As has been constantly pointed out, the English Criminal Law of libel is different. There, a defamatory statement made only to the person defamed may be the subject of a prosecution, provided the defamation would lead to a breach of the peace. This view is supported by the Full Bench ruling in *Queen-Empress* v. *Taki Husain* (5). It is perfectly clear what the question before the Full Bench there was, from the judgment of Mahmood, J., at page 219 of the report. He says:

> "the question before us is an extremely limited one, namely, whether or not a libellous communication made only to the person whose character is attacked amounts to the offence of defamation, as defined in S. 499 of the Indian Penal Code."

and the question is answered by the majority of the Full Bench in the negative. This being the law, it is clearly the duty of the prosecution to prove affirmatively that the accused published the libel (see *Jeremiah* v. *Vas* (6)) and the fact that the accused has omitted to deny publication will not supply the deficiency. In that case, a difference of opinion arose between Sundara Aiyar, J., and Phillips, J., on the question, as to whether the conviction should be set aside, or fresh evidence recorded, where the Magistrate had improperly refused to take evidence, which the prosecution attempted to adduce. On reference to a third Judge (Benson, J.), additional evidence was taken. We have no evidence in the present case, that the prosecution protested, when the District Magistrate returned the original defamations to the Resident's Court, though it is said that the Counsel for the accused did protest against the reception of certified copies. I think the learned District Magistrate was wrong in conducting the proceedings on certified copies alone, if in fact he did so; but I am willing for he purposes of this case to assume that Mr. Skipp's affidavit is correct and that he actually had the originals in his hands when he gave his evidence.

Now, Ex. A (1) is said to have been a letter posted in Bangalore by the Appellant bearing postal seal:

> "Bangalore, 4th January 1922, 8-45 a. m."

and the following words were written on the outside of the cover, though it is not clear from the evidence, whether they were written on the front or the back of the cover:

> "Worse than the thief is the ingrate, for he is a thief who steals our goodness and kindness. Then stabs you, then twists the dagger."

It was addressed to Mr. T. C. Skipp St. Marks Square, Local. Mr. Skipp's evidence with regard to Ex. A (1) is exceedingly meagre. He say that some time in January, 1922, he received a letter from the accused or rather a new year wish and that Ex. A (1) is a copy of the words written on the cover. He further says:

> "I am positive these letters" (including Ex. B to which further reference will be made) "were written by the accused. She has admitted them in Court".

To begin with, assuming as I have said, that Mr. Skipp had the original in his hands and that it bears the post mark as stated, it is to my mind doubtful if Mr. Skipp's deposition can be said to be a proof of the handwriting of the accused. I am assuming in his favour that the letter was posted and received by him. As the words were written on the outside of the communication, it would fall within the decisions relating to postcards. It has been held that there is evidence of publication, if the libel be written on a postcard. Lord Reading, C.J., in *Huth* v. *Huth* (7) says:

> "The mere fact that the words are written on a postcard which is posted must be taken as some evidence that a third person will read it or has read it."

The publication in this sense is merely notional. No person has been called to actually prove that it was read. As I have already stated, this may not be necessary; but more significant still, no person has been called to say that he or she read the words complained of and connected them with Mr. Skipp, the addressee. In the absence of the original, which is again to be greatly deplored, I will assume in favour of the prosecution that the words complained of were written on the front of the cover and therefore must have been more or less close to the name of the addressee. If the

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(5) (1884) 7 All. 205 = (1884) A.W.N. 340 (F.B.).
(6) (1911) 36 Mad. 457 = 22 M.L.J. 73 = 10 M.L.T. 506 = (1911) 2 M.W.N. 576 = 12 Cr.L.J. 585 = 12 I.C. 961.
(7) [1915] 3 K.B. 32 = 84 L.J.K.B. 1307 = 113 L.T. 145 = 31 T.L.R. 350.

words are defamatory,—on which more hereafter—it appears to me extremely doubtful whether it can be presumed that, in the absence of positive evidence that the words were ever actually read by anybody, the words are connected with Mr. Skipp. The words are said to be taken from a book of moral phrases and maxims called "Brass tacks" and I find it extremely difficult to say that the words must inevitably have been taken to refer to Mr. Skipp, by reason of the national publication which is presumed, when an open communication is sent through the post. Are the words defamatory? There is one case of the year 1869, *Cox* v. *Lee* (8), in which it was held actionable to charge a man with ingratitude. There is no question, of course, that this could not be the subject of a criminal charge under the English law. I am very much inclined to doubt whether, under the terms of section 499, Indian Penal Code, to charge a man with ingratitude involves an intention to harm the reputation of such person. It would depend largely on evidence as to the reputation that the person enjoyed in the society, in which he moved, for gratitude or other proper, but not necessary, ingredients in a good character. I am, however, content to say that presuming publication in favour of the complainant and even assuming that the words in question are capable of a defamatory meaning, there is no ground in the circumstance of their appearing in Ex. A for connecting them with the complainant.

Now with regard to Ex. B: The evidence with regard to Ex. B is also in my opinion strangely deficient. It again depends entirely on the deposition of the complainant himself. B is said to be a letter written to one of the complainant's sons, then in England, by the accused and it contains statements which, it has not been contended, may not be defamatory of the accused. Here again, the complainant says he is positive that this letter was written by the accused and that she has admitted them in Court. We have no evidence but it may be that this so-called admission refers to something that occurred in the breach of promise trial. The admission has not been produced or exhibited, and, under the circumstances, we can pay no regard to it whatever. It is said or assumed that Ex. B must have been posted by the accused in Bangalore, to the complainant's son in England, and it is then said by the complainant that he received the letter complained of, Ex. B, enclosed in a letter of the son to him, the complainant. Much argument was expended on the question as to whether, assuming this letter was posted in Bangalore, there would be any publication in British India, to bring it within the jurisdiction. As I have stated above, the complainant must prove publication in fact. The words must be published within the territorial jurisdiction. *R.* v. *Burdett* (9) is an authority for saying that a letter is deemed to be published both where it is posted and where it is received and opened. Here even the original of Ex. B would seem to bear no marks of posting whatever the complainant says:

"Cyril (that is one of his sons) sent me Ex. B with a letter. I have not got that letter, I do not know where it is."

This seems to justify the assumption that Ex. B was enclosed in a letter of Cyril's to his father, the complainant. There is no legal evidence that Cyril ever received Ex. B, or returned the letter with its original cover; and there is no evidence from the complainant of any posting of the letter by the accused in Bangalore or elsewhere. I am ready to assume in favour of the prosecution that, if it is proved that the letter had been posted, it is immaterial whether it had been posted in Bangalore or in Mysore Territory. The learned District Magistrate as J. P., would have jurisdiction over European British subjects, to which class the accused belongs, in Mysore. But as to the posting of the letter, there is again only the presumption that, when the complainant said that he was postive that that letter was written by the accused, that was sufficient to prove her handwriting. Assuming that posting in Bangalore, if proved would be sufficient publication, unless the accused could show that it had come directly and unread into the possession and control of the complainant, on the authority of *R.* v. *Burdett* (9), it seems to me fatal to the prosecution case that the son was not examined, either in person, or in commission to prove receipt of this letter. That

(8) [1869] L.R. 4 Ex. 284=38 L.J. Ex. 219=21 L.T. 178.

(9) 4 B. and A. 95.

will be evidence that it had been sent through the post. It would also have been satisfactory, but perhaps strictly unnecessary, if he could have proved that he had read the contents. On the bare deposition of the complainant, with all the deficiencies, it, in my opinion, presents, I am of opinion that it has not been proved that Ex. A (1) emanated from the accused. This seems to be fatal in the case of Ex. B also.

Before finishing, I should like to emphasize the fact once more that, though I expressed great surprise at the hearing, at the course adopted by the learned District Magistrate, in allowing certified copies of the libels to go in, my judgment is based on the assumption that nothing but the original libels were before the Court and in the hands of the witness, when he gave his deposition.

On these grounds, I am clearly of opinion that the conviction on neither of these alleged libels can stand and that the conviction must be set aside. The fine inflicted on the accused must be refunded, if it has been paid.

Hughes, J. :—The accused has been found guilty of defamation under section 500 of the Indian Penal Code. There are two counts in the charge. The first count relates to certain alleged defamatory words said to have been written by the accused, on or about 12th January, 1922, at Bangalore, in a letter to the son of the complainant. The second count relates to certain words, alleged to have been written by the accused, on or about 4th January, 1922, at Bangalore, on the outside of envelope, addressed and posted to the complainant.

The case has been badly handled throughout. The complaint itself is exceedingly vague and does not even specifically refer to the matter of the second count. There is a mass of irrelevant evidence. The deposition of P. Ws. 2 to 9 are of no use whatever. But the most serious defect is that the original writings containing the alleged defamation referred to in the counts have not been marked as exhibits, though it appears they are available and could have been marked. Instead of that, certified copies of those documents, which have been exhibited in the Civil Court, have been treated as evidence in this case. If it had been necessary. I think additional evidence should have been allowed to be taken in this appeal, so that the originals might be sent for and the complainant examined with reference to them; for it appears to me that the Court was at fault in not seeing that the originals were filed. The certified copies should not have been marked as exhibits and it was the duty of the Court to insist on the originals being filed. If the Court had insisted, the complainant would have done so; for it seems from his affidavit the originals were actually in Court.

But in the view I take of this case it is not necessary; for even assuming the documents were written by the accused, a fact which she has not denied, I do not think the conviction can stand.

Taking the second count first, it is doubtful whether the description of a man as an 'ingrate' would lower in the estimation of others his moral or intellectual character or his credit (*vide* Explanation 4 of section 499, Indian Penal Code). But taking it that it is defamation to style a man an ingrate, with the added commentary that an ingrate is worse than a thief, there is nothing to show that the words referred to the complainant. No witnesses have been called to speak to this and the complainant himself does not say that the words refer to him.

The conviction as to the second count therefore cannot be supported.

With regard to the first count, the difficulty is one relating to jurisdiction. Some passages in the letter (copy of which is marked as Ex. B) are clearly defamatory. In the complaint, it is alleged that the accused wrote the letter and it was posted at Bangalore and sent to the complainant's son, who was in England. There is no direct proof that the letter was written in Bangalore but we are asked to presume this fact because the letter is headed "22 Cubbon Road." Such a presumption has been drawn, but personally I think it is not a safe presumption. People may put their usual address at the head of their letters, whether actually written there or not. However if the letter was written at Bangalore that would not be enough to give jurisdiction to the District Magistrate, Bangalore. It would be necessary to prove that it was there handed over to somebody to take to the addressee, or that it was there posted. If the letter was so handed over or posted at Bangalore, the accused would have had no further

control over it and that offence of making an imputation, with intent to harm reputation, would so far as the accused is concerned be complete [*vide Krishnamurthy Aiyar* v. *Parasurama Aiyar* (10)]. But in this case there is no evidence that the accused handed over the document to anybody at Bangalore, or that she posted it there. There is in fact no evidence really that the letter was posted at all. The complainant says that his son sent the letter on to him. But there is no evidence as to how the son got the letter. The letter, if any, which was sent by the son, enclosing this letter to his father, has not been produced and the son has not been examined as a witness.

We cannot presume that the letter of which Ex. B is a copy, was sent by post to England, or that it was posted at Bangalore Cantonment or City.

It follows that it is not shown that the District Magistrate had the jurisdiction to try this case. The conviction on the first count also cannot be sustained. I agree that the appeal must be allowed and the accused acquitted, and the fine, if levied, refunded.

Appeal allowed.

(10) 1923 Mad. 666=44 M.L.J. 648=17 M.L.W. 164=72 I.C. 69.

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* * 1924 Madras 345.

SPENCER AND DEVADOSS, JJ.

P. Ananthanarayana Aiyar—Petitioner-Appellant.

v.

P. Ramasubba Aiyar—Respondent.

A. A. O. No. 90 of 1922, decided on 30th August, 1923, against the order of the District Judge, Tinnevelly, dated 11th October, 1921.

(a) *Provincial Insolvency Act, S. 78—High Court excused delay in asking for leave.*

Court can excuse delay under S. 78 in the presentation of an appeal or application and in a proper case High Court will excuse the delay in asking for leave to appeal under S. 75 (3). [P. 346, C. 1.]

(b) *Provincial Insolvency Act, Ss. 53, 54—Creditor can apply under Ss. 53 or 54.*

A creditor can move the Court under S. 53 or 54 of the Act to set aside a voluntary transfer, or to avoid a fraudulent preference whatever the circumstances might be. (42 Mad. 322 and 10 L.W. 59, *Dist.*) [P. 346, C. 2.]

(c) *Provincial Insolvency Act (V of 1920), Ss. 68 53 and 54—Creditor's remedy is not only appeal but also the resort to provisions of Ss. 53 and 54.*

The whole tenor of S. 68 is against the view that a creditor's only remedy against the refusal of the Official Receiver to take action under S. 53 or 54 of the Act is by way of appeal under S. 68. A creditor can at any time during the pendency of the insolvency proceedings move the Court under S. 53 or 54 on the ground that the Official Receiver has refused to move in the matter as there is no period of limitation provided for such an application. [P. 347, C. 1.]

It is no doubt the policy of the Insolvency law to prevent a scramble among creditors, to avoid a multiplicity of actions and to have the insolvent's estate wound up with the best possible expedition and with the least amount of expense in the interests of the creditors as well as of the insolvent. The jurisdiction of the Court to make an order under S. 53 or 54 of the Act on a proper consideration of the facts, no matter who moves the Court is not restricted by any of the provisions of the Provincial Insolvency Act. An order made under S. 53 or 55 enures for the benefit of all creditors and not merely for the benefit of a particular creditor. (37 All. 252 and 2 P.L.J. 101, *Foll.*) [P. 347, C. 2.]

(d) *Provincial Insolvency Act, Ss. 53 and 54—Creditor can appeal against order in favour of another creditor under Ss. 53 and 54.*

A creditor is a person aggrieved by an order in favour of another creditor in a proceeding under Ss. 53 and 54. (61 I.C. 924 and 39 All. 152, *Not Foll.*; 62 I.C. 761, 52 I.C. 188, 36 I.C. 761 and 51 I.C. 461, *Foll.*) [P. 348, C. 1.]

(e) *Receiver—Official Receiver must protect the estate for benefit of all creditors and on a creditor giving indemnity for costs conduct proceedings for benefit of all creditors.*

When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the Official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation. A general notice which is sent as soon as a person is adjudicated insolvent asking the creditors to prove their claims is not such a notice as should be given to the creditor who impeaches a particular transaction of the insolvent as being in fraud of creditors. The Official Receiver should represent the estate for the benefit of creditors and place before the Court the result of his inquiry and help a creditor on his indemnity for costs even to appeal against the order of the Court. [P. 349, C. 2.]

P. N. Appuswami Aiyar and *P. V. Krishnaswami Aiyar*—for the Appellant.

K. V. Krishnaswami Aiyar and *T. L. Venkatarama Aiyar*—for the Respondent.

Judgment:—The appellant is one of the two petitioning creditors, who applied to the District Court of Tinnevelly, in I. P. No. 12 of 1919, to have the 3rd respondent in this Court adjudicated an insolvent. One of the allegations in the petition was that the hypothecation in favour of the 2nd respondent was in fraud of creditors. The Official Receiver, Tinnevelly, who is the 4th respondent, sold the hypotheca, free of encumbrance and paid the 2nd respondent in full. The petitioning creditors applied to the District Court, Tinnevelly, to have

the hypothecation declared void, under sections 53 and 54 of Act V of 1920. The District Judge held that the application was an appeal against the act of the Official Receiver under section 68 of the Act and dismissed it with costs, as being barred by limitation, it not having been presented within 21 days of the order of the Receiver. This appeal is against the judgment of the District Judge.

The appeal came on for hearing on 1st August, 1923, when the appellant's vakil, Mr. P. V. Krishnaswamy Aiyar, asked for time, to file an application for leave to appeal under section 75, clause (3). Time was granted and the application for leave to appeal was filed on 6th August, 1923.

Mr. K. V. Krishnaswamy Aiyar objected to leave being granted, as the affidavit on behalf of the appellant was not satisfactory; and he further contended that, even if leave were granted, the appeal would be out of time, as it was presented on 10th January, 1922, without obtaining leave. As the new Provincial Insolvency Act came into force, only in 1920, and as the Insolvency law is not well understood in the Moffussil, we deemed it proper to grant leave, under section 75, clause (3), to file an appeal against the District Judge's order. The appeal as presented, under section 75 (2), having been presented in time, there is no substance in the objection that the appeal is under section 75 (3) out of time. Even if it is, section 78, which is a new provision, not contained in the old Act, empowers the Court to excuse delay in the presentation of appeal or application. This being a fit case for excusing delay, the appeal was heard on the merits after excusing the delay.

Mr. K. V. Krishnaswamy Aiyar raised a preliminary objection that no appeal lay to this Court, as the application to the lower Court was under section 68 of the Provincial Insolvency Act of 1920 and as it was not open to a creditor to move the Court for an order under section 53 or 54 of the Act against an alienee or a creditor, and he relied on *Mariappa Pillai* v. *Raman Chettiyar* (1), and *Jhabba Lal* v. *Shib Charan Das* (2). Application to the District Court was not made under section 68, as is clear from a perusal of the petition. It follows that the District Judge was wrong in treating it as out of time under that section. The question for consideration is, can a creditor move the Court under section 53 or 54 of the Act? None of the decisions relied on by him goes the length of holding that a creditor could not move the Court at all, to set aside a voluntary transfer, or to avoid a fraudulent preference whatever the circumstances might be. The main point decided in *Mariappa Pillai* v. *Raman Chettiyar* (1) was:

"No Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference, or a voluntary transfer made within two years of the adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, an insolvent by a petition duly presented under the Act."

In the course of the judgment there is an observation that:

"it is the Official Receiver who must set the Court in motion to annul a transfer under section 36 or 37."

This observation has to be read in connection with the facts of that case. It was neither laid down, nor intended to be laid down, in that case that, under no circumstances, could a creditor move the Court for an order under section 53 or 54 of the Provincial Insolvency Act of 1920.

In *Jahbba Lal* v. *Shib Charan Das* (2), the petitioning creditor applied to the Insolvency Court for attachment of a certain property as being that of the insolvent. It did not appear that he had ever moved the Receiver to take steps for attaching the property. The Court granted the application and directed the Receiver to attach the property which was done. The sons of the insolvent claimed the property as their own. The Court allowed part of the claim. Both the creditor and the sons appealed to the High Court. Walsh, J., observes at page 155:

"Creditors have a right to prove for their own claims, a right to supply the Receiver with information relating to claims which the insolvent's estate may have against other persons; and they have a right to bring the Receiver's conduct and decisions before the Court, if he declines to act or neglects his duties, but they have no legal interest in the insolvent's estate and no title to represent it. If they want the Receiver to litigate the question they can supply him with funds, or indemnify him against the costs in the event of failure, if he is unable to proceed for want of funds; but it would be contrary to the whole scheme of the insolvency Act, if any one out of a large number of creditors was at liberty to start all kinds of questions and set the law in motion independently of the

(1) (1919) 42 Mad. 322=10 M.L.W. 59=52 I. C. 519.
(2) (1917) 39 All. 152=15 A.L.J. 1=37 I. C. 76.

Receiver. The proper course, if a creditor is desirous of supporting the Receiver and securing a decision in his favour, is to attend the Court to watch the proceedings, or obtain the permission of the Court to intervene as *amicus curiae*."

The learned Judge observed that if the Receiver declined to move in the matter, the proper course for the creditor was to apply to the Court, under section 22 of Act III of 1907; section 22, now section 68, gives a right of appeal to a person aggrieved by any act or decision of the Receiver. The word "act" must be understood in its ordinary sense. It cannot mean a mere omission or refusal to take steps at the request of a creditor. It is not defined in this Act. The General Clauses Act defines the word "act" of the Official Receiver as contemplated by section 68 of the Act. It would be a different matter, if after hearing the parties, he passes an order that the transaction is a valid one. What he does then would amount to a decision against which there is an appeal provided. Section 68 contemplates acts of the Official Receiver, such as selling the property of the insolvent, taking possession of property, and decisions on creditors' proofs of debt, either admitting them or rejecting them. The whole tenor of section 68 is against the view of the learned Judge that a creditor's only remedy against the refusal of the Official Receiver to take action under section 53 or 54 of the Act is by way of appeal under section 68. A creditor can at any time during the pendency of the Insolvency proceedings move the Court under section 53 or 54, on the ground that the Official Receiver has refused to move in the matter, as there is no period of limitation provided for such an application. It may be seen from the recital of the facts in *Jhabba Lal* v. *Shib Charan Das*(2) that what the creditor did in this case was to go over the head of the Receiver and apply to the Court to attach property claimed by persons who were not parties to the insolvency proceedings. The creditors' application is not described as one under section 53 or 54. The Insolvency Court exercised powers of taking possession of property similar to those conferred by section 56 (3). There is an earlier decision of the same Court in *Khushhali Ram* v. *Bholar Mal* (3) to the effect that one creditor can impeach the validity of another creditor's debt and that the Judge is bound to enquire into his petition. The earlier case is not overruled in the latter one and must therefore be regarded as representing the prevailing law in the United Provinces.

It is no doubt, the policy of the Insolvency law to prevent a scramble among creditors, to avoid a multiplicity of actions and to have the insolvent's estate wound up with the best possible expedition, and with the least amount of expense, in the interests of the creditors, as well as of the Insolvent. The jurisdiction of the Court to make an order under section 53 or 54 of the Act, on a proper consideration of the facts, no matter who moves the Court is not restricted by any of the provisions of the Provincial Insolvency Act. Any order made under section 53 or 54 enures for the benefit of all creditors and not merely for the benefit of any particular creditor. There is no rule that the Official Receiver alone should move in the matter and the provisions of sections 53 and 54 do not support the contention that the Official Receiver alone and nobody else can move in the matter. The sections lay down in what circumstances, transfers and preferences shall be deemed void against the Official Receiver. It was held by the Patna High Court in *Hemraj Champa Lall* v. *Ramkisen Ram* (4) that:

"what was contemplated by the procedure provided for by this statute was that the Receiver was the person to impeach any fraudulent transfer or conveyance by the Insolvent of his property. If the Receiver refuses to do so, then it would be open to any creditor to apply to the Judge for leave to institute a proceeding under S. 36 on his own behalf and on behalf of the other creditors. But until the Receiver refuses or declines to act, no one else can do so, because he is the person to set the proceeding under S. 36 in motion."

In *Ex parte Kearsley*: *In re Genese* (5), Cave, J., laid down the course to be pursued by a creditor if the trustee refused to act:

"Now the proper course for creditors, if the trustee refuses to act, or to allow his name to be used, is for them to come to the Court and apply for leave to use the name of the trustee, on giving him an indemnity against costs. On such application, the Court will consider the nature of the proposed proceedings, and, if satisfied that there are *prima facie* grounds for allowing the creditors to proceed will grant the application."

(3) (1915) 37 All. 252=13 A.L.J. 270=28 I.C. 573.

(4) C.W.N. (1917) Pat. 33=2 Pat. L.J. 101=1 P.L.W. 752=38 I.C. 369.

(5) 55 L.J.Q.B. 325=17 Q.B.D. 1=34 W.R. 474 =3 Morrell 57.

(See also Williams on Bankruptcy, 10th Edition, page 373). The practice in English Bankruptcy Courts appears to all intents and purposes the same in India. The petition of the appellant in this case is in substance, such an application. The petitioners alleged that the Official Receiver not only failed to move the Court to set aside the alienation in question, but also that he acted against the interests of the creditors. In the absence of any rules framed under the Act in regard to this matter, when an Official Receiver declines to assert his rights, a creditor can apply to the Court to allow him to use the Official Receiver's name in order to recover the insolvent's property, or to set aside a voluntary transfer, or to avoid a fraudulent preference for the benefit of the creditors. In this case, the requirements of the law have been satisfied by making the Official Receiver a party to the application and the Respondent's contention fails.

It is next contended that no appeal lies against the order of the lower Court, as the appellant is not a "person aggrieved" by the order, and reliance is placed in support of this contention upon *Jhabba Lal* v. *Shib Charan Das* (2) and *Ishar Das* v. *Ladha Ram* (6). In *Jhabba Lal* v. *Shib Charan Das* (2), the Court held that the appellant was not a proper party to the application and he could not appeal against the order, except in the event of an order for costs being made against him, which ought not to have been made and he was not a "person aggrieved" under section 46 of the old Act. In *Ishar Das* v. *Ladha Ram* (6) the Lahore High Court followed the decision in *Jhabba Lal* v. *Shib Charan Das* (2). In *Kumarappa Chettiar* v. *Murugappa Chettiar* (7), Sir Francis Oldfield and Krishnan, JJ., held that a creditor was a person aggrieved by an order in favour of another creditor in a proceeding under section 36 of the Provincial Insolvency Act, III of 1907, to which the Official Receiver, the appellant and the other creditors were parties. This decision was followed in another decision by Oldfield and Seshagiri Iyer, JJ., in *Jagannatha Ayyangar* v. *Narayana Ayyangar* (8). We see no reason why we should not follow these decisions of our Court and hold that a creditor can appeal when he is a party to the decision appealed against. In *Nikka Mal* v. *Marwar Bank, Ltd.* (9), a creditor applied to have a sale by the insolvent declared null and void against the Official Receiver. Though his attention was called to the matter by the Court, the Official Receiver took no action. It was held that the Court, under the circumstances

"had power to entertain the application and further that it was the duty of the Court to judicially enquire into the matter, when it was brought to its notice. This view is strongly supported by the decision in *Kushkali Ram* v. *Bolar Mal* (3) already referred to."

In *Appireddi* v. *Appireddi* (10), Ayling, O.C.J., and Odgers, J., refer to *Nikka Mal* v. *Marwar Bank* (9) and remark with reference to an application to set aside a transfer:

"It may well be that, when the Receiver fails to move in the matter, a creditor may do so."

In the face of these authorities, it cannot be contended successfully that a creditor can never apply to the Court under section 53 or 54 of the Provincial Insolvency Act, when the Official Receiver refuses to act. But it is urged that a creditor is not a person aggrieved by the order of the lower Court, even though it be held that he could move the lower Court for an order under either of the sections. If he could move the lower Court to set aside a transfer or to avoid a preference under section 53 or 54, he cannot be said to be a person not aggrieved by the order of the lower Court passed against him. In *Kumarappa Chettiar* v. *Murugappa Chettiar* (7), a Bench of this Court held that:

"Any appeal against an order passed under sections 36 and 37 of the Provincial Insolvency Act need not necessarily be presented by the Official Receiver, but may be presented by a creditor of the insolvent."

This was again decided in *Jagannatha Ayyangar* v. *Narayana Ayyangar* (8). We do not rest our decision that an appeal lies in this case upon the slender ground that there is an order for costs against the appellant though that is sufficient to dispose of the respondents' objection. If the Official Receiver refuses to move the Court under section 53 or 54, even though a creditor offers to indemnify him against costs in the event of an adverse order

(6) (1921) 62 I.C. 924.
(7) (1916) 36 I.C. 771.
(8) (1919) 52 I.C. 761.
(9) (1919) 52 I.C. 188.
(10) (1921) 45 Mad. 189=41 M.L.J. 606=14 M. L.W. 639=(1921) M.W.N. 816.

against him, such creditor can apply to the Court to permit him to use the Official Receiver's name, or make him a party to the proceeding and may move for an order under section 53 or 54, and if the order is against him and if the Official Receiver refuses to appeal notwithstanding the offer of indemnity against costs, the creditor can appeal against the order and may make the Official Receiver a party to the appeal. In this case, the learned Judge declined to hear the case on the merits and the appellant suffered a legal grievance and, therefore, has a right of appeal. The well known case of *Ex parte Sidebotham, In re Sidebotham* (11) James, L.J., in the course of his judgment referred to the case of *In re Webb, Ex pare Walter* (12) in which it was held that a creditor who had not been heard before the Registrar on the question of the registration of liquidation resolutions was entitled to appeal from the Registrar's order, because the question of registration or non-registration of such resolution was one which affects the interests of all the creditors.

We hold the respondents' contention that no appeal lies in this case to be untenable.

In his deposition in the District Court the appellant alleged that he asked the Official Receiver to take proceedings under sections 53 and 54 of the Act and that the Official Receiver promised to do so but failed to take any action. The Official Receiver did not go into the witness-box and deny the first petitioner's statement that he informed the Official Receiver about the suit transaction. He contended himself with denying it in his memo of October 11th, 1921. The District Judge has not found the 1st petitioner's statement to be untrue but he remarks in paragraph 8 of his judgment:

"It is worthy of note that the condition of sale that the property was to be sold free of encumbrance and subject to discharge of the amount due to the 1st respondent out of the sale proceeds was only announced to the bidders on the day of the sale and before the sale commenced and was not mentioned either in the sale notice (Ex. IV (*a*), posted on the notice board of the Official Receiver's office nor in the brief notice of sale sent by post card to creditors (Exs. II, IV, etc.)."

The mortgage is one of four alienations made at or about the same time and within three months of the presentation of the petition for adjudication of the 3rd respondent as an insolvent; one of which was set aside by the Court, one was given up by the mortgagee and one was not registered and, therefore, invalid. Any expression of opinion on the evidence might prejudice the trial of the case by the lower Court but it is sufficient to say that there is a case for enquiry on the merits. It is urged for the respondent that a notice was sent to the appellant as well as to other creditors and that he did not take steps in time to have the hypothecation in question set aside. It would not be proper to express any opinion on the conduct of the Official Receiver, as he is not before us, but the memorandum put in on his behalf shows that he has not correctly understood what his duty is in matters of this kind. When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the Official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation. In this case the allegation that the hypothecation in question was a fraudulent one was made in the petition presented for adjudication of the 3rd respondent as an insolvent. A general notice, which is sent as soon as a person is adjudicated insolvent asking the creditors to prove their claims, is not such a notice as should be given to a creditor who impeaches a particular transaction of the insolvent as being in fraud of creditors. The Official Receiver should fix a date for enquiring into the *bona fide* of particular transactions of the insolvent and should give notice to such creditors as have already informed him of the nature of the transaction and should also give notice to others to appear before him and state their objections, if any, to the alienations or alleged fraudulent preferences by the insolvent. He should examine the insolvent as regards the transactions which have come to his knowledge and the substance of his examination should be reduced to writing; and the statements of the creditors and witnesses whom they produce in support of their allegations should also be reduced to writing. If he finds that a certain alienation or other transaction is in fraud of creditors, he should himself move to have it set aside by a Court. But if he is not satisfied that such is the case and, if a creditor is willing to indemnify him

(11) [1880] 14 Ch. D. 458=49 L J. B.K. 41=42 L.T. 763=28 W.R. 715.
(12) [1876] 2 Ch. D. 326=45 L.J. B.K. 105=34 L.T. 701=24 W.R. 834.

against costs in the event of failure, it is his duty to move the Court for setting aside the alienation or other transaction as being in fraud of creditors. He should not in such cases express his own opinion as to the nature of the transaction, but should place before the Court such evidence as the creditor is prepared to produce, for the finding of the Court may differ from that of the Official Receiver, and a trial before the Court will bring out many facts which perhaps the Official Receiver may not be able to get at; and, in the event of an adverse decision of the District Court, if a creditor is willing to indemnify him for the costs of an appeal against the order of the Court, the Official Receiver should prefer an appeal after taking security for costs. The Official Receiver should not consider it the duty of creditors alone to bring to his knowledge the nature of any doubtful transaction, but it is his duty to enquire into the nature of every transaction which *prima facie* does not appear to be proper and *bona fide* and valid. In cases where the transaction is within three months, he should enquire fully into the matter before satisfying himself that it is above board; and, in such cases, it is his duty to call upon the creditors to appear before him on a date fixed for the purpose to prove their allegations against the *bona fides* of the transaction. The Official Receiver should give every facility to the creditors to impugn the transactions of the insolvent which are ostensibly within three months of the insolvency. The order of the District Judge is set aside and he is directed to restore the petition to file and dispose of it according to law.

The appellant's costs of this appeal will be borne by the 2nd respondent.

Order set aside.

1924 Madras 350.

KRISHNAN, J.

In re *Samachari and others.*

Cr. Rev. Cases Nos. 243 and 248 of 1923, decided on the 13th September, 1923.

(a) *Penal Code, S. 414—Separate finding that property is stolen property is essential—Circumstantial evidence may be the basis of such finding.*

The finding that the property in question was stolen property is an essential finding for a conviction under S. 414. Sufficiently strong circumstantial evidence may support such a finding. An accused concealing property believing it to be stolen while really it was not, commits no offence.

It is not necessary to prove in what theft or in what manner the property was stolen. (13 C.L.J. 793, *Expl.*; 6 Bom. 402, *Foll.*) [P. 351. C. 1.]

(b) *Criminal trial—Joint trial.*

The evidence against each accused in a joint trial should be separately scrutinised. [P. 351, C. 2.]

T. Richmond, K. P. Raman Menon, B. Sitarama Rao and *K. Srinivasa Rao* — for Petitioners.

J. C. Adam—for the Crown.

Order:—In these cases, the 1st three accused in C. C. No. 8 of 1922, on the file of the Taluk Magistrate of Adoni, are the petitioners before me. The 4th accused in the case was acquitted by the appellate Court and hence he is not a party to the revision. The four accused were charged under section 414, Indian Penal Code, on the ground that they voluntarily assisted in concealing and disposing of property, namely, a bundle of 233 dressed skins, produced before the Court, which they knew or had reason to believe was stolen property, by transferring the said property from Gooty to Adoni, then by depositing it in different places and by offering it for sale. Both the lower Courts convicted the accused of the offence charged.

The prosecution case is that Messrs. Hazee Sheik Meeran Sahib and Co. despatched by rail 16 bales of tanned skins, from Dronachalam, in Kurnool District, to Madras, that one of the bales was found missing when the train reached Cudappah, on the 1st June, 1922, and that this missing bundle was found in the Sonavala Ginning Factory, where the first accused was offering it for sale. The other accused are said to have assisted, in getting these goods from Gooty to Adoni, and to have also assisted in getting them sent to various places and to have helped towards their sale.

All the appellants pleaded not guilty. To convict the accused under section 414, Indian Penal Code, it is necessary that the property, that is the subject of the charge, should be stolen property and further that the accused should have known, or had reason to believe, that it was stolen property, which they were trying to conceal or to make away with. The finding therefore that the property in question is stolen property is an essential finding for a conviction under section 414. It was argued before the appellate Magistrate,

that assuming all the facts alleged by the prosecution to be true, there was no evidence to show that the skins in Court were identical with those contained in the bale which was lost and that they were stolen property. In answer to this argument, the appellate Magistrate relied upon *Emperor* v. *Bhudankhan* (1), a case which he considered was a sufficient answer to it. That case, as I understand it, only goes to the length of holding that it is not actually necessary to prove in what theft the property was stolen, or in what manner it was stolen. That no doubt is true on the words of the section. It is not necessary to establish that the property was the subject-matter of any particular theft; but nevertheless it must be shown that it was the subject-matter of some theft or other. If an accused person thinking that an article, which is in his possession is stolen property, tries to conceal that property, when as a matter of fact it is not stolen property at all, but property honestly come by, I do not think that any offence under section 414 would be committed; for, the very essence of section 414 is the concealment of stolen property, which the accused knew or had reason to believe to be stolen property. That being so, the appellate Magistrate should have come to some definite conclusion, as to whether the skins in question were stolen property. I do not mean to say that it is necessary to show actually from where the skins were stolen, or that they were identical with the skins lost in transit in the train in this case. The fact that the property dealt with is stolen property may in some instance be inferred indirectly from circumstantial evidence, as from the way in which it is dealt with, by the party dealing with it; this was done in the Bombay case, *Empress* v. *Rango Timaji* (2). But the circumstances must be such, as would justify the conclusion that the property is actully stolen property. In this case the first Court did come to a definite conclusion on the point and held that the skins before the Court were really part of the bales, which had been carried from Dronachalam to Madras and also that the theft of these skins, while in transit, had been proved. The appellate Magistrate has not come to any definite conclusion on either of these points; but he simply relies on the case in 13 Criminal Law Journal, which, he considers, dispenses with the necessity of his coming to a definite conclusion on the points.

As I propose to send the case back to be heard again in appeal, I do not propose to go into the question, whether the facts proved with regard to the conduct of these accused, with reference to the skins, are sufficient in themselves to justify a finding, that the skins were stolen goods. That must be left to the appellate Magistrate to decide, on hearing the appeal again.

Then there are one or two other points, to which I would like to draw the appellate Magistrate's attention. The evidence as regards the 2nd appellant that there is an entry in the account book of the 3rd appellant going to show that he paid rent, on account of the 2nd appellant, is not admissible against the 2nd appellant at all. It is an entry that appears in a book kept by the 3rd appellant and it is difficult to see how it is admissible in evidence against the 2nd accused. It will also have to be considered, whether the statement in Ex. M could be treated as evidence against the 2nd and 3rd accused. Of course, I need not say that the evidence against each of the accused should be separately scrutinised to see whether the offence charged against each one of them is made out against each. I set aside the judgment of the appellate Magistrate, except in so far as it acquits the 4th accused, and remand the appeal to be disposed of by a competent Magistrate, chosen by the District Magistrate. I am not sending the case back to the same Magistrate, who disposed of the appeal, as he has already come to certain conclusions, which may prejudice the accused at the re-hearing.

Case remanded.

(1) (1912) 14 Bom. L.R. 893=13 Cr. L. J. 793=17 I.C. 537;
(2) (1881) 6 Bom. 402.

1924 Madras 351.

KRISHNAN, J.

In re *Ellen and another* (Accused).

Cr. R. C. No. 366 of 1923, decided on 4th September, 1923.

Workmen's Breach of Contract Act, S. 2—Money advanced on condition of service for a certain period—Balance of money to be repaid after the term of service—Arrangement is not unfair.

The agreement was for a sum of Rs. 160 due by the accused, father and son, to the complainant and they agreed to work for a period of one year

and subsequently to repay any money that may be found still due by them to him at the end of the year. They were to be paid Rs. 6 per month out of which Rs. 2 a month were to be taken towards this debt, Rs. 4 being paid to them in cash. There was no obligation under the agreement to work in the tope after the period of one year and the bond then converted itself into a simple money debt bond. The Magistrate merely directed the two accused to work for the period of six months, the balance of the period of one year after deducting the period for which they had already worked. The order did not say that they should work in the tope any longer than they agreed to; the recovery of the balance that may be found due at the end of the year was to be by a suit. *Held*, there was nothing unfair in the arrangement and S. 2 of the Act did not apply.

A. S. Sivakaminathan—for the Crown.

Order:—This is a reference by the District Magistrate of North Arcot recommending that the order passed by the second class Magistrate of Gudiyatham in C. C. No. 230 of 1923 under the Workmen's Breach of Contract Act should be set aside. The District Magistrate considers that the agreement which the second class Magistrate has enforced in this case is "but a cloak for slavery." The agreement was for a sum of Rs. 160 due by the accused, father and son, to the complainant and they agreed to work in his cocoanut tope for a period of one year and subsequently to repay any money that may be found still due by them to him at the end of the year. They were to be paid Rs. 6 per month out of which Rs. 2 a month were to be taken towards this debt, Rs. 4 being paid to them in cash. This working in the tope was to continue for only a year, and there is no obligation under the agreement to work in the tope thereafter; and the bond then converted itself into a simple money debt bond. I am unable to see anything unfair in this arrangement, or anything which would amount in the remotest degree to what may be called slavery. Here are two people who have no credit whatever, entrusted with a sum of Rs. 160 the only arrangement being that they were to pay off Rs. 2 every month by working in the complainant's tope for a year; afterwards it was apparently arranged that the complainant was to take such steps as he may be advised to recover any balance due from them, by suit or otherwise. There does not seem much prospect of the complainant getting back the balance from these two people after the year is over. However that may be, the second class Magistrate has merely directed the two accused to work for the period of six months, the balance of the period of one year after deducting the period for which they had already worked in the tope. The order does not say that they should work in the tope any longer than they agreed to; the recovery of the balance that may be found due at the end of the year was to be by a suit. I do not think this is a case for the application of section 2 of the Act. I regret therefore that I am unable to accept the recommendation of the District Magistrate. The records will be returned.

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* * 1924 Madras 352.

SCHWABE, C.J., and RAMESAM, J.

Surjimull Murlidhar Chandick—Plaintiff-Appellant

v.

Ananta Lal Damani and another—Defendants-Respondents.

O. S. A. No. 53 of 1922, decided on the 23rd April, 1923, from the judgment of Philips, J., dated 28th February, 1922.

Stamp Act, Sch. I, Art. 1—Test is intention of parties—Document is not necessarily acknowledgment because it contains a balancing item at the end where object is not to supply evidence to creditor.

Where the document contains other entries from which it is right to deduce that the intention is to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the sending of the document, although it contains a balancing item at the end, is not to supply evidence to the creditor. Test is, looking at the document and the surrounding circumstances, what was the intention with which that document was given; was that meant to be a bare acknowledgment and a promise to pay to be used in evidence against the sender or was it sent for some other dominent purpose. (4 Cal. 885; 9 Cal. 127; 15 Cal. 162, *Foll.*; 19 C.L.J. 87; 21 Bom. 201, *Dist.*) [P. 353, C. 1 and P. 354, C. 1.]

T. R. Ramachandra Aiyar and *K. V. Sesha Aiyangar*—for Appellant.

K. Jagannatha Aiyar and *R. Purushottam Aiyangar*—for Respondents.

Grant and Greatorex—for 1st Respondent.

Judgment:—This is an appeal from a decision of Phillips, J., deciding a case on the ground that a document acknowledging a debt was not admissible in evidence. The document is called a *Roka*. It shows credit entries and the balance

due at the last account and interest thereon up-to-date, and debit entries of the amount paid off and a balancing item of Rs. 4,397-12 3 and then the words "balance payable up to Kartik Sudh 1st of Samvat 1974 (that is 15-11-1917) Rs. 4,397-12-3" and the signature of the defendant. The circumstances under which that document came into existence are clear from the correspondence, and I do not think that any evidence could be adduced which would give the Court any further assistance than is obtained from the correspondence. A letter, Ex. B, was produced from the defendant stating that he had taken down the statement of account which had been sent for, and given it to Ammajee, the plaintiff's mother, and promising on coming to Madras that he would prepare a fresh statement of account and give it to the plaintiff. When he came to Madras, in pursuance of that promise the Roka was sent. The question is whether or not that is an acknowledgment within the definition of "acknowledgment" in the Stamp Act, for if it is, it has to be stamped, and if it be not stamped it cannot be admitted in evidence and in such a case the legislature has thought fit to impose what to my mind is an appalling penalty of the plaintiff losing his claim altogether; because there is no penalty provided, by the payment of which to Government, the document can be admitted. Perhaps, in view of this provision, the draftsmen of the schedule has so worded it that it has left many loopholes, and has given rise to a conflict of judicial opinion when it comes to interpretation. The words are "acknowledgment of a debt exceeding Rs. 20 in amount or value, written or signed by, or on behalf of a debtor in order to supply evidence of such debt." The first question that arises is whether any particular document is given to supply evidence of the debt. It is quite clear to my mind on the authorities that the question is whether it is given with the dominant intent to supply evidence of the debt; and it has been held that (where the document contains other entries from which it is right to deduce that the intention is to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the sending of the document, although it contains a balancing item at the end, is not to supply evidence to the creditor. *Brojendar Coomar* v. *Bromomoye Choudharani* (1), *Brojo Gobind Shaha* v. *Goluk Chander Shaha* (2), *Nund Kumar Shaha* v. *Shurnomoyi* (3) and *Ambica Dat Vyas* v. *Nitayanund Singh* (4) are all instances of this. Cases quoted to the contrary are *Sitaram* v. *Ramprosad* (5) and *Mulji Lala* v. *Lingu Makaji* (6). In those two cases there was something quite different from the other cases and from this case. There, there was nothing but an acknowledgment of debt. In both those cases the words amounted to giving the figure, and the statement was that account having been taken the balance due was so much, and I can understand the view in those cases that there was merely sending an acknowledgment of debt for the purpose of giving the other party an acknowledgment for use in evidence. The matter also came before this Court in *Ramaswami Iyer* v. *Gnanamani Nachiar* (7). There, there was a somewhat complicated document containing a statement of the balance due by a zemindar to his agent and an acknowledgment by the zemindar that he had examined the account and found it correct, and releasing the agent from all claims against him. It was held by Abdur Rahim, O.C.J., first that that was an acknowledgment within the meaning of the Stamp Act and secondly that it was a release, and being a release, it could not be looked upon as a document which was inadmissible though looked upon as an acknowledgment it would be inadmissible. With that part of the jugdment Philips, J., did not agree, because he did not think that it amounted to a release. He did, however, think that it amounted to any acknowledgment, but said that it did not matter in that case, because whether the document was admitted or not, it did not affect the merits of the case. It follows that this point in that case was not necessary for the decision. It seems to be in direct conflict with some of the cases in Calcutta quoted above, and speaking for

(1) (1878) 4 Cal. 885 = 3 C.L.R. 520.
(2) (1882) 9 Cal. 127.
(3) (1887) 15 Cal. 162.
(4) (1903) 30 Cal. 687.
(5) (1913) 19 C.L.J. 87 = 18 C.W.N. 697 = 22 I.C. 858.
(6) (1896) 21 Bom. 201 (F.B.).
(7) (1916) 31 M.L.J. 851 = (1917) M.W.N. 121 = 5 L.W. 279 = 37 I.C. 984.

myself, so far as it relates to acknowledgment I do not agree with it. That being the state of the authorities, the Court has to apply its mind to the questions—looking at the document and the surrounding circumstances—what was the intention with which that document was given; was that meant to be a bare acknowledgment and a promise to pay to be used in evidence against the sender, or was it sent for some other dominant purpose? In my judgment, the answer must be that it was given with the intention that it was to be a statement of account as between the parties—containing entries of payments by the defendant as well as a statement debts due from him, and also a statement of the calculation of interest, and the rate of interest which the defendant admitted that he was under a liability to pay. In these circumstances in my judgment, the document is not an acknowledgment and ought to have been admitted.

The question is also raised whether or not it comes within the other exceptions in the article in that it contains a promise to pay the debt and a stipulation to pay interest. These two questions seem to be difficult and interesting; but in the view I take, of the first point, it is not necessary to consider them. In my opinion, this judgment is wrong and must be set aside.

It is suggested that we should direct a new trial on this issue of limitation. If I were satisfied that there would be anything to gain by such a course, I should order a new trial. But in this case I am not so satisfied, and I am clear that any evidence of intention given at this stage could not be of the least assistance to the Court. I think one has in the letter referred to and in the document itself so much to show that it is not a mere acknowledgment given with the intention of supplying evidence of the debt to the other side, that any amount of verbal evidence adduced would not affect the proper interpretation of the document.

This appeal must be allowed and the case must go back to the Original Side for disposal on issues 2, 4 and 5 and the additional issues if the Court thinks it necessary.

The costs of this appeal must be paid by the respondents and the costs of the first trial save in so far as the first defendant has been deprived of them will abide the result of the second. The Court-fee paid on the appeal memorandum will be refunded to the appellant on application. The memorandum of objections is dismissed.

Appeal allowed.

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* * 1924 Madras 354.

AYLING AND ODGERS, JJ.

Ramaswami Chetty—Plaintiff-Appellant.

v.

Palaniappa Chetty and others—Defendants-Respondents.

S. A. No. 1258 of 1919, decided on 17th April, 1923, against the decree of the District Judge, Ramnad, at Madura in A. S. No. 1007 of 1918.

(a) *Civ. Pro. Code, O. 6, r. 17—Partible property other than that included in the plaint can be partitioned.*

Property proved to be partible though not included in the plaint can be decreed to be partitioned without formal amendment. (29 Mad. 165, *Appr.*) [P. 355, C. 1.]

(b) *Hindu Law—Joint family--Self-Acquisition—Money received by co-parcener by giving his son in adoption is not self-acquired property.*

Where the question was whether money received by a co-parcener in a Nattukottai family on his giving his son in adoption was his self-acquired property.

Held in these families male member was valued for his earning capacity and the test appeared to be whether the acquisition of money was made at the expense of or to the detriment of the joint family property; if it was, it cannot be self-acquisition. The transfer of boys, by adoption was much to the detriment of their natural family, as it was to the advantage of their adoptive family (in consideration of which detriment and advantage these payments were made) and the property so acquired cannot be self-acquisition of the co-parcener in the absence of a custom to the contrary.

A. Krishnaswami Ayyar and *E. Vinayaka Rao*—for Appellant.

S. Srinivasa Ayyangar, K. N. Aiya Ayyar, A. Narayanaswami Ayyar, T. Nallasivam Pillai and *V. Ramaswami Aiyar*—for Respondents.

Ayling, J.:—This appeal arises out of a family partition suit, between Nattukottai Chetties and is confined to properties named in B and D schedules, which were included by the first Court, among those to be partitioned, but were struck out, by the District Judge in first appeal.

The case of the D schedule properties may be dealt with first. The Subordinate Judge says :—

"In addition to the properties, mentioned in the plaint, there is a sum of Rs. 1,500 in deposit in a Pegu firm. The plaintiff did not know of it. It is given out in the deposition of the 1st defendant that it is family money. Therefore, it will be treated as family property, which must be divided between all the members of the family. So another schedule will be attached to the decree and that will be D schedule, consisting of this money of Rs 1,500. Of course, plaintiff must pay Court-fee before a final decree is passed and it is only then, that he will get his share."

The District Judge has excluded this property from partition, solely on the technical ground that there has been no amendment of the plaint so as to include it. We think this is not a sufficient ground. It is not denied that the property is joint family property and it is clear that the omission to have the plaint amended at the same time that the D schedule was attached to it, was a mere oversight. In fact, the addition of the schedule implies an amendment of the plaint without which it would be meaningless. We direct that this property be included in the partition, and that the decree be amended accordingly.

The question relating to B schedule property is of a very different, and much more difficult nature. It consists of money obtained by 1st defendant, as consideration for giving two sons in adoption ; 1st defendant and his remaining sons (plaintiff and defendants 2, 3, and 4) make up the joint family concerned in the suit. What we have to decide is, whether money so obtained is the self-acquisition of 1st defendant or the property of the joint family.

Both the lower Courts have treated this question, as one of pure Hindu Law ; and have come to opposite conclusions ; that of the District Judge being adverse to plaintiff-appellant. The learned Vakil, who appeared for the latter, suggested in argument before us, that it is a matter which should be determined by caste custom before us and that an issue should be framed and referred for determination on evidence to be newly recorded. Mr. S. Srinivasa Ayyangar for 1st respondent (1st defendant) objects to this ; and we think his objection must be allowed. The plaint contains absolutely no reference to a custom ; and from the judgments of both the lower Courts, it is clear that nothing of the kind was set up before them. We cannot, therefore, allow this plea to be set up in Second Appeal. It is possible that a legal custom exists, which, when properly pleaded and proved, may render our decision on the question, of merely academic interest ; but so far as this case is concerned, we have no alternative but to deal with the question, from the only point of view, disclosed in the pleadings before us, that of pure Hindu Law. And it is unfortunately one of first impression, on which there appears to be no authority, either in case-law or text-books. There is only one case so far as appears, which, though not dealing with the question before us, tends to show some light upon it. It is reported in *Murugappa Chetti* v. *Nagappa Chetti* (1) and arises out of a similar adoption, for consideration in a Nattukottai Chetty family. The question for the learned Judges' decision was whether the payment of *consideration* invalidated the adoption ; and they decided that it did not, although the practice of receiving consideration for an adoption was one, which could not but be reprobated, and although an agreement to pay consideration was not enforceable. But the leading judgment, which is that of Subramania Iyer, Officiating Chief Justice, contains passages, which I find very instructive in our present difficulty.

The learned Judge, who was undoubted authority in such matters, says that among the Nattukottai Chetty community the payment of consideration for the giving of a boy in adoption is the rule and the absence of payment, the exception. He proceeds to trace the reason to the fact that in this very prosperous and enterprising community "every male child is expected to become an earning man," and this expectation is mostly realised. Consequently when a Chetty gives away his son in adoption, he is virtually contributing to the wealth of the family of the adoptive father. With the commercial instinct implanted in him, a member of this community sees nothing heinous in a practice, which prevents the natural father becoming a loser by giving away his son.

In other words the sum paid is the consideration for the transfer of a potential earning member from one family to another. One family gains just what the other loses ; and although at the close of

(1) (1906) 29 Mad. 161=16 M.L.J. 22.

the passage quoted, the learned Judge refers to the "natural father" becoming a loser, this could only be representing the family, for individually he would be no more concerned with loss of the son's earnings, than would any other member of the family, and would gain a certain personal benefit, by the increase of his own fractional share obtainable on partition.

Of course, every such transfer of a member of one joint family to that of another increases or reduces the number of members, entitled to a share on partition, so that the individual members of the family, from which the adopted boy comes, will primarily benefit, and those of the family to which he goes, will primarily lose by the transaction. But the latter family, as a family will gain, and the former will lose, by the adoption; since the custom of payment proceeds on the assumption that a male Nattukottai Chetty, to put it tersely earns more than he eats.

This view of the matter I am quite prepared to accept on the authority of the learned Judge quoted, as well as because it seems a reasonable explanation for the existence of a custom in this caste, and in few, if any, other castes. As I shall show it is of considerable importance when one comes to consider the text dealing with self acquisition, to which I shall refer, a task which I need not say I undertake with considerable diffidence.

The materials are found in Ghose's Principles of Hindu Law, Vol. II, pages 101—103.

The main principle laid down by Yagnavalkya is:

"Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs."

The term father's estate seems to indicate merely the patrimony or the body of joint family property: *vide* Mitakshara, Chap. I, section 4 (1-7), set out in Ghose, as above quoted, and Smritichandrika, Chap. VII, section 28, quoted in Mayne's Hindu Law, section 281.

The test appears to be whether the acquisition was made at the expense of, or to the detriment of the joint family property; if it was, it cannot be self-acquisition.

Applying this to the present case, the transfer of the boys, by adoption was as much to the detriment of their natural family, as it was to the advantage of their adoptive family, (in consideration of which detriment and advantage, these payments were made); and property so acquired cannot be self-acquisition.

This conclusion is strengthened by the somewhat analogous case of the bride price, under the Asura form of marriage. The Mitakshara says:

"What is received at a marriage concluded in the form termed Asura or the like.....must be shared with the whole of the brethren and with the father." Ghose's Hindu Law, Vol. II, page 103.

As shown by Mayne (section 81), this payment springs from the fact that an unmarried girl was a valuable commodity and the case stands on much the same footing, as the adoption of a Nattukottai Chetty boy.

Mr. Srinivasa Aiyangar for respondent has sought to support the decision of the lower appellate Court, by reference to the doctrine of *Patria Potestas* and to the fact that under Hindu Law, power of giving a boy in adoption is confined to the father or mother. But the power of disposition does not necessarily carry with it the rights to appropriate the proceeds of the disposition; and it seems to me we are on safe ground, in looking to the general principle governing self-acquisition, and the condition of the caste, with which we are concerned. I am inclined to think that in the absence of a custom to the contrary, which must be alleged and proved, sums paid to a Nattukottai Chetty in consideration of giving a son in adoption are not his self-acquisition.

It follows that the property in Sch. B must be added to the partible property and the decree amended accordingly.

I would allow appellants their costs in this and in the lower appellate Courts.

Odgers, J.:—The suit was for partition of family property, the co-parceners being Nattukottai Chetties. There are two points raised on this second appeal:

(1) The properties in D schedule were excluded by the District Judge, on the ground that though clearly family properties the plaint had not been amended so as to include them, though additional Court-fee had been paid. The point is purely technical and the District Judge should, in my opinion, have allowed the plaint to be amended, so as to include these properties.

(2) Certain moneys were obtained by 1st defendant from the persons to whom, in 1913, he gave two of his sons in adoption. Are these moneys to be treated as self-acquisition of 1st defendant, or as a family property and therefore divisible?

The question is interesting and practically *res integra*. The Subordinate Judge held that these moneys belonged to the family, the District Judge *contra* held they belonged to the father. Mr. A. Krishnaswami Aiyar for the appellants contended that it should be established by evidence whether in this community there is a custom for the natural father to treat payments of this character as his own, or as belonging to the family, it not being disputed that in this caste such payments are usual. Mr. S. Srinivasa Aiyangar for the respondents contended and rightly that no custom had been set up and as it must be specially pleaded we were precluded from going into the question of its existence in second appeal. It follows therefore that if hereafter the question of custom is agitated in a properly constituted suit what I am about to say will very possibly be found to be beside the mark. My remarks are based on consideration, apart from any question of custom, on the best materials available. It has to be remembered that these Nattukottai Chetties are traders and that every male member of the community is at least a potential earner for the family of which he is a member. It is, therefore, not unnatural that when the wage-earning capacity of a family is diminished *pro tanto*, by the giving of one or more of the members in adoption, some monetary or other compensation should be paid, by the adopting family, whose potential earning capacity is proportionately increased by the adoption. Such compensation is probably nothing like the capitalized value of the earnings of the member given in adoption; on the other hand, he may earn little or nothing and the shares of those remaining in the family are proportionately individually appreciated by the fact that there are after the adoption fewer sharers. Though not directly in point, so as to form a ruling authority in the present case, we have a judgment of Subramania Aiyar, Offg., C.J., in *Murugappa Chetti* v. *Nagappa Chetti* (1). The learned Judge was considering there, whether the acceptance of a gift on adoption affected the validity of the latter. He said at page 165:

> "It is abundantly clear from the evidence that in the community to which the parties belong (chetties) such payments form the rule and the contrary, the exception; and so long as these men continue to be moved by the desire for the perpetuation of lineage, by recourse to the fiction of adoption, the payments will not cease and the consequences of the stricter rule would only be that the payments would be made in secret and that when any litigation should ensue, with reference to the adoption, it would be attended by the production of untrue evidence, either on the part of persons denying payments that have really taken place, or on the part of those who falsely set up such payments. Why the practice of paying money is prevalent largely among these Chetties and is avowed is perhaps not difficult to understand. Their community is a most thriving and prosperous compact little one, in this presidency. Its members are able, enterprising traders, doing business in India and elsewhere. It is a pride of their community that there is in it none so poor as to depend for his livelihood on the charity of others. Every male child is expected to become an earning man and this expectation is mostly realized. Consequently, when a Chetty gives away his son in adoption, he is virtually contributing to the wealth of the family of the adoptive father."

This last sentence gives, in my opinion, support to the view that any money so paid would be paid as compensation to the natural family. This view is further attempted to be supported by the analogy of bride price in Asura marriages. The Mitakshara (Chapter I, Sect. 4) commenting on Yagnavalkya (Chapter II, Sects. 118 and 119) says:

> "What is received at a marriage concluded in the form Asura and the like.....must be shared with the whole of the brethren and the father". (Ghose's principles of Hindu Law, Vol. II, page 103).

For the respondents, it is urged that the detriment to the family, which was to be provided by the co-parceners, is the bride price and that the text does not mean what is to become of the bride price when received; it refers to the liability of the adoptive family for the amount. It may be immaterial to discuss it; but, in my opinion, such is not the meaning of the text in question. It clearly refers to the receiving and not to the giving of the bride price. It is further said that the reference is only two gifts at nuptials and not to the bride price at all; but I see nothing to limit the words thus. Two more important points are, however, taken by Mr. S. Srinivasa Aiyangar: (1) that the detriment to the family cannot be assessed in money are money's worth and that consequently any money paid on adoption cannot be said to be compensation to the family; for the loss of an earner, especially as the detriment, if any, to be taken into account, must be the present detriment which, owing to the age of the boy given in adoption, is only the problematical capacity of earning in the future which is

practically nil. I do not think this is an answer to the theory of compensation to the family, for the loss of a possible future earner; it may not be an adequate or mathematical compensation; but it may nevertheless be regarded as in some measure making the loss good to the family; and (2) a more serious counter theory to my mind is that the money is to be regarded as a present to the father of the boy given in adoption, to induce him to exercise his paternal rights in favour of the adoptive family. The father has the power to dispose of his son, therefore, he should keep the money. This does not necessarily follow. Vasishta says (Chapter XV, 1-8):

"Both parents have power to sell or to desert him (a son)", (page 137, Mayne's Hindu Law, 9 Ed.).

This is, of course, antiquated and no rule of the sale of a son as such would now be recognised at law. I think that having regard to the nature and chracteristics of the community involved and to those considerations, which I have already set out at length, it is on the whole more consistent to hold against this theory. It is not a personal present, but is only paid to the father as the eldest and managing member of the co-parcenery, for the benefit of the latter. I have, therefore, come to the conclusion that the property in Sch. B belongs to the family and should be included in the decree for partition. The appeal succeeds; the decree of the District Judge will be set aside and that of the Subordinate Judge restored. The appellants will have their costs here and in the lower appellate Court.

Appeal allowed.

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* 1924 Madras 358.

SPENCER AND DEVADOSS, JJ.

K. Venkataratnam—Respondent-Appellant.

v.

The Official Receiver, Godavari District—Respondent-Petitioner.

A. A. O. No. 1106 of 1920, decided on 6th August, 1923, against the Order of the District Judge, Rajahmundry, dated 6th December, 1921.

(a) *Provincial Insolvency Act (V of 1920), S. 53—Transfer by insolvent immediately prior to insolvency without consideration paid—Transfer by vendee—During appeal from annulment of adjudication—Second venaee paying part of the consideration to mortgagee does not prove transfer to be* bona fide.

An insolvent nominally transferred certain property of his to one *P*. The deed directed *P* to pay certain amounts to one *A* a mortgagee but no payments were made by *P*. Pending the appeal from order annulling adjudication, *P* sold the land to the nephew and son-in-law of the insolvent who paid off out of the consideration the mortgagee *A*. The order annulling the adjudication being reversed:

Held, that the conveyance by the insolvent in favour of *P* was voidable under S. 53 as not being in good faith and for valuable consideration;

Held, also that the payment by the second vendee to the mortgagee would not make the sale in his favour a *bona fide* one for consideration as he was aware of the insolvency proceedings and as his transfer was obtained pending the appeal against the annulment of the adjudication.

Held, further that the covenant to pay *A* in the sale-deed to *P* was not binding personally on the second transferee.

(b) *Assignment—Vendee's vendee not bound by personal covenants against first vendee.*

Vendee's vendee is not personally bound by any covenant made by first vendee with vendor to pay off a mortgage on the property sold.

P. Somasundaram—for the Appellant.

P. Narayana Murthi—for the Respondent.

Judgment:—One Maradugula Venkataratnam applied to be declared insolvent, on the 24th of March, 1910, and he was adjudicated as an insolvent on the 31st of August, 1912. Within three months of the petition in insolvency, the house, which is the subject of this appeal, was nominally transferred for Rs. 4,000, on the 4th of January, 1910, to one Perrazu, who is the 2nd respondent. Admittedly, the consideration for this sale remained unpaid. On the 22nd of August, 1912, the same property was sold to the appellant, for the same price of Rs. 4,000, by the 2nd respondent. There was a composition of the claims of the creditors, approved by the District Court, upon which the District Court annulled the adjudication, on the 19th December, 1912. There was an appeal to the High Court, the result of which was that the adjudication was restored on the 24th of March, 1914.

The Lower Court has found that the transaction, by which the appellant purchased the house in question, was voidable, under section 53 of Act V of 1920, as being a transfer of property, not made in good faith and for valuable consideration, within two years of the transferor being declared insolvent.

The important facts in the case are that the first sale was without consideration; that the appellant is the nephew and son-in-law of the first insolvent; and that he admitted in his evidence that he was aware of the presentation of a petition by his father-in-law, to be adjudicated insolvent, soon after that petition was filed. One Asuram had a mortgage decree against the insolvent in O. S. No. 10 of 1909 and one of the terms of Ex. I (*a*) was that the sale amount should be paid towards the mortgagee-decree-holder's decree. The appellant paid Rs. 4,700 to Asuram, on the 12th of February, 1914, and it is now argued that payment was *bona fide*, because, it was made according to the terms of the transfer deed, in favour of the appellant's vendor; but the appellant must have been aware at the time that an appeal was pending from the District Court's order, annulling the adjudication, and therefore if he paid any part of the consideration for his transfer, during the pendency of that appeal to a stranger, he did so at his own risk. He was not personally bound by the covenant in Ex. I (*a*), which was executed before the insolvent had applied for adjudication, as regards the promise to pay the mortgagee Rs. 4,000 of the purchase-money. Any such covenant that was contained in the document was subject to the result of the property passing away, out of the insolvent's control and becoming vested in an Official Receiver. The appellant, in ignoring the fact that an appeal was pending against the annulment of adjudication and in paying the unpaid purchase-money to a stranger, in order to benefit his own father-in-law, evidently acted without good faith and at his own risk.

We, therefore, agree with the Lower Court that the transaction was voidable under section 53, corresponding to section 36 of the old Insolvency Act and dismiss the appeal with costs.

Appeal dismissed.

* 1924 Madras 359.

KRISHNAN AND COLERIDGE, JJ.

Parvathi Ammal—Appellant-(3rd Defendant).

v.

Govindaraja and another—Respondents (Plaintiff and 1st Defendant).

S.A. No. 196 of 1921, decided on 20th April, 1923, against the decree of Addl. Sub-Judge, Tanjore, in A.S. No. 21 of 1920.

(a) *Transfer of Property Act, S. 52—Mortgage suit—Sale of mortgaged property during pendency of mortgage suit is affected by the doctrine of* lis pendens.

A suit to enforce a mortgage on property by its sale is a suit in which a right to immoveable property is directly and specifically in question with the meaning of S. 52 and a sale of the mortgaged property during the pendency of such suit is affected by the doctrine of *lis pendens*. (31 Cal. 745, *Dist.*; 29 All. 339 and 18 I.C. 177, *Foll.*).

(b) *Transfer of Property Act, S. 52—Contentious—Compromise after contest does not make suit non-contentious.*

The fact that the suit was subsequently compromised after contest does not make it a non-contentious suit. [P. 360, C. 1.]

P. N. Appuswami Ayyar and *P. V. Krishnaswami Ayyar*—for Appellant.

S. Muthiah Mudaliar—for Respondents.

Judgment:—This second appeal is argued mainly with reference to the property covered by sale deed Ex. B. That sale was made after the suit No. 13 of 1915 (on the file of the Court of the Temporary Subordinate Judge of Madura) to enforce a mortgage on the property by its sale had been instituted. The question that arises is whether the doctrine of *lis pendens* applies to the sale in question and whether it should be held to have been subject to the result of the mortgage decree The learned Subordinate Judge has answered this question in the negative relying on the ruling in *Upendra Chandra Singh* v. *Mohan Lal Marwari* (1). We are unable to concur in that view. That ruling is inconsistent with the ruling of Privy Council in *Faiyaz Hussain Khan* v. *Prag Narain* (2) and has not been followed even in Calcutta. See *Tinoohan Chatterjee* v. *Trilokya Saran Sanyal* (3). It has been dissented from in

(1) (1904) 31 Cal. 745.
(2) (1907) 29 All. 339 = 34 I.A. 102 = 17 M.L.J. 263 = 5 C.L.J. 563 = 4 A.L.J. 344 = 9 Bom. L.R. 656 = 11 C.W.N. 561 (P.C.).
(3) (1913) 17 C.W.N. 418=18 I.C. 177.

this Court in *Kathir* v. *Mareema Dissa* (4) and the learned Vakil for the respondent has rightly not attempted to support it. As regards the question whether the fact that the suit was subsequently compromised made it a not contentious suit, it is clear from the authorities that it did not. See *Annamalai Chettiyar* v. *Malayandi Appavi Naick* (5) and *Krishnappa* v. *Shivappa* (6). We must therefore hold that the sale under Ex. B is affected by the mortgage decree and plaintiff's suit with reference to it must be dismissed. As regards the sale under Ex. A, however, plaintiff is entitled to a declaration that the property is not liable to be sold in execution of the mortgage decree and to an injunction to prevent such a sale. The decree of the lower appellate Court will be modified accordingly. The parties will pay and receive proportionate costs throughout.

Decree modified.

(4) (1913) 38 Mad. 450 = (1913) M.W.N. 672 = 14 M.L.T. 185 = 20 I.C. 976.
(5) (1905) 29 Mad. 426 = 1 M.L.T. 145 = 16 M.L.J. 372.
(6) (1909) 31 Bom. 393 = 9 Bom. L.R. 530.

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* 1924 Madras 360.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Sundara Ramanujam Naidu — Petitioner.

v.

Sivalingam Pillai and another—Defendants-Respondents.

Civil Revision Petition No. 255 of 1921, decided on 19th April, 1923.

(a) *Court Fees Act, S. 7, Cl. X (a) and Cl. V (e) — A suit for specific performance and delivery of possession falls under Cl. X (a) and not under V (e).*

A suit for specific performance and delivery of possession clearly falls within the description of a suit for specific performance, under Cl. X (a) and the addition of the prayer for possession makes no difference. The suit cannot be properly described as a suit for possession of property and brought under Cl. V of Court Fees Act, simply because a prayer for possession is added any more than, for example a suit for redemption of usufructuary mortgage. Wherein also there will be a prayer for possession, can be so described and brought under the clause. The relief by way of giving possession arises from the relief granting the execution and delivery of the sale deed, as without a registered sale deed title cannot be transferred under the Transfer of Property Act where the value is over Rs. 100, without the latter relief being granted, the former cannot. (6 All. 231, *Foll.*) [P. 361, Cs. 1 and 2.]

(b) *Court Fees Act, S. 17—Suit for specific performance and delivery of possession does not comprise of two subjects.*

The suit for specific performance and delivery of possession is not a combination of two suits or two or more distinct subjects, to attract the application of S. 17 of the Court Fees Act. (38 All. 292, *Foll.*; 11 I.C. 228 and 60 I.C. 512, *Diss.*) [P. 362, C. 1.]

(c) *Civil Pro Code, O. 2, r. 2—Suit for possession based on agreement to sell is barred after suit for specific performance but is not barred if based on conveyance.*

If a plaintiff claims in the first suit only a conveyance and omits to ask for possession, a second suit for possession based upon the agreement may fail; but if the claim for possession in the second suit is based upon the conveyance obtained in pursuance of a decree in the first suit, the cause in the second suit is entirely different and the first suit cannot operate as a bar. (38 Mad. 698; 1 L.W. 147 and 18 Bom. 537, *Foll.*) [P. 363, C. 2.]

T. Narasimha Ayyangar and *T. S. Desikan*—for the Petitioner.

A. Krishnaswami Ayyar, *T. S Ramaswami Ayyar* and *V. Sundaram Ayyar*—for the Respondents.

Krishnan, J.:—This Civil Revision Petition arises from a suit brought by plaintiff to enforce specific performance of a contract to sell a shop, by directing the defendant to deliver a proper sale-deed to him, on his paying the price into Court and for recovery of possession of the property. The question that arises for decision is what is the proper value of this suit for purposes of jurisdiction. Section 8 of the Suits Valuation Act makes the value for Court-fees and for jurisdiction the same in such suits. We have therefore to see under what provision or provisions of the Court Fees Act the suit has to be valued. The District Munsif held that it was one for recovery of possession and should be valued under section 7, clause 5 (*e*) of the Act and as that value was over Rs. 3,000, the pecuniary limit of his jurisdiction, he returned the plaint to be presented to the proper Court. On appeal the Subordinate Judge upheld that view and hence the revision to us by the plaintiff.

Plaintiff contends that the suit falls under clause 10 (*a*) of section 7 and not under clause 5 at all. The defendant on the other hand argues that the suit falls under clause 5 (*e*) and its value is either the aggregate of the values computed under clauses 5 (*e*) and 10 (*a*), or at any rate is the value under clause 5 (*e*). Clause 10 (*a*)

provides that in a suit for specific performance of a contract of sale, the Court-fee payable is "according to the amount of the consideration." Now the consideration stated in the document is "the sum total of the principal, interest, costs incurred and other miscellaneous expenses connected therewith." We called for a finding to ascertain how much these items totalled up to in cash and the finding is that it works out to Rs. 2,265. We accept that finding as one of fact; and it follows that if the suit is valued under clause 10 (*a*) alone, it is within the Munsif's jurisdiction.

It seems to me that the suit clearly falls within the description of a suit for specific performance, under clause 10 (*a*) and the addition of the prayer for possession makes no difference. The relief by way of giving possession arises from the relief granting the execution and delivery of the sale-deed, as without a registered sale-deed, title cannot be transferred under the Transfer of Property Act where the value is over Rs. 100; without the latter relief being granted the former cannot. See *Muhi-ud-din Ahmad Khan* v. *Majlis Rai* (1). Nevertheless both the rights, *viz.*, the right to the sale-deed and the right to possession spring out of the same contract, though one necessarily precedes the other. The delivery of possession is a part of the specific performance of a contract of sale, unless the terms thereof show that the vendee was not under an obligation to deliver possession. The claim for delivery of possession is as much a part of specific performance, as the claim for the payment of the price is, when the seller brings the suit for specific performance. In fact this Court has held in *Bhashyakarlu Naidu* v. *Andalammal* (2) that a suit for the purchase price by itself is a suit for specific performance. It is clear from form 47, 1st Schedule, Appendix A of the Civil Procedure Code, that a prayer for possession is a proper prayer in a suit for specific performance, without altering the character of the suit. It seems to me that this suit cannot be properly described as a suit for possession of property and brought under clause 5 of the Court Fees Act, simply because a prayer for possession is added, any more than, for example, a suit for redemption of a usufructuary mortgage, wherein also there will be a prayer for possession, can be so described and brought under that clause.

Now, as regards the authorities cited before us, the case in *Nihal Singh* v. *Sewa Ram* (3), is a direct ruling on the point and is in favour of the view I am taking. On the other hand, a ruling of the Calcutta Court in *Madan Mohan Singh* v. *Gaja Prasad Singh* (4) has an observation in it that the suit, such as the one before us is in substance a suit for possession and must be valued as such. That view has been followed by the Lahore High Court in *Gopal Das* v. *Parmanand* (5). But the question has not been fully discussed in these cases and with great respect to the learned judges, I regret, I am unable to follow their view for the reasons I have given above.

It was strenuously contended by the learned Vakil for the respondent that the view I am taking is opposed to the view taken in *Krishnammal* v. *Sundararaja Aiyar* (6), as to the nature of a suit for specific performance. That was a ruling under Order 2, rule 2 of the Code of Civil Procedure, and it was held there that the failure to ask for possession in the suit for specific performance did not bar a second suit for possession. This ruling is directly against the ruling in *Krishnasami* v. *Sundarappayyar* (7), but the point was not referred to a Full Bench. I do not think we need however settle the conflict of opinion as the ruling relied on has no direct bearing on the present case which is one under the Court Fees Act. The point there was whether a plaintiff suing for obtaining a proper sale deed was entitled to make a claim for possession as a matter of right and the learned Judges held he was not, and that clause (2) of rule 2 therefore did not apply to him. Though it was conceded that such a plaintiff may be permitted to add such a prayer, it was held that it was not a claim that arose directly from the cause of action sued on and therefore the failure to make it did not entail the consequence stated in clause (2) of the rule. Whether this view

(1) (1884) 6 All. 231 = (1884) A.W.N. 42.
(2) (1918) 9 L.W. 19 = 36 M.L.J. 69 = (1918) M.W.N. 896 = 49 I.C. 385.
(3) (1916) 38 All. 292 = 14 A.L.J. 434 = 35 I.C. 275.
(4) (1911) 14 C.L.J. 159 = 11 I.C. 228.
(5) (1921) 60 I.C. 512.
(6) (1915) 38 Mad. 698 = 1 L.W. 147 = (1914) M.W.N. 200 = 15 M.L.T. 108 = 22 I.C. 912.
(7) (1895) 18 Mad. 415 = 5 M.L.J. 164.

be correct or not, the point in the suit before us is totally different. It is this, that when the prayer for possession is allowed to be added, does the suit cease to be one for specific performance and become a suit for possession, or combination of both suits, under the Court Fees Act? I do not think so.

I have already given my reasons, for holding that it cannot be treated as a suit for possession, under the Court Fees Act. It follows of course that it could not be a combination of two suits either, or of "two or more distinct subjects" to attract the application of section 17 of the Court Fees Act. The word "subject" is of a somewhat uncertain connotation and it was held to be "not capable of any precise definition" in *Neelakanthan* v. *Ananthakrishna Ayyar* (8). The case cited in *Krishnasami* v. *Sundarappayyar* (7) is no authority for saying that in a suit for specific performance and for possession, Court-fee should be paid on the aggregate value of the two prayers. Though perhaps that case seems to have assumed such a proposition, there is no discussion about it and the observation itself is an *obiter dictum* as the deficient Court-fee had been paid. We cannot thus treat it as an authority on the point. No other case has been cited to support the same view.

I have come to the conclusion that the present suit is rightly valued, under section 7, clause 10 (*a*) of the Court Fees Act and that it is within the jurisdiction of the Munsif. I therefore set aside the orders of both the Lower Courts and direct the District Munsif to take the plaint on his file and dispose of the suit according to law. Defendant will pay plaintiff's costs in this and in the lower appellate Court. The costs in the first Court will abide and follow the result.

Venkatasubba Rao, J.:—The point to be decided is whether the District Munsif's Court has jurisdiction to entertain the suit. The plaintiff prayed for a decree directing the defendant to execute a sale-deed in respect of the suit property and to deliver possession thereof. The defendant had agreed to execute a conveyance in favour of the plaintiff, and the suit was to enforce specific performance of this agreement. It has been found that the house is worth more than Rs. 3,000, but the consideration for the contract of sale amounts to Rs. 2,265. Is this a suit for specific performance falling under section 7, clause (10) of the Court Fees Act, or is it a suit for possession to which section 7, clause (5) of the same Act applies? In the former case, the Court-fee payable has to be computed *ad valorem* on the amount of the consideration (in this instance Rs. 2,265), and under section 8 of the Suits Valuation Act (VII of 1887), the same amount will determine also the Court which has jurisdiction to try the suit. On the other hand, if the suit is one for possession, the Court-fee has to be computed under section 7, clause (5) (*e*), with reference to the market value of the house (more than Rs. 3,000), and under section 14 of the Madras Civil Courts Act, III of 1873, the forum will have to be determined with reference to that value. In short, if the suit is held to be a suit for specific performance of a contract of sale, the District Munsif's Court will have jurisdiction: if the suit is held to be a suit for possession, that Court will have no jurisdiction.

I am quite clear that the suit falls within section 7, clause (10) (*a*) of the Court Fees Act. The words used are "specific performance of a contract of sale." Specific performance does not exist merely of the execution of a sale-deed. A suit to obtain a sale-deed is not what is referred to in the said section; but it is a suit for specific performance of a contract of sale. The execution of a conveyance is only a part of the specific performance. If the vendor agrees to execute a conveyance as well as to deliver possession, it cannot be said that specific performance of the contract does not comprise both the execution of the sale-deed and delivery of possession. In every contract of sale, unless the contrary appears, the vendor must be deemed to impliedly agree to give possession of the property to the purchaser. In a suit for specific performance, the purchaser seeks to enforce the terms of his contract. The seller as much agrees to put the purchaser in possession, as he agrees to execute a conveyance in his favour.

Then it is argued that, as the plaintiff also claims possession in the suit, the suit must be regarded as one for possession. But the specific provision relating to suits

(8) (1907) 30 Mad. 61 = 16 M.L.J. 462 = 1 M.L.T. 426.

for specific performance excludes the applicability of the general provision relating to suits for possession. If the claim to possession is involved in the claim to specific performance, the suit will still remain one for specific performance and it must be dealt with, only on that footing. A suit for redemption is, in effect, a suit for possession of the property ; but can it be contended that the provision applicable to such a suit is not the one dealing with suits for redemption, section 7, clause (9), but the one dealing with suits for possession, section 7, clause (5)? I shall not use the words principal and ancillary. It is not strictly correct to say that, in a suit for specific performance of a contract, the execution of a conveyance is the principal relief and possession is secondary and ancillary. It is, indeed, difficult to say in the abstract that a certain relief is the primary relief claimed. I would prefer to rest my judgment on the ground that a suit for specific performance is, in its essence, different from a suit for possession, and the mere fact that possession is also claimed does not render the suit any the less a suit for specific performance.

I may observe that the agreement on which the suit is based, far from indicating an intention not to give possession, contains evidence of the fact that the parties intended that possession should be given.

The view taken in *Nihal Singh* v. *Sewa Ram* (3), a decision of a single Judge, supports my conclusion. In *Madan Mohan Singh* v. *Goja Prosad Singh* (4), the Calcutta High Court took a different view ; but there is no discussion of the principle, and we find merely a statement to the effect that a suit for specific performance is, in substance, a suit for possession. *Gopal Das* v. *Parmanand* (5) is a decision of a single Judge of the High Court of Lahore and it affords very little assistance, because in the judgment it is assumed that a sale had already taken place and, therefore, the suit could not possibly be regarded as one for specific performance of a contract to sell, though I must say, with all respect, that it is far from clear how there could be a completed oral sale, the consideration being stated to be Rs. 4,250. *Nathe Khan* v. *Muhammad Khan* (9), is a case from the Punjab, and the learned Judge who decided it followed *Madan Mohan Singh* v. *Gaja Prosad Singh* (4), on the ground that he could not find any authority to the contrary, although his own inclination was the other way.

I hold that the suit is a suit for specific performance of a contract to sell.

Mr. Alladi Krishnaswami Aiyar, the learned Vakil for the defendant, very strongly relied upon *Krishnammal* v. *Soundararaja Aiyar* (3). It was held in it that a plaintiff who had obtained in a previous suit a decree directing the defendant to execute a sale-deed, was not barred after obtaining the conveyance, from instituting a fresh suit for the recovery of possession of the property covered by the conveyance. Order 2, rule 2 of the Civil Procedure Code omitting portions not relevant, runs thus :

"Every suit shall include the whole of the claim which the plaintiff is entitled to make, in respect of the same cause of action ; and when a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted."

The argument advanced is this : if a second suit for possession is not barred, it follows that the right to possession does not arise out of the same cause of action : and if the right to possession does not arise out of the same cause of action, it is wrong to say that out of the same contract spring both the rights—the right to a sale-deed as well as the right possession. But this argument ignores the fundamental difference to which reference is made in the judgment of Tyabji, J., in *Krishnammal* v. *Soundararaja Aiyar* (6), between a right to possession arising out of the contract to sell and the right to possession based upon the conveyance, a distinction also pointed out in the judgment of Sargent, C. J., in *Nathu valad Pandu* v. *Budhu valad Bhika* (10). If a plaintiff claims in the first suit only a conveyance and omits to ask for possession, a second suit for possession, based upon the agreement may fail ; but if the claim to possession in the second suit is based upon the conveyance obtained in pursuance of the decree in the first suit the cause of action in the second suit is entirely different, and the first suit cannot operate as a bar. This is the effect of *Krishnammal* v. *Soundararaja Aiyar* (6), and *Nathu valad Pandu* v. *Bhudu valad Bhika* (10). It has been held that in the

(9) (1918) 128 P.W.R. 1918=46 I.C. 534.

(10) (1894) 18 Bom. 537.

same suit there may be prayers both for the execution of a conveyance and for possession. It has also been held that a second suit for possession is not barred by the previous suit, in which a mere conveyance was claimed. I do not think that there is any inconsistency in the two sets of decisions. The right to possession claimed in the second suit must be deemed to be the right based upon the conveyance, and not arising out of the contract to sell. This is, in my view, the true principle and, judged in the light of it, the decisions are easily reconcileable, and the view I am taking is not opposed to the principle underlying these various decisions.

In the result I agree with the order proposed by my learned brother.

Case remanded.

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* 1924 Madras 364.

ODGERS AND HUGHES, JJ.

Ramaswami Reddiar—Defendant-Appellant.

v.

Peria Veera Kudumban and others—Plaintiffs-Respondents.

S.A. No. 508 of 1921, decided on 17th July, 1923, against the decree of the Addl. Sessions Judge, Madura, in A.S. No. 9 of 1921.

Transfer of Property Act, S. 60 –Partial merger of mortgagor's interest by any cause breakes integrity of mortgage.

Purchase by a mortgagee in a Court-auction of the equity of redemption of some only of the mortgaged items discharges the portion of the mortgaged debt which is chargeable on those items. (43 Mad. 372 and 31 All. 335, *Foll.*) What is necessary is that the mortgagee should have acquired the share of a mortgagor. Whether he acquires it, by purchase or by inheritance or otherwise the result is the same. The mode of acquisition is immaterial. [P. 364, C. 2.]

K. V. Krishnaswami Ayyar and *S. Ganapathisundaram*—for the Appellant.

K. Rajah Ayyar—for the Respondent.

Judgment:—The only point argued in this appeal is whether the Subordinate Judge was right in holding that the mortgage, Ex. I-A, had been broken up by the sale under Ex. I. It is urged for the appellant, that as all the sharers were bound by the mortgage under section 60 of the Transfer of Property Act, the security is not redeemable as to 3/5ths, as decreed. The sale has been held valid as to 2/5ths of the property conveyed thereunder and invalid as to 3/5ths. It is urged that notwithstanding this there has been no extinction of the mortgage security, in the hands of the purchaser (who was also the mortgagee) as to 2/5ths of the security. We have been referred to no authority beyond section 60 of the Transfer of Property Act, by the appellant; he seeks to distinguish the cases we are about to refer to, by saying that in none of them has there been any assent or conduct on the part of the mortgagee, such as would show his acquiescence in a partial redemption. On the other hand, we have been shown no authority which draws a distinction between the case of a mortgagee, who originally purchases a share only of the mortgaged property and a mortgagee who by some legal proceedings is ultimately declared to have purchased only a share, as in the present case. The point is covered by *Ponnambala Pillai* v. *Annamalai Chettiar* (1). It is a decision of the Full Bench and decides that the purchase by the mortgagee in Court-auction of the equity of redemption of some only of the mortgaged items discharges the portion of the mortgaged debt which is chargeable on those items. The Full Bench decision in *Bisheshur Dial* v. *Ram Sarup* (2) is followed. There Banerji, J., said:

"Therefore when the rights of the mortgagee and the mortgagor become vested in the same person, only so much of the debt can be held to have been discharged as was proportionate to the value of the property, in respect of which the confluence of rights takes place;"

and in *Hamida Bibi* v. *Ahmad Husain* (3) it was held that:

"Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee, there is a merger of rights and the integrity of the mortgage is broken up, by reason of the right of redemption and the right of the mortgagee passing to the same person. The mortgagee cannot throw the whole burden of the debt on the remainder of the property and compel the other mortgagors to redeem the whole mortgage. In order to bring about this result, it is not necessary that the fusion of rights should be by act of parties. What is necessary is that the mortgagee should have acquired the share of a mortgagor. Whether he acquires it, by purchase, or by inheritance or otherwise, the result is the same and the mode of acquisition is immaterial."

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(1) (1920) 43 Mad. 372=38 M.L.J. 239=(1920) M.W.N. 235=11 L.W. 429=55 I.C. 666.
(2) (1900) 22 All. 284=1900 A.W.N. 69 (F.B.).
(3) (1909) 31 All. 335=6 A.L.J. 387=1 I.C. 779.

It appears to us therefore that no distinction is possible, as contended by the learned Vakil, for the appellant. We are, therefore, of opinion that the lower appellate Court was right. This second appeal must be dismissed with costs.

Appeal dismissed.

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* * 1924 Madras 365.

OLDFIELD and DEVADOSS, JJ.

T. Vedaviasa Aiyar—Appellant.

v.

The Madura Hindu Labha Nidhi Co., Ltd.—Respondents.

S. A. No. 6 of 1922, decided on 17th April, 1922, against the decree of the District Court, Madura.

(a) *Civ. Pro. Code, S. 47—Parties need not be ranged on opposite sides—Questions between defendants inter se are covered by the section.*

Section 47 is not confined in its scope to the determination of questions arising between parties ranged on opposite sides in the suit but extends to the determination also of questions arising between the judgment-debtors *inter se*. (7 All. 681, 13 L.W. 15, 31 All. 82. (F.B.), *Dist.*; 19 Cal. 683 (P.C.) *Foll.*)

(b) *Civ. Pro. Code, S. 47—Relating to execution—Question as to order in which properties are to be sold if one of substantive right, is covered by the section.*

Where the question raised in execution is one of substantive right though it relates only to the order in which properties are to be directed in the sale proclamation to be sold, it is not an administrative matter but one relating to the execution, discharge or satisfaction of the decree. (24 Cal. 729, *Foll.*)

T. L. Venkatarama Aiyar—for the Appellant.

P. S. Narayanaswami Aiyar, P. V. Krishnaswami Aiyar and *P. R. Srinivasan*—for the Respondent.

Judgment:—The question in this appeal is whether the lower appellate Court was right in holding that no appeal lay to it and passing an order of dismissal. The decision of the Court of First Instance was as to the order in which certain items of property were to be sold in execution of a decree on a mortgage and the question is whether that decision was appealable as having been passed under section 47, first, because although it was passed between the parties to the suit that order should be read as relating only to questions arising between the parties who are opposed to each other in the suit; that is, it is contended between the plaintiff and one or other of the defendants and not between the defendants themselves. In support of this we have have been referred to *Raynor* v. *The Mussoorie Bank* (1), *Yagnasami Ayyar* v. *Chidambaranatha Mudaliar* (2), and *Bhagwati* v. *Banvari Lal* (3). But although these cases do contain language susceptible of an interpretation, which may support the appellant's argument, that argument was not what was being considered by the learned Judges. For in each of those cases the matter under consideration was in dispute between a judgment-debtor and his representative or a person on whom his interest had in some way devolved and not (as here) between two judgment-debtors, whose interests were absolutely independent. It is, in our opinion, clear on principle that no such rule, as the 8th respondent's learned Vakil contends for, can be laid down. In the case, for instance, of a partition suit, the judgment-debtors may very well find their interests opposed, when delivery is attempted, although up to the final decree they had no cause for complaint against each other and similarly in administration or partnership suits. We can see no reason for acceding to the suggestion that we should limit the scope of section 47 in the way suggested, when to do so, would exclude from its purview the decision of many of the questions, which must inevitably arise only after the decree and when the result would be to frustrate the object of the section, recognised by the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4), *viz.*, the cheap and speedy settlement of all disputes at the stage of execution.

The other argument attempted is that the question now raised is intrinsically not one relating to the execution or satisfaction of the decree, because it has arisen in proceedings for and relates to the settlement of the terms of the sale proclamation. It is true that the question in terms is only whether one item of the mortgaged property shall be sold before the others and, of course, whether that order of sale shall be entered in the proclamation. But in fact we may say, without expressing any opinion on the merits, that the question raised is

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(1) (1885) 7 All. 681 = (1885) A.W.N. 204.
(2) (1921) 13 L.W. 15 = 61 I.C. 961.
(3) (1909) 31 All. 82 = 6 A.L.J. 71 = 5 M.L.T. 185 = 1 I.C. 416 (F.B.).
(4) (1892) 19 Cal. 683 = 19 I.A. 166 = 6 Sar, 209 (P.C.).

whether the decree shall be satisfied to a substantial extent primarily from the 12th defendant's item 2, in accordance with the terms of his transfer from the mortgagor and the 13th defendant, the Official Receiver, representing the mortgagor's estate. It is clear that the interests of the owners of the item of the mortgaged property, other than item 2, will be seriously affected according as the 12th defendant's claim for postponement of the sale of the last mentioned item is allowed or rejected. In those circumstances, the matter is not, in our opinion, one of those referred to as administrative in *Sivagami Achi* v. *Subrahmania Ayyar* (5), in respect of which no appeal is allowed. The question raised is of a substantive right covered by section 47, the disposal of which, as the last paragraph of the judgment in *Sivagami Achi* v. *Subramania Ayyar* (5) shows results in an appealable order. To illustrate this, we may refer to the judgment of Banerjee, J., in *Jogodishury Dabea* v. *Kailash Chundra Lahiry* (6): "An order in execution proceedings can come under section 244 (now section 47), only when it determines some questions relating to the rights and liabilities of parties with reference to the relief granted by the decree, not when it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way." The result is that an appeal lies to this Court and lay to the lower appellate Court. The lower appellate Court has not dealt with the appeal before it on the merits. There must, therefore, be a remand, its decision being set aside in order that it might do so. Costs in the lower appellate Court and in this Court to date will be costs in the cause and will be provided for in the order to be passed on remand.

Civil Revision Petition No. 74 of 1922 is dismissed. No order is made as to costs.

Case remanded.

(5) (1904) 27 Mad. 259=14 M.L.J. 57 (F.B.).
(6) (1897) 24 Cal. 725=1 C.W.N. 374 (F.B.).

* 1924 Madras 366.

SPENCER AND ODGERS, JJ.

Narayanaswami Chetti—Petitioner-Appellant.

v.

Vellaya Pillai — Counter-petitioner-Respondent.

A.A.A. O. No. 46 of 1922, decided on the 12th September, 1923, against the order of the Sub-Judge, Vellore, in App. No. 120 of 1921.

Transfer of Property Act, Ss. 81 and 82—Decree-holder-mortgagee can sell in any order in absence of direction in the decree.

A decree-holder is entitled to execute his decree against any of the mortgaged properties where the decree is silent on the point; the judgment-debtor has no legal right to demand that the decree-holder should execute his decree in any particular manner to suit the individual judgment-debtor. [P. 367, C. 1.]

Civ. Pro. Code, O. 34, r. 5—Mortgagee can sell in any order in absence of direction in decree.

A decree-holder is entitled to execute his decree against any of the mortgaged properties where the decree is silent on the point; the judgment-debtor has no legal right to demand that the decree-holder should execute his decree in any particular manner to suit the individual judgment-debtor. (34 Cal. 13, *Foll.*; 41 Cal. 418. 31 Mad. 419, 9 Cal. 406, *Dist.*) [P. 367, C. 1.]

K. V. Ramachandra Aiyar—for Appellant.

C. Padmanabha Iyengar—for Respondent.

Judgment:—The District Munsif's action in dismissing the mortgage decree-holder's execution petition because he sought to bring only the 2nd item to sale cannot be supported. A decree-holder is entitled to execute his decree against any of the mortgaged properties (vide *Amir Chand Bukshi Sheo Pershad Singh* (1).

Admittedly the respondent has no right to have the properties marshalled under section 81 of the Transfer of Property Act; nor has he as against the mortgagee the right that section 82 of that Act gives to a buyer against a seller when more properties than one are subject to a common charge. In *Tara Prasanna Bose* v. *Nilmoni Khan* (2) which was a case falling under that section, the mortgagee had foreclosed and was therefore treated as representing the seller.

Nor is it alleged that the present is any case of fraud on the part of the mortgagee.

(1) (1906) 34 Cal. 13=4 C.L.J. 573.
(2) (1913) 41 Cal. 418=25 I.C. 118.

The respondent as 2nd defendant was a party to the suit and he did not at the time of trial ask the Court to direct in the decree that the properties should be sold in any particular order.

Appayya v. *Rangayya* (3) and *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry* (4) relate to the equitable discretion that Courts possess to direct at the time of deciding the suit in what order the mortgaged items shall be sold.

As the decree in this case is silent on the point, the respondent has no legal right to demand that the decree-holder should execute his decree in any particular manner to suit the individual judgment-debtor.

Ramaswami Chetti v. *Madura Mill Company, Ltd.* (5) is a case of marshalling. There is an observation of Srinivasa Iyengar, J., that the Court has a discretion even at the time of execution to direct that, if the sale of one item would be sufficient to satisfy the decree, that item should be sold first. This observation is not applicable to the facts of the present case.

The learned Subordinate Judge remarked that it was the mortgagee's fault that he did not sue on both his mortgages simultaneously. But in our opinion he was not bound to do so (vide *Subramania* v. *Balasubramania* (6).)

We reverse the orders of the Lower Courts and direct the District Munsif to restore the petition to file and to pass orders for execution of the decree in the light of the foregoing remarks.

Costs in the District Munsif's Court and in this Court will be borne by the respondent.

Order set aside.

(3) (1908) 31 Mad. 419=3 M.L.T. 287=18 M.L.J. 229 (F.B.)
(4) (1883) 9 Cal. 406=11 C.L.R. 565.
(5) (1916) 1 M.W.N. 265=34 I. C. 338.
(6) (1915) 38 Mad. 927=29 M.L J. 195=30 I.C. 317 (F.B.).

* 1924 Madras 367.

SPENCER AND DEVADOSS, JJ.

Pitchayya—Petitioner-Appellant.

v.

Yaralgadda Ankineedu—Counter-Petitioner-Respondent.

A. A. A. O. No. 89 of 1922, decided on 17th August, 1923, against the order of the District Judge, Masulipatam.

(a) *Civ. Pro. Code, s. 102—No second appeal lies even in execution.*

Where the suit is one of a small cause nature and the claim is valued at less than Rs. 500, no second appeal lies even in the matter of execution. (17 Cal. 631 and 18 C. L.J. 538, *Dis.*)

(b) *Civ. Pro. Code, O. 21, r. 17—Rule does not prevent Court from allowing amendment at latter stage.*

The words "on receiving an application for the execution of a decree" in rule 17 are not intended to make a party suffer for the failure of the Court establishment, which checks plaints and execution petitions on their presentation, to notice at once all defects in any application that may be received and these words do not preclude a Court from making an order allowing a defect to be remedied at a latter stage. (14 M. W. N. 157, *Foll.*) [P. 368, C. 1]

M. Kamanna—for the Appellant.

C. V. Ananthakrishna Ayyar—for the Respondent.

Spencer, J.:—As the suit is one of a small cause nature and the claim is valued at Rs. 388 and odd, no second appeal lies even in the matter of execution—vide *Mavula Ammal* v. *Mavula Maracayar* (1).

We are asked to treat the appeal as a revision petition and to revise the order which directs execution to proceed against the appellant's immoveable properties on the ground that when the execution application was presented, no schedule of immoveable property belonging to the judgment-debtor was attached to it as prescribed by Order 21, rule 13, and that by the time this omission was supplied, 12 years had expired from the date of the decree and execution had become barred under section 48, C. P. C.

Order 21, rule 17, C.P.C., declares that on receiving an application for execution, the Court shall ascertain whether the requirements of rule 13 among others have been complied with, and may either reject the application or fix a time for the defect to be remedied. Clause 2 states that if an application is so amended it shall be deemed to be an application in accordance with law and to have been presented on the date when it was first presented.

The Calcutta High Court in a Full Bench decision *Asgar Ali* v. *Trilokya Nath Ghose* (2) dissenting from the opinion previously expressed by Petheram, C.J., in *Macgregor* v. *Tarini Churn Sircar* (3) took a very strict view of section 245 in the Code of 1882 corresponding to Order 21, rule 17

(1) (1906) 30 Mad. 212=17 M.L.J. 376.
(2) (1890) 17 Cal. 631 (F. B.).
(3) (1884) 14 Cal. 124.

and although in the present Code the word "amended" has been altered into "defect remedied" and clause 2 has been added, the Calcutta High Court continues to require a strict compliance with the formalities (see *Navab Sir Salimullah Bahadur* v. *Sainaddi Sarkar* (4).) I am, with due respect, inclined to think that the words "on receiving an application for the execution of a decree" in rule 17 were not intended to make a party suffer for the failure of the Court establishment which, checks plaints and execution petitions on their presentation, to at once notice all defects in any application that may be received and that these words do not preclude a Court from making an order allowing a defect to be remedied at a later stage as it might well do if the words were "on or after receiving." Under section 148 the Court would even have power to extend the time allowed for remedying the defect.

In *Varadiah* v. *Raja Venkata Perumal Raja* (5), a Bench of this Court, in a decision to which I was a party allowed a petitioner to amend his application even at the time of appealing, when without such amendment it would have been barred by the 12 years' rule.

This was in harmony with the less rigid view taken by this Court in *Sattappa Chetty* v. *Jogi Soorappa* (6) where it was held that section 245 did not take away the power of the Court to amend the application for execution at any time before disposal.

I am of opinion for these reasons that there is no reason to exercise our power of revision in the present instance and I would dismiss the C. M. S. A. with costs.

Devadoss, J.:—I agree.

Second Appeal dismissed.

(4) (1913) 18 C.L.J. 538 = 22 I.C. 337.
(5) (1914) M.W.N. 157 = 14 M.L.T. 530 = 26 M.L.J. 89 = 21 I.C. 782.
(6) (1894) 17 Mad. 67.

* 1924 Madras 368.

KUMARASWAMI SASTRI, J.

S. Ranghia Chettiar—Defendant-Petitioner.

v.

Annasamy Alwar Ayyangar—Plaintiff-Respondent.

Civ. Rev. Petition No. 839 of 1922, decided on 6th September, 1923, revising the order of the Sessions Judge, Tinnevelly, dated 9th October, 1922.

Provincial Insolvency Act (V of 1920)—Proceedings on petition under old Act are governed by the new Act.

There is no authority for holding that in spite of the passing of the Act V of 1920, all proceedings on petitions filed under Act III of 1907 should continue to be dealt with under the provisions of the old Act.

K. R. Rangaswami Ayyangar—for the Appellant

A. Alwar Ayyangar—for the Respondent.

Judgment:—The petition was presented when the old Insolvency Act III of 1907 was in force. Nothing was done except transferring the application to the Official Receiver. After the new Insolvency Act V of 1920 came into force the adjudication order was passed. It is contended that the provisions of the old Act applied and that all cases filed when Act III of 1907 was in force should be dealt with on the footing that that Act continues to be in force. I do not think that contention is sound. No doubt any orders passed under the Act or rights obtained thereunder will be unaffected by the new Act. I can find no authority for holding that in spite of the passing of Act V of 1920 all proceedings on petitions filed under Act III of 1907 should continue to be dealt with under the provisions of the old Act.

Petition dismissed.

*** * 1924 Madras 369.**

OLDFIELD AND VENKATASUBBA RAO, JJ.

C *M. Ranganatha Thathachariar*—First Respondent-Appellant

v.

Krishnaswami Thathachariar and others—Respondents.

Appeal against the Order No. 360 of 1922, decided on 21st March, 1923, against the order of the Sessions Judge, Chingleput, dated 15th July, 1922.

(a) *Civ. Pro. Code, S. 92—Scheme under is to be interpreted like an Act, and where District Court is referred to it is not the person but the tribunal that is meant.*

No distinction can be drawn between the interpretation of an Act, and that of a scheme under S. 92, Civ. Pro. Code. District Court in such a scheme means not the person but the tribunal.

(b) *Civ Pro. Code, S. 92—Scheme—Remedy not asked in suit out given in the scheme cannot be or need not be asked in execution and order thereon is not appealable under S. 47. Civ. Pro. Code.*

When the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for execution of the decree or that the order granting or refusing it is appealable as one passed under S. 47.

When a suit is instituted in the words of S 92, Civ. Pro. Code, to obtain a decree settling a scheme the relief must so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. ((1923) M.W N. 133 and (1922) M.W.N. 78, *Foll.*; 24 B. 45, *Diss.*)

C. Krishnama Chariar—for the Appellant.

Chandrasekara Iyer and *T. M. Vedantam*—for the Respondents.

Oldfield, J.:—This appeal is against an order passed by the Subordinate Judge's Court, Chingleput, on a petition presented to it under clause 10 of the scheme sanctioned by the decree in A. S. No. 212 of 1909 for the management of one of the Conjeevaram Temples. That petition was presented on the assumption that a vacancy had occurred among the trustees under the scheme and that, as it had not been filled by either of the two agencies primarily responsible for filling it, the lower Court must in accordance with the scheme do so. The lower Court held after enquiry into the point disputed before it, that, a vacancy had occurred and directed that it should be filled in the manner provided by the Rules framed by the High Court. No more need be said to show that there is no question of failure on the part of the lower Court to exercise jurisdiction or of interference with its action by way of revision. The question is then only of interference, as we are asked to interfere, in the exercise of our appellate powers; and we have, accordingly to decide whether an appeal against the lower Court's disposal lies, respondents contending that it does not.

That, it is conceded, depends first on whether the position of the District Court under the scheme, clause 10, is that of a *persona designata*; not of a Court which will, in case its order is appealable under any appropriate provision of law, be subject to our appellate jurisdiction. The test to be applied has been considered fully in a recent decision, *Ramaswami Gounden* v. *Muthu Velappa Gounden* (1) which was followed in *Venkatarama Iyer* v *Zanab Hamid Sultan Marocayar* (2), and there is no necessity to add anything to that statement of the law, except that no distinction can be drawn between the interpretation of an Act, which was then in question and that of the scheme before us. There is accordingly first the consideration that, as the procedure to be followed in the Court's exercise of the power conferred by the scheme is not specified therein, the applicability both of its ordinary judicial procedure must be presumed and also, as follows from *National Telephone Co., Ltd.* v. *Post Master General* (3) of the law relating to appeals from its ordinary decisions. And next when in accordance with the course taken by the Privy Council in *Balakrishna Udayar* v. *Vasudeva Iyer* (4) we refer to the position occupied by the Court under clauses of the scheme other than that now under construction, for instance clauses 13, 48 and 61 and find that its functions thereunder are clearly judicial, we must take the same view of the function, with which we are now concerned.

(1) 1923 Mad. 194=46 Mad. 636=44 M.L.J. 1=16 M.L.W. 848=(1923) M.W.N. 133=71 I.C. 1039.
(2) 1923 Mad 360=44 M.L.J. 161=17 M.L.W. 656=(1923) M.W.N. 78=32 M.L.T. 114.
(3) (1918) A.C. 546=87 L.J.K.B. 1197=109 L.T. 562=57 S.J. 661=15 Ry. and Can. Traff. Cas. 109=29 T.L.R. 637.
(4) (1917) 40 Mad. 793=44 I.A. 261=15 A.L.J. 645=2 Pat. L.W. 101=33 M.L.T. 69=26 C.L.J. 143=19 Bom L.R. 715=(1917) M.W.N. 628=6 L.W. 501=22 C.W.N. 50=11 Bur. L.T. 48=40 I.C. 650 (P.C.).

If, however, the Court was in this matter acting judicially, it is still, as respondents contend, necessary to see whether its order was one, against which under the ordinary law an appeal will lie; and that, it is not disputed, depends on whether its order was, a decree within the meaning of section 2 of the Code of Civil Procedure or more particularly whether it was the determination under section 47 of a question relating to the execution of a decree. That it was so is alleged on the short grounds that the order was passed to give effect to the scheme and that the scheme was prescribed in and is part of the decree. But first that takes no account of the requirement of the latter section that the question determined shall be one arising between the parties to the suit or their representatives. For in the present case if the parties to the lower Court's order, some at least, respondents 5 to 8, were impleaded only in their capacity as members of the Board of Supervision, which was created only under the decree in O. S. No. 11 of 1907, of them 6, 7 and 8th respondents were certainly not parties in any sense and were not even connected with the community, to which the plaintiffs therein belonged or with them, even in the representative capacity, in which they sued on behalf of the Thathachar family. And generally it is clear that this requirement of section 47 cannot be regarded as necessarily fulfilled by every Court's order made under the scheme; for it is obvious that this would not be so in the case of an order under clause 48 or clause 61 for the removal from office of a person, who until his appointment had had no connection with the institution and was a stranger to the suit.

There is moreover a further and equally substantial objection to the appellant's contention that the question determined by the lower Court does not relate to the execution of a decree. For the relief asked for in O. S. No. 11 of 1907 was simply the framing of a scheme; and, when that had been done in the decree passed, there was no further relief asked for or granted, in respect of which execution could be taken out. That having been the scope of the suit and the decree, there is no ground for the suggestion, which in fact appellant's contention involves, that the decree anomalously must be regarded as executable in perpetuity on every occasion, on which a deviation from the scheme is alleged. True, the scheme provides for the Court's intervention on such occasions. But to assume that it will intervene by way of execution will be to beg the question in issue; and it is material that there is no such explicit provision for enforcement of the scheme in execution as was contemplated in a case to be referred to, *Prayag Doss Jivaru Mahan* v. *Tirumala Srirangacharla Varu* (5), the only provision for future control over the trust being general, in clause 64, for the making of rules by the District Court and in clause 65 for the modification by the High Court of the scheme itself.

It is useless in view of the distinctive characteristics of the Indian Law of religious endowments and Indian procedure relating to execution to refer to English practice or decisions. Appellant relies first on the decision just referred to as enunciating the general principle that directions in a scheme can be enforced in execution by persons interested but the preceding and succeeding context makes it clear that the Court was really only formulating a provision in the scheme it was framing. *Damodar Bhat* v. *Bhogilal* (6) referred to in the decision just noticed is no doubt in appellant's favour to the extent that the Court was prepared to treat persons, who had been parties to the decree and who failed to submit accounts in accordance with the schemes prescribed in it, as in contempt and to compel them to do so by imprisonment or attachment of their property. But this authority was merely mentioned and distinguished in *Lokasikhamani Mudaliar* v. *Thyagaraja Chettiar* (7) and it does not seem to have ever been followed. It is, moreover, material that in it, as appears from *Damodar Bhat* v. *Bhogilal* (6) the taking of accounts was a relief asked for specially in the suit and granted independently of the framing of a scheme in the Court of first instance, and as there is nothing to show that this part of the decree was altered in appeal, that fact may afford an explanation for the High Court's conclusion. Here, when the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme

(5) (1906) 28 Mad. 319=15 M.L J. 133
(6) (1900) 24 Bom. 45=1 Bom. L R 509
(7) (1917) M. W. N. 420=5 L.W. 596=38 I.C. 415.

need or can be asked for in execution of the decree or that the order granting or refusing it is appealable as one passed under section 47.

On the ground that no appeal lies the appeal must be dismissed with costs.

Venkatasubba Row, J.:—Ientirely agree.

When a suit is instituted in the words of section 92, C.P.C., to obtain a decree settling a scheme and a decree is passed embodying a scheme the relief sought must so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. In a suit for money the decree directs payment of it by defendant to the plaintiffs. To realise the money, it may be necessary to execute the decree. Similarly in suits for specific moveables, for recovery of immoveable property, to enforce specific performance of a contract, etc., what is awarded by the decree has to be realised in execution. But where the relief asked is that a scheme may be settled by the decree the plaintiffs have obtained all that they have asked; the scheme that is framed by the Court is similar in this respect to a scheme settled out of Court or a scheme contained in a will or an instrument which has made the dedication.

The argument that the application in question was an application in execution, was possible because the particular clause in the scheme under which the application was made, directed an application to the Court and the Court is defined in the scheme as either the Subordinate Court having jurisdiction over the temple or the District Court of Chingleput. But most of the clauses in the scheme make no reference to the Court at all. And can it be contended with any show of reason that the provisions of those clauses can be enforced in execution of the decree? For instance, clause 25 of the scheme provides that the trustees shall annually before a certain date prepare a budget for the following year. In the preparation of the budget the trustees are directed to have regard to the custom of the institution. If the budget is not prepared or, in the preparation of it, the custom is disregarded, is the remedy to be by way of execution of the decree? The dereliction or non-compliance may occur fifty or hundred years after the passing of the decree. Clause 42 says that the treasurer shall not keep with him more than Rs. 2,000 in cash. If he disobeys this direction how can it be enforced in execution? Clause 54 again provides that the opinion of the Board of supervision shall be determined by the majority of its members. If the Board on any particular occasion gives effect to the view of the minority I fail to see how the relief can be got in execution. Dealing with the last mentioned instances, it is obvious that neither the treasurer nor the members of the Board may happen to be parties to the suit; most likely they may not. It is impossible to conceive how an execution application lies.

The Court to which the application in question was made happens to be the Court which has jurisdiction to execute the decree passed in the suit. But this is a mere accident. The scheme might have provided that the application was to be made to another Court, a Court not having jurisdiction to execute the decree. As a matter of fact, clause 63 of the scheme provides for an application to the *High Court of Madras* for disposal of surplus funds, and similarly clause 65 contemplates an application also to the High Court for the modification of the scheme. Surely if such applications are made, by no stretch of imagination can they be described as execution applications.

Now, turning to authority, the only case which may seem to support the contention of the appellant is *Damodar Bhat* v. *Bhogi Lal* (6). But I think it may be distinguished in the manner suggested by my learned brother. If, however, the case can be said to decide that a decree settling a scheme may be executed, I respectfully dissent from it *Prayagdas Ji varu Mahant* v. *Tirumala Srirangacharlu Varu* (5) does no more than merely cite *Domodar Bhat* v. *Bhogi Lal* (6). The question did not arise and the Court was merely concerned with the actual terms of the scheme to be sanctioned. Some reliance was next placed upon *Swaminadha Mudaliar* v. *Kumaraswamy Chettiar* (8), decided by Spencer, J., and myself. The question that arose was whether a decree could be executed by persons other than those on the record. In holding that it could be, we merely reproduced an observation occurring in the judgment in *Prayagdas Ji varu*

(8) 1923 Mad. 472=44 M.L.J. 282=17 M.L.W. 422=32 M.L.T. 212=(1923) M.W.N. 239=72 I.C. 284.

Mahant v. *Tirumala Srirangacharlu Varu* (5), to the effect that persons interested (that is, other than those who are on the record) may enforce in execution the directions in a scheme. We were dealing with the question as to who could execute a decree and we held that persons not parties to the suit could also execute it. We were concerned only with the first words of the sentences we quoted and we did not intend to decide (and of course there was no occasion for it) whether or not a scheme decree is capable of execution.

I also agree that the Court exercised its powers as a Court of law and not as a *persona designata*; but the appeal was filed and justified on the footing that the order related to execution and could be questioned in appeal under section 47, C. P. C., and we were not asked to interfere with the order in the exercise of our powers of revision or of superintendence.

With these observations, I agree that the appeal should be dismissed with costs.

Appeal dismissed.

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* 1924 Madras 372.

RAMESAM AND WALLACE, JJ.

Etakandan Kunhokker—(3rd Prisoner)-Appellant

v.

The Crown—Opposite Party.

Cr. Appeal No. 871 of 1922, decided on 19th July, 1923, against the order of the Special Magistrate, Malabar Division, in Special Case No. 379 of 1922.

Madras Regulation II of 1819 Notwithstanding stopping of judicial proceedings regulation applies—Existence of reason cannot be gone into by High Court.

Because judicial proceedings are started the regulation does not become inapplicable. Statement in the warrant that the necessary reasons exist in the opinion of the Governor-in-Council is sufficient and conclusive (see S. 2, cl. 3) and it is not open to the High Court to consider the correctness of the statement.

K. V. Krishnaswami Iyer—Amicus Curiae.

The Public Prosecutor—On behalf of the Crown.

Ramesam, J.:—This matter relates to the 3rd accused in Special Case No. 379 of 1922 on the file of the Ordinance Special Magistrate, Malabar. He was charged with others for an offence under section 395, I.P.C. The case was ultimately withdrawn against him and he was acquitted. But, a warrant of commitment under Regulation II of 1819 was issued and he was detained in custody under it. Thinking he was convicted, he appealed to this Court. Our brothers Ayling and Odgers, JJ., who heard the appeal dismissed it as incompetent; but, entertaining doubts as to the applicability of Regulation II of 1819 to a case of this nature, they ordered notice to the Public Prosecutor to show cause why a writ of *Habeas Corpus* should not be issued.

We are indebted to the arguments of Mr K. V. Krishnaswami Iyer who appeared for the accused *amicus curiae* and of the Public Prosecutor who appeared to show cause.

In *Queen* v. *Amir Khan* (1) it was held that commitment under the analogous Bengal Regulation III of 1818 was not a judicial proceeding. Regarding a similar commitment under Regulation II of 1819, as an executive Act of Government, the question is whether it is legal in this case and we can issue a writ of *Habeas Corpus* for the release of the committed person.

Mr. K. V. Krishnaswami Iyer's contentions are:—

(1) As the accused has not been convicted, the Order of the Government does not apply. The Government Order does not expressly refer to convicted persons only, nor as we read it, can it be so confined by implication. No doubt the District Magistrate's Circular has not construed the Government Order but we are not dealing with the District Magistrate's Circular but the Government Order.

(2) He next contends that, once judicial proceedings are started the Regulation becomes inapplicable. We do not agree with this construction of the Regulation. We are of opinion that even after proceedings are started against a person and before they are finished, it is open to the Government to withdraw them and take action under the Regulation.

(3) It is next contended that the reasons mentioned in the preamble, on account of which action can be taken by the Governor-in-Council under section 2 of the Regulation do not exist in this case. We think that the statement in the warrant that such

(1) (1871) 9 Ben. L.R. 36=17 W.R. Cr. 15.

reasons exist in the opinion of the Governor-in-Council is sufficient and conclusive (see section 2, clause 3) and it is not open to us to consider the correctness of the statement.

I may add it is not for us to consider the propriety of the application of the Regulation on the ground that the accused is a lad of ten or eleven. The rule must be discharged.

Wallace, J.:—The real point for decision in this case is whether the fact that a judicial proceeding has already been started against an individual deprives the Governor-in-Council of the power of taking proceedings against him under Regulation II of 1819. For the appellant reliance is placed on the wording of the preamble and of section 2 of the Regulation. As to the language of the preamble, I think the words "When such proceeding may for other reasons be unadvisable" wide enough to cover a case like the present where a judicial proceeding has been instituted and has even proceeded as far as a finding by the Judge that the appellant was guilty, but where a formal conviction and sentence have not been passed, since such conviction and sentence were considered unadvisable by the Governor-in-Council for reasons stated in the G. O. Public Memorandum No. 471, dated 21—7—1922 The question of the propriety of these reasons of State policy cannot in my opinion, be opened in this Court.

As to section 2 of the Regulation, I am unable to see how it applies. The point of time when ulterior proceedings of a judicial nature are not immediately under contemplation is the point of time when the Governor-in-Council decides that the individual should be placed under personal restraint. In a case like the present, when the Governor-in-Council has decided that further judicial proceedings are "unadvisable" and has decided to issue a warrant of commitment under section 2 he, *ipso facto*, has abandoned all idea of ulterior proceedings of a judicial nature. I cannot see, therefore, how the wording of section 2 stands in the way of the issue of a warrant.

I see nothing in the proceedings of the Governor-in-Council which violates the terms of the Regulation, or which is contrary to any other law. There is no ground therefore for this Court to issue a writ of *Habeas Corpus*.

Rule discharged.

1924 Madras 373.

KRISHNAN, J.

G. G. Jeremiah—Petitioner (Accused-Appellant)

v.

W. H. Johnson—Respondent.

Cr. R. C. 948 of 1922, dated the 16th August, 1923.

Crim. Pro. Code, S. 454—Once the right is waived in appeal or revision, it cannot be asserted—Case includes appeal and revision.

When an accused waived his right to be tried as an European British subject, the special privileges given to him as such, one of which is his right to come up to the High Court in revision by virtue of the definition of "High Court" in S. 4, Cl. (*f*) of the Crim. Pro. Code is lost and he should be tried like any other ordinary individual not only in the matter of the trial itself but in the matter of appeal and revisions as well. The words "in any subsequent stage of the same case" include an application to get his conviction set aside in revision. The word "case" is wide enough to include the whole of the proceedings connected with the prosecution; the trial, the appeal and the revision are all stages in a case.

L. A. Govindaraghava Iyer—for the Petitioner.

V. L. Ethiraj for *the Public Prosecutor*—for the Crown.

Order:—In this case the petitioner one Mr. Jeremiah of the Civil and Military Station, Bangalore, was convicted of the offence of defamation under section 500, I.P.C., and sentenced to a fine of Rs. 100 by the First Class Second Magistrate of that station; and his conviction was confirmed on appeal by the Sessions Judge of the same station and application is made to this Court to revise the judgments of these two Courts and to hold that there was no case against the petitioner under section 500, I.P.C.

A preliminary objection has been taken to the hearing of this case by this Court on the ground that the proper tribunal to hear it is not this Court but the Resident's Court at Bangalore. It may be stated that Mr. Jeremiah claims to be a European British subject but he did not claim to be dealt with as such by the Magistrate before whom he was tried. He waived his claim under section 454, Criminal Procedure Code. The question whether he is really a European British subject or not was thus not made the subject of any investigation or determination. I will, however, take it for the purpose of deciding the preliminary

objection that he is a European British subject. The question then is when a European British subject has waived his claim to be tried as such under the Criminal Procedure Code, whether the proper tribunal that should exercise the power of revision is this Court or the Court of the Resident at Bangalore. It is conceded that in all trials where no question of European British subject comes in, this Court has no power of revision under sections 435 and 439, Criminal Procedure Code over the convictions by the Sessions Court of Bangalore as that Court is not an inferior Criminal Court with regard to this Court; but the proper tribunal to exercise that power is the Resident's Court of Bangalore.

The Public Prosecutor has cited in favour of his preliminary objection the case *Queen-Empress* v. *J. Grant* (1), where a Bench of the Bombay High Court had to consider a very similar question. There an European British subject waived his right to be dealt with as such by the Magistrate before whom he was tried, and the question arose whether the High Court of Bombay could exercise revisional jurisdiction over the Magistrate's conviction or whether it was the Judicial Commissioner of Sindh that should exercise it. Their Lordships held that when an accused waived his right to be tried as an European British subject, the special privileges given to him as such, one of which was his right to come up to the High Court in revision by virtue of the definition of "High Court" in section 4, clause (*j*) of the Code of Criminal Procedure was lost and that he should be tried like any other ordinary individual not only in the matter of the trial itself but in the matter of appeal and revisions as well. Against this authority Mr. Govindaraghava Aiyar for the accused has cited the decision in *Harris* v. *Peal* (2) where Walsh, J., of the Allahabad High Court took a different view. After a careful consideration of the argument addressed, I am inclined to agree with the Bombay decision, particularly the reasoning of Mr. Justice Birdwood. Section 454, Criminal Procedure Code, says: "If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before, and disallowed by, the Committing Magistrate, it is not again made before the Court to which such subject is committed, he shall be held to have relinquished his right to be dealt with as such European British subject and shall not assert it in any subsequent stage of the same case." I am inclined to think that the words "in any subsequent stage of the same case" include this application to get his conviction set aside in revision. The word "case" is wide enough to include the whole of the proceedings connected with the prosecution; the trial, the appeal and the revision are all stages in that case in my view. That being so the petitioner cannot now come up here before me asserting that he is an European British subject and take advantage of the definition of "High Court under section 4, clause (*j*), Cr. P. C. to come to this Court as such European British subject. It is only if a person can plead that he is an European British subject that he can claim the right to come to the High Court. The mere fact that he is an European British subject is not sufficient to make the first part of the definition apply to him. He must plead the fact, and if it is disputed, the Court must investigate and determine it. If he does not or cannot plead the fact, the Court can take no notice of it. In such cases, as the second part of the section says, "High Court" means the highest Court of criminal appeal or revision for any local areas which in this case is the Resident's Court at Bangalore. It follows that in section 435, Cr. P. C., this is not the Court referred to. The right given under the Criminal Procedure Code to European British subject to claim to be tried in a particular manner is in my opinion a privilege which they may claim if they think fit, but if they waive their claim, they cannot be allowed to claim it any more at any subsequent stage of their case and that is what section 454, Cr. P. C. says. The definition in section 4, Cr. P. C. must, I think, be read with section 454.

In my view, therefore, this revision petition fails and must be dismissed. The petitioner, if so advised, may move the Resident's Court at Bangalore.

Revision dismissed.

(1) (1868) 12 Bom. 561.
(2) (1920) 17 A.L.J. 896=21 Cr. L.J. 767=58 I.C. 351.

1924 Madras 375 (1).

KRISHNAN, J.

In re *K. V. S. Ramachandra Rao*—Petitioner.

Cr. C. No. 954 of 1922 and Cr. P. No. 794 of 1922, dated 17th August, 1923.

Madras District Municipalities Act (V of 1920), S. 249, Sch. 5, Clause (q)—Last clause qualifies all—Conversion of paday into rice is an Industrial process.

The words "likely to be dangerous to human life, health or property" are to be taken as qualifying each one of the previous clauses in (q) and not merely the last. The object seems to be to bring under municipal control by the method of issuing licenses the keeping or using of things which are dangerous to human life, health or property. Ordinarily any large machinery is dangerous to human life, but one cannot presume it with reference to any particular machinery. The conversion of paddy into rice is an industrial purpose.

P. Venkataramana Rao—for Petitioner.

The Public Prosecutor—for the Crown.

Order:—This case raises the question of the construction of section 249 of Madras District Municipalities Act V of 1920 taken with clause (q) of Sch 5. The accused keeps a rice mill for converting paddy into raw rice, within three miles of the municipal limits of Rajahmundry. A notification was issued under section 249 of that Act and as the result of that the parties doing anything for one or more of the purposes specified in Sch. 5 were obliged to take out licenses from the Chairman. The accused has been convicted for not taking out a license accordingly for his rice mill within the time allowed.

It is argued before me that the conviction is wrong as accused's mill was not used for any of the purposes mentioned in Sch. 5. The point turns on how clause (q) of Sch. 5 is to be construed, particularly on whether the last words of it "which is likely to be dangerous to human life or health or property" is to be read as qualifying the last clause "any industrial process," or is to be read with each of the clauses preceding it beginning with "storing any explosive or combustible material." Some clue to the construction of the clause (q) is given in the proviso to it wherein the words "for private use" have to be clearly read with each one of the preceding words as otherwise it will be a direct contradiction of clause (n) above. It seems to me reasonable to read "likely to be dangerous to human life, health or property" as qualifying each one of the previous clauses in (q) and not merely the last. The object seems to be to bring under municipal control by the method of issuing licenses the keeping or using of things which are dangerous to human life, health or property. To hold otherwise will be to give undue extension to the clauses dealing with the using of fuel or machinery for industrial purposes. The purely grammatical construction of the language of clause (q) would seem also to suggest that the last clause qualifies all the previous clauses.

In the view taken by the lower Courts the question whether the machinery used by the accused was dangerous to human life, health or property has not been considered. Ordinarily any large machinery is dangerous to human life, but we cannot presume it with reference to any particular machinery. The case must therefore go back to the trial Court to be re-tried in the light of the above observations.

It may be stated in conclusion that I do not accept the argument that the conversion of paddy into rice is not an industrial purpose. It is clearly one.

The conviction is set aside and the case remanded to the Bench Magistrate for a fresh trial and disposal. The fine if paid will be refunded.

Retrial ordered.

1924 Madras 375 (2).

KRISHNAN, J.

In re *M. Sreeramulu and others*—Petitioners.

Cr. Rev. No. 976 of 1922 and Cr. Rev. Petition No. 813 of 1922, decided on 17th September, 1923, revising the judgment of the Sub-Judge, Ellore.

Crim. Pro. Code, S. 423—Alteration of charge under Ss. 147, 323 into one under S. 160 is illegal.

Alteration of charge under Ss. 147 and 323. Penal Code, into one under S. 160 is not justifiable. [P. 376, C. 1.]

V. Suryanarayana—for the Petitioner.

V. L. Ethiraj—for the Crown.

Order.—In this case, five accused apply in revision to this Court, to set aside their convictions, by the appellate Magistrate, under section 160, Indian Penal Code. They were originally convicted under sections 147 and 323, Indian Penal Code,

by the trying Magistrate; but on appeal, the appellate Magistrate acquitted the 1st accused altogether and changed the conviction of the five accused, under sections 147 and 323, Indian Penal Code, into one under section 160, Indian Penal Code, acquitting them of offences, which they were originally charged with. It seems quite clear to my mind that the charge under sections 147 and 323, Indian Penal Code, cannot be altered into one under section 160, without a proper charge being framed and the accused tried again on the latter charge. It is not a case where an accused charged for a major offence is convicted for a minor offence, where the major offence is not proved. The offence under section 160, Indian Penal Code, is different from those under the sections, under which the accused were originally charged; for, under section 160 to establish an offence of affray, it must be shown that the fight took place in a public place and that there was also a disturbance of the public peace. Neither of these facts is in evidence in this case. The Public Prosecutor has drawn my attention to a case in *Sabir Husain* v. *Emperor* (1), in which a learned Judge of the Allahabad High Court converted a conviction under sections 147 and 323, Indian Penal Code, into one under section 160, in revision. But in doing so, he does not seem to have considered the propriety of altering the conviction in that manner and whether it was right to do so, without giving the accused an opportunity to meet the charge under section 160. No reasons are given and there is no discussion in the judgment, as to whether such alteration could legally be made. The learned Judge, thinking that on the evidence in the case an offence under section 160 was made out, convicted the accused under that section in revision. I am unable to follow the precedent that has been so created. I am of opinion that the alteration of the charge under sections 147 and 323, Indian Penal Code, into one under section 160, is not justifiable in this case. The accused must, therefore, be acquitted of that charge. In the result, all the accused succeed in revision.

Their convictions and sentences must be set aside and the fines, if paid, be refunded.

Conviction set aside

(1) (1921) 19 A.L.J. 487=22 Cr. L.J. 621=63 I.C. 157.

* 1924 Madras 376.

WILLIAM AYLING AND ODGERS, JJ.

In re *P. Ayamad and others*—Appellants-Petitioners.

Cr. A. No. 1438 of 1922, dated 27th March, 1923, against the judgment of the Court of the Special Judge of Malabar, Calicut in Case No. 65 of 1922.

Crim. Pro. Code, S. 141—A charge of harassing Hindus is not too general—Common object must be distinct to accused.

The charge of unlawful assembly with the common object of 'harassing Hindus' is not too general and unfair or unjust to the accused. What is necessary is that the accused shall have reasonably distinct notice of the common object imputed to them and of the manner in which that common object is to be brought within the language of S. 141. [P. 377, Cs. 1 and 2.]

The Public Prosecutor—for the Crown.

Ayling, J.:—This case arises out of the Moplah rebellion. The appellants have been convicted of offences under sections 149 and 307 of the Indian Penal Code. The prosecution evidence shows that on 18th February, 1922, a band of about 25 armed Moplahs, including the appellants, came to the Paramba of P.W. 2 where he, along with P. Ws. 3 and 4 were engaged in husking cocoanuts. The prosecution witnesses fled, but were pursued by the Moplahs with cries of "shoot the dog." The 1st accused fired and wounded P. W. 2, but not seriously and the prosecution witnesses managed to escape. On the very same day P. W. 2 gave a complaint, Ex. B, naming the present appellants. The latter belong to the same *amsom* as the prosecution witnesses and are well known to them. No personal enmity is shown: and there seems to be no reason why the identification of the appellants should not be accepted. The evidence of the single defence witness examined is immaterial.

The appellants were not represented before us; but the learned Public Prosecutor has deemed it his duty to draw our attention to a point in connection with the charge, which might be argued in their favour. The charge runs thus:—

"That you on or about the 19th day of February, 1922; at Puthur, Calicut Taluq, formed an unlawful assembly with the common object of harassing Hindus in prosecution, of which accused fired at and hit Cheriayamana Nair, and thereby committed an offence punishable under Ss. 149 and 307, Indian Penal Code, and within my cognisance."

In a similar case Referred Trial No. 88 of 1922, Oldfield and Devadoss, JJ., appeared to have held that the definition of the common object of the unlawful assembly in the charge was too general, and that the charge contained no averment on which the accused could be held responsible for the main offence charged (murder). They, therefore, set aside the conviction and ordered a retrial.

It is unnecessary to say that we treat this decision with greatest respect. It is, however, not reported and therefore not binding on us; and we conceive that it is our duty to determine whether in the case before us, there is any error, omission or irregularity in the case, which has in fact occasioned a failure of justice within the meaning of section 537 of the Code of Criminal Procedure.

No objection was raised by the accused either in the lower Court or in their appeal petition, but as they have been unrepresented throughout, we lay no stress on this. The question is whether the phrase "with the common object of harassing Hindus" either did not fall within the five heads of section 141 of the Indian Penal Code or was too general to give the accused an idea of what they were charged with; or was such, that shooting at a man, could not be said to be done in prosecution of that common object.

We do not think any of these things can be said. The Special Judge has explained, in his judgment, that by the phrase "Harassing" he meant "vexing by repeated attacks" and the commission against Hindus of various offences such as criminal force, theft, etc., "which are the object of these gangs when they assemble." It is a matter of common knowledge that at this late stage of the rebellion, the efforts of the rebels were directed against their Hindu fellow-subjects as well as against Government and I should myself understand the word "Harass to imply the infliction of injuries on Hindus on person and property. I think it is in general accord with the definitions quoted in the judgment in Referred Trial No. 88 of 1922 from the Oxford and Century Dictionaries as illustrating the meaning of the word.

Such a meaning would fall within the scope of clause 3 of section 141 "to commit mischief or criminal trespass or other offence," and where, as in the present case, the band of harassers are armed with swords and a gun, I think each one of them must be credited with the knowledge that murder was likely to be committed in the course of this harassing.

It is possible to suggest a more definite and more appropriate phrase but I think the phrase used is sufficient to satisfy the requirements of the sections and to give the accused persons a sufficiently clear idea of the charge against them.

I would, therefore, confirm the convictions and the sentence on the 1st accused who actually fired. I would reduce the sentences of the others to seven years' transportation.

Odgers, J.:—I agree with the judgment of my learned brother and were it not that the Public Prosecutor has raised an important point of pleading wherein we are constrained to differ from a decision of a Bench of this Court, which, however, as has just been pointed out, is not binding on us, I should have said nothing. As it is, I only refer to the question as to whether the charge of unlawful assembly with the common object of harassing Hindus is too general and therefore unfair or unjust to the accused. The learned Special Judge explains that "by harassing" he meant "vexing by repeated attacks" a phrase which I see includes the various offences against Hindus criminal force, theft, etc. I respectfully agree with the passage in the judgment in Referred Trial No. 88 of 1922 (the decision referred to) "what is necessary is that the accused shall have reasonably distinct notice of the common object imputed to them and of the manner in which that common object is to be brought within the language of section 141." In other words, does "harassing Hindus" fairly fall within the purview of the expression "to commit any mischief or criminal trespass or other offence" in section 141? In my opinion it does. It is matter of common knoweldge that one of the main objects of the Moplah rebellion came to be the conversion of Hindus to Islam and to force them to this by attacks on their persons and property. The accused are said to be five of twenty-five Moplahs who attacked with guns and swords four Hindus husking cocoanuts. I would hold that "harass" in its dictionary meaning of "to annoy by repeated attacks, to harry, lay waste, devastate, plunder, to trouble, vex by repeated attacks" is within the language of section 141 (3) and that this

expression does convey to the accused the common object of the assembly alleged and the manner in which it is sought to bring the common object within the language of the Indian Penal Code. The plea was never raised at any stage by the accused and I think it is quite clear that not only were they not in fact under any disadvantage by reason of the language of the charge but they have no ground for complaint in law for the reasons I have given.

Conviction confirmed.

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* 1924 Madras 378.

COUTTS-TROTTER, J.

Sukdevadoss Ramprasad—Plaintiff

v.

Dewan Bahadur Govindoss Chathurbujadoss and Company—Defendants.

C. S. No. 19 of 1923, decided on 4th October, 1923.

Contract Act, S. 30—To constitute wager mere absence of likelihood of delivery is not sufficient but agreement not to deliver is necessary.

It is not enough that both parties contemplate that delivery would not in fact be likely to be demanded but a definite agreement that delivery could not in any event be demanded without a breach of understanding between the parties, is necessary to render a contract a wagering contract. [P. 378, C. 3.]

V. V. Srinivasa Aiyangar—for Plaintiff.

A. Doraswami Aiyar and *V. Varadarajah Mudaliar*—for Defendants.

Judgment :—The plaintiff's case on the face of their plaint is simply a claim for the price of goods sold and delivered. It is not contended that the actual goods were delivered. It is admitted that documents purporting to be delivery orders on which delivery of the goods could be demanded passed between the parties. The defence is a somewhat unusual one namely that the transactions were not really sales of goods at all but were in the nature of gaming and wagering. The only thing that I find in the evidence in support of that contention is the fact that the goods after passing from the plaintiffs to the defendants and going through other hands ultimately reverted by purchase to the plaintiff. That is obviously not conclusive. A buyer may sell with the knowledge that the person to whom he sells will pass on the goods and if the market is rapid and transfers take place quickly he may very well contemplate that the person who ultimately claims the goods may be the last of a long chain of buyers and if the market were against him when he is called upon to deliver he might well think it to be the wisest course to buy back the goods at the end of the circle and wait for an advance in the market price. Thus it may happen that a perfectly legitimate series of transactions take place without the goods having physically left his possession and it may well be that the state of the market was such that the documents of title to the goods, in this case called *pattapatties*, changed hands so rapidly that the seller in each particular case may have thought it extremely improbable that he would ever be called upon to give delivery to his immediate buyer. As I understand the law as laid down in the leading English cases, and it is obvious that the defence in this case is based upon those cases, that is not enough ; you must not only have a state of things in which both parties contemplate that delivery would not in fact be likely to be demanded, but you must have a definite agreement that delivery could not in any event be demanded without a breach of the understanding between the parties. The defendant's own witnesses negatived the supposition that such an understanding existed here. They all agree that they would have been compelled to take or entitled to ask for delivery as the case may be unless and until they had passed a *pattapatti*, which is in fact a document of title to the goods, to their sub-purchaser. That being the defendants' evidence, I think their case fails on their own showing and that however much one may suspect that the speculative element entered into these transactions as no doubt it did, that suspicion cannot translate itself into a determination that these were gaming transactions. If the merchants of Madras desire to enter upon the dangerous and slippery path of gambling in differences and at the same time reserve to themselves the right of setting up that not overhonest defence they must learn its technique a little better than they have done in this case.

My judgment is that the goods were sold, that the transfer of *pattapatties* was in fact a delivery and that the plaintiffs must have a decree for the amount claimed with costs and interest at 6 per cent. till

payment. The defendants of course will have their remedy over against the persons who bought on the same terms from them.

Suit decreed.

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* * 1924 Madras 379.

ODGERS AND WALLACE, JJ.

Bachala Peda Somadu and others—Appellants

v.

Nethipudi Appigadu and others—Respondents.

Cr. Appeal Nos. 39 and 40 of 1923, decided on 23rd August, 1923, against the order of the District Judge, Godavari Divn., Rajahmundry.

(a) *Criminal trial—Self-defence plea is not available where there is general fight between parties.*

The defence of self-defence which must be specific individual in every case, cannot be relied on where there is good evidence to hold that there was a general fight between two parties. [P. 380, C. 1.]

(b) *Crim. Pro. Code, S. 288—Depositions before Committing Magistrate is on the same footing as those in the Sessions Court.*

They can be used as substantive evidence if justice requires it, *e.g.*, where there is conspiracy to suppress one part of evidence.

Corroboration is necessary where both depositions are entirely conflicting and equally balanced. The effect of S. 288 is to place the deposition of a witness before the Committing Magistrate on exactly the same footing with the deposition in the Sessions Court. It is a testimony within the meaning of S. 157 of the Evidence Act. (43 M.L.J. 229 and 24 Mad. 415, *Foll.*)

Under S. 288 the Court is not restricted to using the evidence before the Committing Magistrate only for the purpose of contradicting the witness at the trial. The section is intended to enable a Court to read the previous evidence as substantive evidence at the trial where for the purpose of justice the adoption of such a course is found necessary by the Judge. Where there is clearly a conspiracy to suppress the names of assailants in the Sessions Court but there is corroboration of statements made under S. 288 in all material respects except this, the Sessions Judge is perfectly justified in order to attain the ends of justice in regarding the statements under S. 288 as substantive evidence in the trial. Where there are equally balanced stories, one story in the Sessions Court and the second story as told before the Committing Magistrate, it is as a matter of discretion unsafe to prefer the latter, rather than the former. (38 All. 683 and 24 Mad. 415, *Foll.*) Where the witnesses are so careless of truth as to abandon readily on oath what they have previously sworn on oath their statements on any point should not be accepted without great caution and sound judicial reasons for accepting as true any thing they have said. Sometimes this principle has been interpreted in particular cases to mean that sound judicial reasons are absent unless there is independent corroboration on material particulars. (27 Cal. 295, 21 All. 111 and 22 All. 445, *Foll.*) That is a rule of practice and not a rule of law. [P. 381, Cs. 1 and 2, P. 382, C. 1, and P. 383, C. 1.]

G Lakshmanna, K. Venkataramana Razu and *V. Viyanna*—for Appellants.

The Public Prosecutor—for the Crown.

Odgers, J.:—Taking Criminal Appeal No. 40 of 1923 first, in this case 8 of the 24 accused were convicted by the acting Sessions Judge of Godavari Division, as to accused 2 and 4 to 8 under section 147, as to accused 1 under sections 326, 324 and 148 and as to accused 3 under sections 324 and 148. The riot in which these persons are held to have taken part was a fight between the Panchamas of Voolapalli and the Panchamas of Biccavole, a village close by, and it took place about midday on 12-4-1922 at the boundary between the two villages. The story of the beginning of the fight is told by P. W. 2 whose credibility there is not the least reason to doubt. He is an Inspector of Co-operative Societies, and when on tour from Biccavole on the day in question, 9th accused told him that the Biccavole and Voolapalli Panchamas had quarrels and the Voolapalli people were going to Biccavole to settle the quarrel. It appears that some Voolapalli men had married Biccavole wives and had refused to fetch them away to their houses. P.W. 2 was asked to mediate. He agreed, but thought that it would be better if he had some support and went to fetch the School Master, P.W. 9. He left the two parties of Panchamas, one on each side of the boundary. There was a panchayat formed, but according to the evidence of P.W. 2 a Biccavole man whistled and this was a signal for a general fight between the two factions. P.W. 2, seeing a fight was imminent, went away. He says there were about 70 of the Voolapalli people and about 30 or 40 of the Biccavole people. He saw no weapons in the hands of either party. P.W. 9 does not give any useful evidence as he, seeing the two factions sitting opposite each other on the boundary, apprehended that there would be a fight and ran away. That there was a fight cannot be disputed. The learned Sessions Judge held that accused 1 and 3 were the leaders of the Voolapalli party and that the fight was entirely due to their action.

The other case, Criminal Appeal No. 39, is a case in which certain members of the Biccavole party, accused 1, 3, 10, 11 and 22, have been convicted, as to accused 1 and 3 under sections 148 and 324 and as to accused 10, 11 and 22 under section 147. The accused in Case No. 39 are most of the witnesses in the other case, Cr. Appeal No. 40. Mr. Lakshamanna who appeared for the accused in Criminal Appeal No. 40 pleaded self-defence largely, I think, on the ground that the learned Sessions Judge, possibly rather inaccurately, says "there is a certain element of self-defence to be considered," though he adds that the doctrine is not, in a rioting case, to be discussed when the question is whether a man is guilty or innocent of the offence of rioting. It is admitted that there is no evidence of self-defence on the record. The statements of the prosecution witnesses in Criminal Appeal No. 40 were relied on but were not put in at the trial. It does not seem to me that the defence of self-defence which must be specific and individual in every case can be relied on here where there is good evidence to hold that there was a general fight between these two parties. The plea in Case No. 39 is that the Biccavole party went to the panchayat peacefully and they got the worst of it and that the Voolapalli party were the aggressors. There is no evidence of this whatever. In fact what little evidence there is (of P.W. 2) seems to show that the Biccavole party who are the accused in Case No. 39 began the fight as one of their numbers sounded a whistle which was the signal for the general engagement.

The case would present no subject of interest were it not for the fact that the witnesses in both the cases partly resiled in the Sessions Court from their statements made before the Committing Magistrate. For instance, to take one example from the record in Criminal Appeal No. 40, P W. 4 before the Committing Magistrate's Court distinctly stated that the 1st accused cut him on his right wrist with a sword stick, 3rd accused with a sword stick hit him on the shoulder, 7th accused hit him with a stick on his back. In the Sessions Court he admits there was a fight and that he was injured on his right wrist and that it was caused with a knife but he could not say who gave him the blow. He says the Police forced him to tell the Magistrate that the 7th accused hit him on the back with a stick; he did not see the 1st accused strike anybody. To take another example, P.W. 5 in the Magistrate's Court says that the 1st accused stabbed him with a knife on his left palm. In the Sessions Court he said he received a knife cut on the palm of his left hand. He did not notice who gave him the blow. When he was examined by the Committing Magistrate he says he was confused. P.W. 6 says there was a fight, but he does not know how it arose and that some one gave him a blow on the back with a knife. Before the Committing Magistrate he said that the 1st accused chased him and cut him with a knife on the back. In the Sessions Court he said that the Police compelled him to implicate some one and that was why he said that the accused had struck him on the back with a knife. P.W. 7 said in Sessions Court he received no injuries that day and that he went to the Hospital to get the wound attended to which is obviously false (cf. Ex. G.). P.W. 8 said in the Sessions Court that he received three injuries of which two were caused with a knife and the other with a stick. He cannot say who struck him. In the Committing Magistrate's Court he said the accused 1, 7 and 6 hit him with knives. He also says that the Police frightened him. The same unwillingness in the Sessions Court to name the man who injured each witness is to be observed in Criminal Appeal No. 39. It will be tedious to go through the whole of the depositions, but from what I have quoted above it will be gathered that the witnesses on the whole admit there was a fight. Most of them admit they were injured but when it comes to naming the person who injured them they say they do not know. There is in my opinion ground for thinking that these two villagers have now composed their quarrel and that it was a condition of the settlement that none of them should inculpate the other when it came to the trial. On the best consideration that I can give to the facts of the case it appears to us that the Sessions Judge was perfectly justified, subject to what will be said hereafter, in relying on the statement before the Committing Magistrate under section 288, Criminal Procedure Code, and in believing those statements in preference to the statements made by the witnesses in the Sessions Court when they profess ignorance of their assailants.

The allegations made in the Sessions Court as will be seen are two: (1) that the witnesses were confused when they made their statements before the Magistrate and (2) that they were made under compulsion by the Police. But the learned Sessions Judge has found that there could have been no confusion in their minds over three months after the occurrence as they were examined by the Magistrate in August whereas the occurrence was in April, and that the Police complusion, if it existed, would be just as strong in the Sessions Court as it was when they were examined. The Sessions Judge therefore finds that these two allegations were entirely unfounded. This is the reason given by him for preferring the evidence under section 288. But it is objected before us that the learned Sessions Judge was wrong and that the evidence under section 288 ought not, under the circumstances, to have been believed by him as there is no material corroboration of these statements. Several cases were quoted to us on this subject, and I might premise by referring to a case to which I was a party, reported in *In re Velliah Kone* (1), where it was held that the effect of section 288 is to place the deposition of a witness before the Committing Magistrate on exactly the same footing with the deposition in the Sessions Court and that it is a testimony within the meaning of section 157 of the Evidence Act. The learned Vakils for the defence in this case quoted before us *Queen-Empress* v. *Jeochi* (2) and *Queen-Empress* v. *Nirmal Das* (3). *Queen Empress* v. *Jeochi* (2) is to the effect that a conviction cannot be based solely on the evidence before the Magistrate there being no other evidence to corroborate it. In *Queen-Empress* v. *Nirmal Das* (3) it was said: "It is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence, *i.e.*, section 288, if it stood by itself." In a later case in the same Court *Emperor* v. *Dwarka Kurmi* (4), in which one of the Judges who was sitting alone decided *Queen-Empress* v. *Jeochi* (2) it was held that when admitted, the statements under section 288 are exactly on the same footing as all the other evidence in the case, its value being of course a question for the tribunal which has to decide the case on the evidence. Two cases of our own Court were relied on: *Queen-Empress* v. *Bharmappa* (5) which was a case of a retracted confession corroborated by depositions under section 288, the statements made before the Magistrate being retracted in the Sessions. It is really an example of what the Bombay High Court calls in *Queen-Empress* v. *Gharya* (6) "the Madras practice of requiring corroboration of a retracted confession" and which it may be noticed the Bombay High Court does not follow. In *Queen-Empress* v. *Bharmappa* (5) the learned Judges held the depositions read under section 288 and retracted at the trial are not by themselves material corroboration of a retracted confession. But in *Queen-Empress* v. *Doraisami Iyer* (7), it was held that under section 288 the Court is not restricted to using the evidence before the Committing Magistrate only for the purpose of contradicting the witness at the trial. The section was intended to enable a Court to read the previous evidence as substantive evidence at the trial where for the purposes of justice the adoption of such a course is found necessary by the Judge. The only other cases that is necessary to notice is the one cited in *King-Emperor* v. *Bhut Nath Ghose* (8). In that particular case it was held that the Sessions Judge did not exercise a proper discretion in acting on the statement under section 288. It is perfectly clear from the later Madras ruling cited above that, in a case like the present where you clearly have a conspiracy to suppress the names of assailants in the Sessions Court but you have corroboration of the statements made under section 288 in all material respects, except this, the Sessions Judge was perfectly justified in order to attain the ends of justice in regarding the statements under section 288 as substantive evidence at the trial. The contention on behalf of the accused that

(1) 1923 Mad. 20=45 Mad. 766=43 M.L.J. 222=16 M.L.W. 239=(1922) M.W.N. 506=31 M.L.T. 175=24 Cr. L.J. 417=74 I.C. 529.
(2) (1899) 21 All. 111=(1898) A.W.N. 196.
(3) (1900) 22 All. 445=(1900) A.W.N. 169.
(4) (1906) 28 All. 683=(1906) A.W.N. 187=3 A.L.J. 852=4 Cr. L.J. 61.
(5) (1889) 12 Mad. 123.
(6) (1895) 19 Bom. 728.
(7) (1901) 24 Mad. 414.
(8) (1903) 7 C.W.N. 345.

there must be corroboration on the very point on which the witnesses have resiled is clearly in my opinion wrong. If this is necessary then I cannot see any scope for the statements under section 288. In my opinion all that the earlier cases quoted come to is that where you have two equally balanced stories, one story in the Sessions Court and the second story as told before the Committing Magistrate, it is as a matter of discretion unsafe to prefer the latter rather than the former. That is a case of an equal balance of evidence. When there is nothing to show the preponderance of one over the other that may be a perfectly good doctrine. Whereas here you have got general agreement in the two stories the only difference being in the name of the actual assailant of each witness, and such a doctrine is clearly untenable. It therefore seems to me that the legal point fails.

With regard to the facts of the two cases I am of opinion that they have been fairly found by the Sessions Judge on evidence which was available for him to consider and I am not disposed to differ from his findings. The 1st accused in Criminal Appeal No. 40 has been given consecutive sentences amounting to three years and the 3rd accused $1\frac{1}{2}$ years. It is suggested that these are unduly severe. It must be pointed out that this was a serious riot in the course of which one man of the Biccavole party died as the result of injuries received. On consideration I am unable to see any reason to remit any part of the sentences. I would confirm the convictions and sentences and dismiss the appeals in each case.

Wallace, J.:—I agree with my learned brother for the reasons given by him that these appeals should be dismissed.

I wish to say something on the point of law raised in these two cases. It is quite clear from a comparison of the depositions in the Sessions Court of each set of witnesses in these two cases with their depositions in the Committing Court that each eye-witness supported his general account of the fight in every point except that of identifying particular assailants, and that each with one accord in the Sessions Court professed his inability to make any such identification of assailants. None of them goes so far as to give a categorical denial of his former statement that such and such an accused person committed such and such an act, but all say merely that they cannot identify particular assailants or that they do not remember who they were. When it is noted that in S. C. No. 51 of 1922, 13 out of the 14 eye-witnesses are accused in S. C. No. 52, and that in S. C. No. 52, 8 out of 9 eye-witnesses are accused in S. C. No. 51, the conclusion cannot easily be resisted that between the hearing in the Committing Court and the hearing in the Sessions Court both parties came to a mutual agreement that each would not in the Sessions Court identify as assailants the members of the other party. Such a conclusion could only be rebutted if there are strong grounds for thinking that the identification evidence in the Committing Court was due to some coercion or undue influence, and that it was so has been argued before us. It is true that in S. C. No. 51, 7 out of the 14 eye-witnesses say that Police pressure to identify particular assailants was put on them, but three others of these witnesses merely say their identification in the Committing Court was due to a confusion of mind, while the other four give no reason at all. In S. C. No. 52 only one eye-witness out of the 9 complains of Police pressure and the rest give no reason. The theory of police pressure is untenable, since that would have been tightened and not relaxed when the case came to Sessions. It is further very significant that in the Sessions Court in both the cases only 2 out of the 23 eye-witnesses were cross-examined at all, and these two were only asked a few unimportant questions. The defence pleaders in each case evidently were aware from the beginning of the hearing of the cases there that no eye-witness was going to identify any of the accused and therefore it was not worth while cross-examining even on the general features of the fight. The common sense conclusion is that in order to save one another the members of each party had agreed not to identify their assailants in the Sessions Court, that is, they entered into a concerted conspiracy to defeat the ends of justice.

That being the reasonable deduction from the facts, we have to decide whether in such circumstances the lower Court was justified in admitting under section 288, Cr. P. Code, and using as substantive evidence against the accused in each case the evidence of identification given in the

Committing Court, such evidence of identification being lacking in the depositions given before it. It is hardly necessary to emphasise here that, once a Court has admitted on behalf of the prosecution evidence under section 288, the depositions so admitted are just as much evidence for the prosecution in the case as the depositions recorded for the prosecution in the Sessions Court. There is nothing in section 288 which indicates that there is any difference in the probative value of the former when compared with the latter. See *In re Velliah Kone* (1), *Emperor* v. *Dwaraka Kurmi* (4), and *Queen-Empress* v. *Doraiswami Iyer* (7). Whether the Court is justified in admitting under section 288 with mechanical regularity depositions given in the Committing Court of any and every witness who retracts in the Sessions Court is a question to which I shall come later.

We have been referred in argument at the Bar to various cases from which it is sought to deduce a general proposition that a conviction by a Sessions Court based wholly on depositions admitted under section 288 is bad in law. We have not been referred to any ruling which lays down any such broad proposition. The broad principle to be observed clearly is that where witnesses are so careless of the truth as to abandon readily on oath what they have previously sworn on oath, their statements on any point should not be accepted without great caution and sound judicial reasons for accepting as true *anything* they have said. Sometimes this principle has been interpreted in particular cases to mean that sound judicial reasons are absent unless there is independent corroboration on material particulars. See *Queen-Empress* v. *Jadub Das* (9), *Queen-Empress* v. *Joochy* (2) and *Queen-Empress* v. *Nirmal Das* (3). That that is a rule of practice and not a rule of law may be readily seen by taking the extreme case of a conviction based on the uncorroborated evidence of an accomplice which conviction is not bad in law.

An automatic test for the credibility of witnesses is not one that can be stated or ought to be stated in statutory terms. The test cannot be mechanical, but emerges for each case from circumstances and probabilities of that case and is the not result of the effect of these on the mind of the Judge trying the case. In cases where witnesses have retracted in the Sessions Court their statements before the Committing Court, the proper test is, "are there reasonable grounds, grounds sufficient to satisfy a judicial mind, for holding that the former statements are false and the latter are true?" Such grounds might be corroboration by other witnesses but need not necessarily be so. Each case must rest on its own evidence.

In my view, however, such grounds must be found by the trying Court and put forward by it, as the lower Court has done, as a reason for the admission against the accused of former statements under section 288, Cr. P. C., that is, unless the Sessions Court is satisfied that there are judicial grounds for holding that the retraction in the Sessions Court is false testimony and that the statements in the Committing Court are true testimony, it ought not to admit on behalf of the prosecution these latter statements under section 288 at all. And here I would follow the principle laid down in the 27 Calcutta case in so far as it lays down that such statements are not to be mechanically placed on the record without some sufficient grounds, for as I have indicated the Court must have been satisfied first that "there is something to show the truth of the former statement."

The cases which usually arise are where a few witnesses who speak in the Committing Court to having seen the Commission of a crime deny in the Sessions Court their whole story and allege that they did not see the commission of the crime at all; and in most of such cases it would be a sound conclusion that the evidence in neither Court is reliable, unless there is some outside corroboration of the witnesses in the Committing Court. But the present cases are very different from these. Here is a large body of evidence in the Sessions Court to support the main story of the fight as given in the Committing Court up to the point of the identification of the assailants. Then the witnesses retract, being themselves accused in the counter-case and expecting the benefit of a similar retraction of the eye-witnesses in the case in which they themselves are accused; and, as I have said, there is no other reasonable explanation for their retraction

(9) (1900) 27 Cal. 295=4 C.W.N. 129.

on that sole point than that they came to a compact with the other side that the other side would similarly exonorate them in the Sessions Court. It is impossible to resist the conclusion that their retraction on the one point of identification in the Sessions Court is a perjury designed to defeat justice, and that the true evidence is that which they gave in the Committing Court. In these cases therefore I find no difficulty in agreeing with the lower Court as to which are the reliable depositions; and on its conclusion on that point, which was a judicial one, that Court was perfectly competent to act. I agree, therefore, that the learned Sessions Judge was amply justified in the circumstances of these cases in accepting as true and using the evidence of identification of assailants given in the Committing Court by the eye-witnesses and cannot accept the argument put forward before us that the conviction based on that evidence is bad or unjustifiable in law.

Appeal dismissed.

1924 Madras 384.

KRISHNAN, J.

Arumuga Goundan and others—Accuseds-Petitioners

v.

The Crown—Opposite Party.

Cr. Rev. Case Nos. 68 and 83 of 1923, decided on 7th September, 1923, against the judgment of the Sub Magistrate Erode, in Cr. Appeal Nos. 56 of 1922 and 3 of 1923.

(a) *Penal Code, Ss. 224 and 225—Arrest and detention should be legal.*

To sustain a charge under S. 224 or S. 225 the arrest and detention should be legal.

• (b) *Crim. Pro. Code, S. 59—Interpretation—The phrase "in his view" should not be too much strained.*

Where persons went to their cocoanut tope to see if any theft of toddy was going on and saw a man standing on the ground with a pot of toddy in his hands and two of his confederates climbing the trees, and arrested the man on the ground,

Held, the latter should be deemed to be committing theft "in the view of" his arrestor. The toddy should be regarded to be in process of being removed from the tope (35 Cal. 361 and 64 I.C. *Dist.*) Failure to hand over the arrested person to a passing beat constable or taking the arrested person to a Chavadi on the way to the Police Station is not necessarily an unnecessary delay vitiating legality of arrest. [P. 384, C. 2 and P. 385, C. 1]

(c) *Crim. Pro. Code, S. 233 (2)*—Persons who abet in offence of helping others to escape from lawful custody could be tried along with those who escaped and all together could be tried also for offences under Penal Code, Ss. 147 and 323.

K. Ramaswami Goundan and *K. Periaswami Goundan*—for the Petitioners.

The Public Prosecutor—for the Crown.

Order:—This is a case where the first accused is said to have escaped from lawful custody and accused 2 to 8 to have rescued him from such custody. The first accused is charged under sections 147, 323 and 224, Indian Penal Code, and accused 2 to 8 under sections 147, 323 and 225, Indian Penal Code. They have all been convicted by the Stationary Sub-Magistrate of Erode and that conviction has been upheld by the Sub-Divisional Magistrate of Erode. This revision is by all those accused.

The first point taken before me in revision is that the arrest of the first accused was not lawful and, therefore, the conviction under sections 224 and 225 in the case of the first accused and of the other accused, respectively, was not sustainable. What happened was, as found by the lower Courts, that P. Ws. 1 to 3 went to their cocoanut tope, to see if any theft of toddy was going on, as there had been frequent theft of toddy recently from that tope. They found the first accused standing on the ground with a pot of toddy in his hands and two of his confederates climbing the trees, evidently for the purpose of bringing the toddy down. The three prosecution witnesses were able to arrest only the man standing on the ground, with the pot of toddy in his hands, that is, the first accused. It is argued before me that that arrest was illegal, because section 59 of the Criminal Procedure Code does not cover this case at all; for it is said that it could not be predicated that he was committing the offence of theft "in the view of" the persons who arrested him. Section 59 says:

> "Any private person may arrest any person who *in his view*, commits a non-bailable and cognizable offence, or who has been proclaimed an offender etc."

I think in this particular case the facts justify the inference that the first accused was committing theft of toddy, in the view of the three persons, who arrested him.

Evidently these people were out, for committing theft of toddy and the first accused was the man on the ground with toddy taken from the trees. The toddy was, in my view, in the process of being taken or removed from the cocoanut tope: the first step in which would be to bring it down from the trees, which the other two persons who were up the trees were trying to do; and the next step would be to carry the toddy away from the tope, which the man standing on the ground was doing, as he was collecting the toddy in a pot in his hands. I think, one should not put too strained a construction on the words "*in his view*" and I think the prosecution witnesses were justified in arresting the first accused, as one of the thieves committing theft *in their view*. The case in *Bolai De* v. *Emperor* (1) was cited as an authority to the contrary by the learned Vakil, who appeared for the petitioners. That was a case where a Duffadar arrested a person carrying away in his bullock cart some newly cut plantain trees. The Duffadar knew nothing about the plaintain trees, or about their ownership, or where they were cut. All that he saw was the plantain trees being carried away in a cart. It was only because the owner of the plantain garden from which those trees appeared to have been cut was shouting that they were his and stolen by the cart-driver that the Duffadar knew that they were stolen articles. In such a case, as that, I quite agree it is impossible to say that the Duffadar who arrested the thief had seen the theft being committed. In fact, his knowledge that a theft had been committed was entirely, from the information he obtained from the other person, the owner. That case, I do not think, applies here. *Alawal* v. *Emperor* (2) is also a case very similar to that; and there a man who was seen running away, after committing a murder, was arrested by persons, who had not seen the murder being committed at all, but who apparently considered that he was the murderer, as there was a hue and cry, raised by the persons, who were present at the scene of the offence. In this latter case, the learned Judges of the Lahore High Court, following *Bolai De* v. *Emperor* (1), held that section 59 did not authorise the arrest of that person. These cases are clearly distinguishable from the present case, where I am of opinion, from the facts proved that the first accused was a party to the theft and was actually in the process of committing theft, when prosecution witnesses 1 to 3 saw him and arrested him.

It was next argued that, even if I hold that the original arrest was legal, the detention of the person, before he was rescued, became illegal, because when the arrested person was being taken to the temple chavadi, the party met a beat constable on their way. It is suggested that the arrested person should have been handed over to this constable, and this not having been done, the second portion of section 59 (1) was not complied with, as there was unnecessary delay, in handing him over to the Police. There is no evidence to show that this beat constable was in a position to take charge of the arrested person. He was a beat constable and naturally would be looking after his beat duty and cannot be expected to take charge of an arrested offender; all that he would have done probably, if an application had been made to him, would have been to direct them to the Police Station, or to the Chavadi where the man was actually taken.

It is next suggested that he should have been taken to the Police Station direct and not to the temple Chavadi. That objection was not taken in the lower Court and it is not very clear whether it was easier to have taken him to the temple Chavadi, than to the Police Station, at that time of the night. It is not possible to hold that failure to take him at once to the Police Station was such an illegality as would vitiate his detention in the Chavadi. If they had met the Village Magistrate, he would certainly have advised them to take the man to the nearest Police Station and the man would have been so taken, without any unnecessary delay. These points have not been taken in the lower Court and therefore these questions have not been thrashed out on proper evidence.

It is lastly argued that the trial itself was vitiated, as there was a misjoinder of charges in the case. I can see no misjoinder of charges at all. The 1st accused was charged with escaping from lawful custody and with the connected offences of rioting and hurt, under sections 147

(1) (1908) 35 Cal. 361 = 12 C.W.N. 367 = 7 Cr. L.J. 188.
(2) 1922 Lah. 73 = 198 P.L.R. 1922 = 23 Cr.L J. 3 = 64 I. C. 371.

and 323, Indian Penal Code. The other accused, 2 to 8, were charged with helping this man to escape from lawful custody and also under sections 147 and 323, Indian Penal Code. The whole thing was part of the same transaction and there is nothing wrong in having one trial against all the 8 accused in the case. Now, the theft case was not tried with this case at all, but was tried at a separate trial. The Magistrate, as he himself points out in paragraph 7 of his judgment, was quite alive to the fact that the offence of theft and the other offences were distinct offences, which took place at different places and at different times and he accordingly split up the case into two cases and tried them as separate cases. Therefore, no objection on the score of misjoinder of charges or of accused can stand. That being so, there is no ground for interfering in revision with the conviction of the 8 accused in Criminal Revision Case No. 68.

It is then suggested that, as they have been released on bail, the sentence should be reduced to the period they have already suffered; but it must be noted that they got only a sentence of two months' rigorous imprisonment and a fine of Rs. 100 each. I do not consider that those sentences are in any way excessive, or such as call for interference by this Court. Criminal Revision Case No. 68 is therefore dismissed, the convictions and sentences of the accused being confirmed.

As regards Criminal Revision Case No. 83 of 1923, there cannot be any possibility of doubt that the 1st accused is guilty of the offence of theft of toddy. The sentence, a fine of Rs. 50, is by no means excessive. The conviction and the sentence are confirmed and the Revision Petition is dismissed.

Petitions dismissed.

1924 Madras 386.

SCHWABE, C.J. AND KRISHNAN, J.

T. R. Tawker and Sons—Defendants-Appellants

v.

Harsookdoss Choughmull—Plaintiff-Respondent.

O. S. App. No. 68 of 1923 and C.M.P. No. 2382 of 1923, decided on the 27th August, 1923, from the order of Kumaraswami Sastry, J., dated 13th August, 1923.

Madras High Court (Original Side) Rules—Rule 206—Order of Judge under—No appeal lies from such an order.

Matters determined by Judges under rule 206 are not judgments at all. The Court acts only in an administrative or ministerial capacity. Hence no appeal lies from such an order passed by a judge.

Vere Mockett, Counsel, instructed by Messrs. Short Bewas & Co.—for Appellants.

V. V. Sreenivasa Aiyangar—for Respt.

Judgment:—This matter comes before us on a petition for stay of the sale of property pending appeal from an interlocutory order of Kumaraswami Sastri, J., who, acting under rule 206 of the Original Side Rules, had to determine in Chambers certain questions as to the advertisement of some moveable property taken in execution and as to reserve prices to be put upon the articles. The execution debtor is not satisfied with the order and the directions given. Therefore, he brings this appeal.

A preliminary point is taken that no appeal lies. An appeal lies under the Letters Patent from all judgments given on the Original Side of this Court. The question is whether this order is a judgment. Rule 206 of the Original Side Rules corresponds to Order XXI, rule 66 of the Civil Procedure Code, and it has been held by a Full Bench of this Court in *Sivagami Achi* v. *Subramania Aiyar* (1) that matters of this kind determined by Judges under that order or the corresponding sections of the former Civil Procedure Code are not judgments at all, or orders strictly so called; but that the Court is acting in that matter in an administrative or ministerial capacity and that, therefore, no appeal lies. We can find no distinction on this point between appeal coming from the decisions given under Order XXI, rule 66 of the Civil Procedure Code and appeals from the decisions given by the Judge on the Original Side under Rule 206 of the Original Side rules, and if it is right to hold that the one is ministerial we are bound to hold that the other also is ministerial. We are bound by the decision of the Full Bench and must, therefore, hold that no appeal lies.

As, in our judgment, no appeal lies, there is no ground for granting stay, and the petition must be dismissed with costs.

Petition dismissed.

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(1) (1904) 27 Mad. 259 = 14 M.L.J. 57 (F.B.).

1924 Madras 387 (1).

SPENCER AND DEVADOSS, JJ.

The Official Receiver, South Arcot — Appellant-Petitioner

v.

Perumal Pillay and others—Respondents.

A. A. O. No. 91 of 1923, decided on 29th August, 1923, against the decree of the District Judge, South Arcot, in O. P. No. 90 of 1920.

Provincial Insolvency Act (V of 1920), Ss. 4 and 56 Insolvency Courts will generally refuse to decide question of title where it does not consider it expedient or necessary to do so.

S. 4 enables an Insolvency Court to adjudicate upon questions of title which it may deem expedient in the interest of justice.

But the proviso to S. 56 (3) which controls the power given by S. 4 is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove. In such a case it would be a mere waste of time to adjudicate upon questions of title as it would not have power to recover the property freed from the obstruction by others. S. 4 reserves the power to Insolvency Courts to decline to decide questions not deemed by them necessary or expedient. In such cases the Receiver has his remedy by a suit.

T. Narasimha Aiyangar and *S. Rangaswami*—for Appellant.

N. S. Srinivasa Aiyar—for Respondents.

Judgment:—Section 4 of Act V of 1920 is wide enough to enable an Insolvency Court to adjudicate upon questions of title " which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any case" of insolvency.

But the power given by this section is subject to the provisions of the Act, one of which is the provision to sections 56 (3), which is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove.

In this case it is not admitted that the insolvent has a present right to joint possession of these properties along with respondents 2, 4 and 5.

In that respect this case differs from the facts in *The Official Assignee of Madras* v. *Ramachandra Aiyar* (1), where the insolvent had a right to be in joint possession of the family property with his sons.

Seeing that the Insolvency Court, even if it adjudicated upon the title of the insolvent as against his sons, would have no power to recover the property from the sons free of their obstruction as prayed for in the petition, it would be a mere waste of time to adjudicate upon questions of title, and therefore this was a case in which it would certainly be expedient to have these questions decided in a regular suit.

Section 4 reserves the power to Insolvency Courts to decline to decide questions which it does not deem it necessary or expedient to decide in those proceedings.

We think upon this ground that the Insolvency Court was right in declining jurisdiction. The Receiver has his remedy by a suit.

The appeal is dismissed with costs payable out of the estate.

Appeal dismissed.

(1) 1923 Mad. 55=46 Mad. 54=16 L.W. 559=(1922) M.W.N. 653=43 M.L.J. 569=68 I.C. 898.

1924 Madras 387 (2).

KRISHNAN AND WALLACE, JJ.

Palikudathan alias *Samudi Goundan*—Petitioner

v.

Buddu Goundan—Respondent.

Cr. M. P. No. 105 of 1923, decided on 7th August, 1923, praying to set aside the order of the District Magistrate, Salem, dated 30th September, 1923.

(a) *Crim. Pro. Code, S. 195—False information given to Village Magistrate—The Sub-Magistrate cannot grant sanction to prosecute because the Village Magistrate is not his official subordinate.*

District Magistrate revoking Sub-Magistrate's sanction to prosecute is not subject to the High Court.

Where a Sub-Magistrate grants sanction to prosecute for giving false evidence before him, he acts as a Court, and an appeal from his order lies to the District Magistrate and from his order to the Sessions Judge and to the High Court

A Sub-Magistrate cannot grant sanction to prosecute for false information given to a Village Magistrate as the latter is not subject to his authority as a public servant. A District Magistrate revoking Sub-Magistrate's sanction to prosecute under S. 182, I.P C., acts in his capacity of the executive head of the district and is not therefore subject to the authority of the High Court.

K. V. Setha Aiyangar—for the Petitioner.

T. M. Krishnaswami Aiyar— for the Respondent.

Order:—This is an application to this Court for grant of sanction to prosecute the counter-petitioner under section 182, I.P.C. Originally the application was made to the Sub-Magistrate under sections 193 and 211, I.P.C., but the Sub-Magistrate finding that no charge was made against the counter-petitioner by the petitioner converted the application to one under section 182, I.P.C., and proceeded to grant sanction under that section and section 193 for giving false evidence before him. On appeal to the District Magistrate the order granting sanction under both the sections of the I.P.C. was revoked. The petitioner comes here and claims that we should give that sanction now.

Taking section 182 first it is quite clear that the Sub-Magistrate had no authority whatever to grant any sanction in this matter because he was not the public servant to whom the information concerned was given. It was given to the Village Magistrate. It is contended before us that the Sub-Magistrate should be taken as a superior authority to the village under section 195, Cr. P. C., and the ruling in *The Queen* v. *Periannan* (1) is relied on for the purpose but we are unable to concur with that ruling. It was not followed by this Court in the case in *Venkatasawmi* v. *Narasimhayya* (2). The learned pleader for the petitioner was not able to explain how the Village Magistrate could be taken to be subject to the authority of the Sub-Magistrate as a public servant.

It was also argued that we cannot go into the question ourselves because the District Magistrate who revoked the sanction did so in his capacity as the executive head of the district and that he is not subject in his capacity as such public servant to our control. But it is unnecessary to decide this point, for we think that no sanction could properly have been given by the Sub-Magistrate and the revocation of that sanction under section 182, I.P.C., is therefore right. The application so far as it refers to section 193 should have been made to the Sessions Judge and not to us because that sanction was granted by the Sub-Magistrate as a Court and the appeal lay under section 195 to the District Magistrate and from his order the application should have been made to the Sessions Judge. Such an application not having been made, we decline to interfere in the matter. If so advised, the petitioner may make his application to the Sessions Judge.

The petition is therefore dismissed.

Petition dismissed.

(1) (1882) 4 Mad. 241.
(2) (1908) 4 M.L.T. 214.

1924 Madras 388.

OLDFIELD AND DEVADOSS, JJ.

A. R. Narayana Aiyar and another—Plaintiffs-Petitioners

v.

S. I. Ry. Co., Ltd., and another—Defendants-Respondents.

Civ. Rev. Pet. No. 163 of 1922, decided on the 23rd March, 1923, from the decree of the Sub-Judge, Calicut.

(a) *Railways Act, S. 72—Burden is on plaintiff.*

In a suit against a Railway Company for compensation for loss of goods consigned under a special contract embodied in a risk note, the onus is upon the plaintiffs to establish how the loss or deterioration was caused.

(b) *Railways Act, S. 76—Does not apply where there is a risk note.*

The burden of proof is on plaintiff and is not affected by S. 76 of the Railways Act. (41 Cal. 576, 43 Mad. 617=11 L.W. 358, *Foll.*)

A. V. K. Krishna Menon—for the Petitioners.

Brightwell and *Moresby*—for the Respondents.

Oldfield, J.:—Two questions have been raised on this petition. First, whether the burden of proof is on the consignee or the consignor under the risk note, Form H. Second, whether the incidence of the burden of proof is affected by section 76 of the Indian Railways Act.

We deal first with section 76. We have not been shown any case in which there is a special contract or risk note in question and in which section 76 has been applied. Reference has been made to *Nanku Ram* v. *The Indian Midland Railway Company* (1), and *Sesham Pattar* v. *L. S. Moss* (2). But it is not clear that in either of these cases there was any risk note or was anything, on which it could be said that a question of the effect of a special contract apart from the ordinary law was raised.

Turning to the incidence of the burden of proof, we find that in such a case as the

(1) (1900) 22 All. 361=(1900) A.W.N. 111.
(2) (1894) 17 Mad. 445.

present, authority seems to be clearly against the petitioners. *Ghelabhai Punsi* v. *The E. I. Railway Co.* (3), relied on by and referred to in the lower Court's judgment is open to question, because it is founded very largely on the decision in *Curran* v. *Midland Great Western Railway Company of Ireland* (4) and that decision has been regarded with suspicion in the recent case, *H. C. Smith, Ltd.* v. *Great Western Railway Company* (5). More particularly the former can, in our opinion, be distinguished in any event from the present case on the ground, on which Lord Buckmaster was disposed to distinguish it from the case before the House of Lords, with reference to the nature of the property in question. For the bags of rice lost by the plaintiffs before us more closely resemble the boots referred to in the English Case than the pigs referred to in the Irish. The form of contract in question in the case before the House of Lords was, if anything, however, worded more adversely to the Railway Company than the form now under discussion and yet the conclusion was clear that the burden of proof was entirely on the plaintiff. A similar conclusion had been reached in India in *East Indian Railway Company* v. *Nathmal Behari Lal* (6), and *East Indian Railway Co.* v. *Nilkanta Roy* (7), which no doubt has been dissented from by this High Court, in *Madras & Southern Mahratta Railway Co.* v. *Subba Rao* (8), but only on another point not now under consideration. In accordance with those authorities we decide for the defendants and dismiss the revision petition with costs.

Petition dismissed.

(3) (1921) 45 Bom. 1201=23 Bom. L.R. 525=63 I. C. 241.
(4) [1896] 2 Ir. Rep. 183.
(5) [1922] A.C. 178.
(6) (1917) 39 All. 418=15 A.L.J. 321=39 I. C. 130.
(7) (1914) 41 Cal. 576=19 C.L.J. 142=19 C.W.N. 95=22 I.C. 679.
(8) (1920) 43 Mad. 617=11 L.W. 358=38 M. L.J. 360=(1920) M.W.N. 198=28 M.L.T. 49=55 I.C. 754.

1924 Madras 389.

KRISHNAN, J.

In re *A. E. Smith*—Petitioner.

Cr. R. C. No. 187 of 1923 and Cr. R. P. No. 143 of 1923, decided on 28th August, 1923, revising the judgment of the 3rd Presidency Magistrate, Egmore, dated 25th January, 1922.

(a) *Madras City Municipal Act (IV of 1919), S. 288—Necessity for payment of license fee both for use and for erection of machinery—Distinction between — Erection and use of machinery—Removing of machinery and erection at a different place—License must be taken for only those kinds of machinery which are a nuisance or dangerous to the public—Onus of proving that certain machinery is a public danger or nuisance lies on prosecution—Accused's failure to appeal to standing committee against imposition of license fee is not a bar to his contending that the case does not come under the section.*

A license fee should be paid both for erection of machinery as well as for its use, under S. 288. For erection one has to pay only once while for use every year. When machinery is removed from one place to another and set up at the latter place erection fee must be paid anew. Under S. 288 license is necessary only for machines causing public nuisance or danger. The onus of proving the existence of danger or nuisance lies on the prosecution. An accused's failure to appeal to the standing committee against the imposition of the licence fee does not bar him from contending that his case does not fall under the liability imposed by S. 288.

(b) *Interpretation of statutes—Marginal notes in a statute can be referred to.*

If the language of a statute is not quite clear, the marginal notes in the statute may be used to find out the drift.

V. V. Devanathan—for the Petitioner.

K. Krishna Menon for *the Crown Prosecutor*—for the Crown.

Order :—This is an application to revise an order passed by the Third Presidency Magistrate convicting the accused for not taking out a license under section 288 of the Madras City Municipal Act, IV of 1919, for a soda water machinery which he has recently started working in No. 50, Thatha Muthiappan Street. The machinery was originally installed in No. 17, Jone's Street, and the accused obtained the permission of the Commissioner to use the machinery in its new place, but he had not obtained any license under section 288 for the purpose of erecting the machinery in that place. The accused has been fined Rs. 5 for this offence and directed to pay the license fee of Rs. 200 to the Municipality.

It is argued before me as the first point that the accused having been allowed to use the machinery in Jone's Street and it having been merely transferred to the new place, he could not be asked to pay any new license fee for erecting the machinery there. I do not agree with this contention, because the two things are different, the one is an annual payment of the license fee for the use of the machinery and the other is a payment once for all for erecting the machinery and the fact that payment was made in the one case is no excuse for not paying in the second case. It cannot be suggested that there was no erection of the machinery in the new place in Thatha Muthiappan Street for it was dismantled and removed from where it was originally and again put together in its new place. It has, however, been argued before me that section 288 does not apply to this case as the machinery erected by the accused is not one which falls under the description of machinery dealt with in that section. The Crown Prosecutor says that there is evidence to show that this machinery causes noise and vibration and so comes under the description. It seems to me that before the section can be used for the purpose of insisting on a license fee being paid for erecting machinery, it must be shown that its use was likely to produce either noise or vibration or any of the other things mentioned in the section which would amount to a nuisance. The marginal note to the section seems to make this quite clear, though the section by itself is not very clear in its language. In such a case, I am inclined to think that it is legitimate to look at the marginal note to see what the drift of the section itself is. Light is also thrown on the first clause of the section by the second clause which says, "The Commissioner may refuse such permission if the machinery in the proposed position.....will be a nuisance to the inhabitants of the neighbourhood." That shows that it is not every machinery that give rise to any noise or vibration that is hit at by the section but only such machinery which causes such noise or vibration as would be a nuisance to the inhabitants of the neighbourhood. In this particular case, there is no proof that this machinery does cause so much noise or vibration as would amount to a nuisance. All that the Assistant Engineer for the Municipality says is that it causes as much noise as any soda water machinery. What exactly he means it is difficult to say as he was not asked the further question whether the noise or vibration would be sufficient to cause a nuisance. The Magistrate was wrong in throwing the burden of proof upon the accused to show that the machinery that he worked was such as would not cause noise or vibration amounting to a nuisance. The burden is clearly upon the Municipality; it must prove all the facts necessary to justify a conviction. It is also argued that, at any rate, this machinery is dangerous to the inhabitants of the neighbourhood and, therefore, it falls under the last part of the first clause of section 288. It is not clear how this machinery can be said to be a dangerous one as the Crown Prosecutor asserts before me. Here again the Magistrate contented himself with saying that the accused does not deny this possibility, nor as he attempted to prove that there is no such danger. The burden is not on the accused on this point either but on the Municipality. It must be proved by the evidence in the case that danger to the inhabitants of the neighbourhood is likely to arise by the use of this machinery. After all, it is a small soda-water machine worked by a small electric motor. I do not think that can be held to fall under the description of machinery where danger is likely to arise to the inhabitants of the neighbourhood, whatever danger there might be to the persons who actually work the machinery. In these circumstances, I have come to the conclusion that it is not established by the prosecution that this is a case which falls under section 288.

There is finally an argument used by the Magistrate in support of his judgment, namely, that, as the accused did not go to the Standing Committee and seek redress before them, it should be taken as settled that the accused is bound to pay the tax imposed upon him, that it has become final under the law and that the Magistrate could not question its legality. I am unable to agree with this view because the accused is being prosecuted for an offence for non-payment of the license fee and he is entitled to say that he is not bound to pay it. There is no kind of estoppel in a criminal case as the Magistrate seems to think. The prosecution must establish affirmatively to his satisfaction that the tax was payable and that there was a

fault in payment of the tax. The fact that the accused did not appeal to the Standing Committee cannot be treated as in any way preventing him from raising the plea before the Criminal Court, where he is sought to be convicted of an offence by the prosecutor.

In the view I take of section 288 in this case, finding that the accused was not bound to pay the license fee under it because the machinery is not brought within the words of that section, I set aside the conviction and sentence passed by the Magistrate and direct the fine and license fee, if paid, to be refunded to the accused.

Conviction set aside.

1924 Madras 391.

KRISHNAN AND WALLACE, JJ.

Basireddi Narappa—Accused-Appellant

v.

Emperor.

Cr. App. No. 188 of 1923, decided on the 2nd August, 1923, against the order of the Court of Session, in case No. 76 of 1922.

(a) *Crim. Pro. Code, S. 339—Tender of pardon is made to the accused—He rejects the pardon and refuses to give evidence—Then he is jointly tried with the other accused—The trial is not illegal.*

When an accused person rejects the conditional pardon tendered to him and refuses to give evidence as an approver before he is put into the box, his action does not amount to forfeiture of his pardon so as to make his case fall under S. 339 and bar his joint trial with other accused persons. The acceptance of the pardon should continue in force till the accused actually gives evidence and then if he forfeits the pardon by not making a full and true disclosure of facts within his knowledge he should be separately tried.

(b) *Criminal Trial—Retracted confession is to be very cautiously accepted.*

When the only evidence against the accused is his own confessional statement which was retracted before the committing Magistrate as well as before the Sessions Court, the Court has to be fully satisfied that it is a true and really voluntary and reliable statement before admitting it against him.

V. S. Narasimhachariar—for Appellants.

The Public Prosecutor—for the Crown.

Judgment:—In this case the appellant, the 1st accused in Sessions Case No. 76 of 1922 before the Sessions Judge of Anantapur, was convicted by the learned Sessions Judge of the murder of one Vodde Chinnagadu, a servant in his house, on the night of the 20th of May 1922 and sentenced to transportation for life.

There were three accused originally but accused 2 and 3 have been acquitted by the learned Judge. Before we consider the evidence in the case, it will be convenient to deal with a preliminary point which has been raised in the case based upon what is called the tender of a pardon to this accused

It is contended for the accused by his learned pleader that the pardon was not properly forfeited or cancelled and that it was an obstacle in the way of his having been tried, as he has been along with the other accused. But, in the circumstances of the case we think such a pardon will not be a proper objection to the trial. What happened was that this accused promised at first to make a clean breast of all the circumstances of the murder and he was tendered a pardon conditional on his doing so. Before he was treated as an approver and put into the box, he made a statement to the Court that he did not want the pardon and that he wished to be tried and that the pardon might, therefore, be cancelled. We think it is open to an accused, who has accepted pardon in the first instance, to resile from that pardon and to say that he does not want the pardon and that he is not willing to give evidence but wishes to be tried, so that his character may be cleared. In those circumstances, we cannot treat the pardon as an accepted pardon. The acceptance must continue in force till the person pardoned actually gives evidence and it is only then that any question would arise as to whether he has forfeited the pardon by his not giving true evidence in the case. But as in this case the pardon though accepted for a time, was rejected by the accused himself before it really took effect, We cannot treat this as a case falling under section, 339, Cr. P. C., and, therefore we think it was not an objection to the trial of this accused along with the other accused for the offence of murder. In the case cited to us, *Arunachellam* v. *Emperor* (1) the circumstances were different. There the person to whom the pardon was tendered did not refuse to give evidence. He did go into the witness-box and was giving evidence. What happened was that

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(1) (1909) 31 Mad. 272=3 M.L.T. 407=8 Cr. L. J. 153.

he began to say things which were not in consonance with what he led the prosecution to expect he would say, and in consequence of that, his pardon was cancelled and he was put into the dock at once. It was that procedure that this Court decided was not a proper procedure; because when a person has accepted a pardon and is giving evidence, he cannot be tried till it is shown that the evidence which he gave is not a full and true statement of the facts he knew and the pardon forfeited; that should be done in a separate proceeding and he should ordinarily be tried for the offence, if the pardon is found to have been forfeited, in a separate trial. That is not the case here, because the accused himself, as we have said already, rejected the pardon before it took effect.

As regards the merits of the case, practically the only evidence against this accused is his own confessional statement, Ex. (1). No doubt, as the learned Judge says, the Magistrate who took that confessional statement took several precautions to see that it was voluntarily made by the accused; but very often it happens that some influence brought to bear upon the accused continues in spite of the Magistrate's efforts to get it removed. This confessional statement was retracted by the accused both before the Committing Magistrate and before the Sessions Court. In these circumstances, we have to be very careful and, it is only if we are fully satisfied that it is a true, and really voluntary and reliable statement that the accused has made, we should rely on it against him. Here the accused says that he was induced by the Sub-Inspector of Police to make the statement by giving him hopes of being taken as an approver and let off. The circumstances which happened in the case would rather corroborate this statement of the accused because as a matter of fact, a pardon was tendered to him and he was at the beginning made an approver. We have then to see also what corroboration there is of the facts stated in the confession. If the statements made there are corroborated in material circumstances, we might treat it as a reliable document; but in the present case we find there is very little corroboration. It is suggested that the motive stated by the accused is corroborated by the evidence to show that his servant Chinnagadu was carrying on an intrigue with his daughter. But this seems to have been going on for two or three years before the occurrence and the story told in the confessional statement itself about it that all on a sudden, early on the morning of the 21st of May the accused and the two others who have been acquitted in this case conspired together and decided to murder this man because of the intrigue seems to be far-fetched. It is a very unlikely thing that such a resolution would have been made in such a sudden fashion. It is not suggested that the man was taken to the thrashing floor for the purpose of being murdered at all; so that we think that this corroboration on the question of motive is of very little value. The corroboration next relied on is that of the place of the murder, but it must be remembered that it would have been well known to everybody in the place that the murder had been committed in the thrashing floor because of the blood marks there. Therefore that corroboration cannot be treated as corroboration in a material particular. The learned Judge also refers to the conduct of Sivappa in leaving the thrashing floor and the attempt to hush up the matter as supporting this confession. But these two circumstances are not mentioned in the confessional statement and it is not possible to see how this evidence can be treated as corroborating the confession. There are one or two circumstances which rather contradict the confession. The first one is the medical evidence which makes it rather unlikely that any spear was used for the purpose of killing the deceased. The other circumstance is that no mention whatever is made of the two females who gave evidence, P. Ws. 1 and 3, who say that they went to the deceased and got betel from him that night. There is no mention of this whatever in the confessional statement. In these circumstances, we are not inclined to rely upon this confessional statement as embodying the truth in the case. It would be most dangerous to convict a person on such a confessional statement as this. Apart from the confessional statement, there is the evidence, to which we have already referred, of the female witnesses who say that they saw these people in the thrashing floor the previous night. The learned Judge seems to have been inclined to discredit them but he says that he believes it because of the statement of the 2nd accused which corroborates it. The statement of co-accused

like that can hardly be used against the 1st accused. Very probably that story is a false story and we are not prepared to act upon it.

In these circumstances we are unable to support the conviction of the accused by the learned Sessions Judge. We set aside his conviction and direct him to be released.

Conviction set aside.

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* * 1924 Madras 393.

VENKATASUBBA RAO, J.

Ponnuswami Aiyar and others—Petitioners

v.

K. Ganapathi Aiyar, Sub-Divisional Magistrate of Mayavaram—Respondent.

Cr. M. P. No. 234 of 1923, decided on 28th August, 1923.

Contempt of Court—Stay order of High Court communicated to Subordinate Court by telegram from Vakil in High Court and by affidavit of party is sufficient communication of the stay order—Intentional disobedience of such order is contempt.

Notice of an order can be given otherwise than by an official communication of it. Under certain circumstances a telegram may constitute such a notice of an order of a Court as to make a person who disregards the notice and acts in contravention of the order liable for contempt of Court.

But an intention to set at defiance the order of the Court in question should exist in addition to actual disobedience.

T. R. Ramachandra Aiyar—for the Respondent.

The Public Prosecutor—for the Opposite party.

Order:—This is an application of a somewhat unusual kind. I have been asked to commit to prison Mr.K. Ganapati Aiyar, Sub-Divisional Magistrate of Mayavaram, for his wilful disobedience of the order of this Court, dated the 10th April, 1923. In C. C. No. 50 of 1922 pending before the said Magistrate, an application was made by some of the accused for examination as a witness of the Pandarasannadhi of Thiruvaduthurai Mutt. That application was refused by the Magistrate by his order, dated the 6th April, 1923. On the same day the parties applied for a copy of the order and the stamp papers were called for on the 9th April. They were furnished immediately, and the parties were granted the copy at 7 p.m. on the 9th. On the 10th, a revision case was filed in the High Court impeaching the correctness of the order of the 6th and on the application of the accused at about 2-15 p.m. on the same day, I made an order staying further proceedings in C. C. No. 50 of 1922 pending the disposal of the Criminal Revision Case.

The case before the Magistrate was taken up in the usual course on the 11th to which date it stood adjourned. A telegram had been sent by Mr. K. S. Jayarama Aiyar, Vakil for the accused, informing the Magistrate of the order made by this Court. This telegram, it is admitted, reached the Magistrate at about 9 a.m. on the 11th. Finding that the Magistrate was not disposed to act on this telegram, a formal petition was filed supported by the affidavit of K. Sundaresa Aiyar, who was instructing the Vakil for the accused and who was also present in Court when the stay order was made by the High Court. In that affidavit, are set out the facts relating to the application to this Court and the order made staying proceedings. A copy of the telegram and the receipt obtained from the telegraph office in token of the telegram having been despatched, were annexed as exhibits to the affidavit. The Magistrate declined to adjourn the case. It is stated *inter alia* in his order that the accused had sufficient opportunities to have moved the High Court in time so that the order of the High Court could have been formally communicated to the Magistrate. In this he was obviously wrong, because as I have shown the accused acted with great expedition and applied for stay at the earliest possible moment. When the accused found that the Magistrate insisted upon proceeding with the case, they put in another petition stating that their own Vakil had been cited as a Court witness, that in view of the stay order they had not engaged another Vakil to represent them at the trial and that in the circumstances an adjournment should be granted to enable them to obtain proper legal assistance. The Magistrate thereupon made an order dispensing with the evidence of the accused's Vakil and this is what the Magistrate says in his order :

"The Court after reading the evidence of the prosecution and defence witnesses considered that the evidence of N. Kuppuswami Aiyar will help in the decision of the case. It accordingly adjourned the case to the 8th.....After reading the evidence again I came to the conclusion

that the examination of the Court witness may very well be dispensed with.....To avoid delay in the disposal I dispense with the examination of the Court witness now present."

The Magistrate then makes a note : "The Vakil, Mr. Kuppuswami Iyer, does not appear for argument. The case is adjourned for judgmentat 3-20 p.m." The accused however were not in a mood to submit to this order of the Magistrate and so they again requested the Magistrate to send a telegram to the proper officer of the High Court at their expense and ascertain if as a matter of fact the High Court did make a stay order. The Magistrate refused to comply with the request. The accused next applied for an adjournment on the ground that they intended to move the High Court for a transfer of the case to the file of some other Magistrate. This application again met with a similar fate. Mr. Kuppuswami Iyer, Vakil, whose evidence was dispensed with, then put in a memo. of appearance on behalf of the accused noting in it that at 2 p.m. the Court made an order dispensing with his evidence and also noting that the memo. itself was put in at 2-30 p.m. The correctness of these statements in the memo. is not disputed. The Vakil then commenced to argue the case, but he was told by the Magistrate that the judgment would be delivered at 3-20 p.m. and thereupon the Vakil filed the following statement dated 11th April, 1923 at 2-50 p.m. "On my rising to argue the case the Court observes that the matter is ripe for delivery of judgment by 3-30 p.m. Under the circumstances I beg to submit that my argument would be of no use and as such I am unable to do any justice by making any farce of an argument at this juncture." The Vakil thus refused to further argue the case and the Magistrate forthwith read a judgment which had been previously written and which is said to consist of about 20 to 25 typed pages.

These are the facts regarding which there is no controversy, and I have carefully avoided reference to the allegations made on behalf of the accused but denied by the Magistrate.

I shall first deal with the question of law raised. It is said that the Magistrate was not guilty of contempt as he was not bound to obey the order of the High Court until it was officially communicated to him. The Magistrate in this case had before him not only the telegram purporting to have been sent by the Vakil at Madras but there was also a sworn statement to the effect that the High Court had ordered a stay of proceedings. It is argued that it is not necessary to enquire whether the officer believed the statement or not because in no circumstances was it incumbent upon him to act upon any statement or evidence when there was no formal communication from the High Court to the officer concerned. Apart from authority, I think this proposition is unsound. I do not think it will be in the interests of justice to hold that an order of the High Court can be defied with impunity by a party or an officer who having knowledge of it chooses to disregard it. When orders are made or injunctions granted, the Court must insist that they shall be obeyed. The parties concerned may be very injuriously affected by disobedience ; it may occasion loss of property or seriously imperil the liberty of a person. Apart from this, it seems to me that it is hardly consistent with the dignity of the Court to permit its orders to be disobeyed by a party who treats it with contempt. In connection with contempt proceedings this question does not appear to have been decided in India. But the English decisions have clearly laid down that notice of an order can be given otherwise than by an official communication of it. Thesiger, L. J., in *Ex parte Langley* (1) observes :—'

"That, under certain circumstances, a telegram may constitute such a notice of an order of a Court as to make a person who disregards the notice and acts in contravention of the order, liable for the consequences of a contempt of Court."

James, L. J., expresses himself to the same effect.

The same view was taken by Bacon, C. J., in *In re Bryant* (2). He says :

"It is perfectly clear that he (the Sheriff's Officer) knew that an act of bankruptcy had been committed, and he admits that a telegraphic communication had been made to him before the sale, of the fact that an injunction to restrain the sale had been ordered by the Court. He and the auctioneer are both equally to blame. They both violated what they must have known to be the plain law, and proceeded to sell."

(1) 13 Ch. D. 110=49 L.J. B.R. 1=43 L.T. 181=28 W.R. 174.
(2) 4 Ch. D. 98=35 L.T. 489=25 W.R. 230.

I said there are no decided cases in India on the point. In *Sati Nath Sikdar* v. *Ratanmani Nasker* (3), the question was whether the order of the District Munsif under consideration in that case was or was not without jurisdiction. After the High Court directed a stay of proceedings, the Munsif made an order for assessment of mesne profits refusing an adjournment although an affidavit was filed in which it was specifically stated that the High Court had stayed proceedings, and to the affidavit was annexed as an exhibit a letter confirming the statements in the affidavit, written by the Vakil who had obtained the rule in the High Court, to the pleader in charge of the case in the Munsif's Court. The High Court cancelled the order for assessment of mesne profits as being wholly without jurisdiction, and very strong observations were made to the effect that the act of the Munsif plainly amounted to a contempt of the authority of the High Court. These observations are no doubt *obiter dicta* as there was no application before the High Court to commit the Munsif for contempt, but they express the law as laid down by English decisions. In *In the matter of Surjya Narain Singh* (4) the learned Judges referring to the conduct of a Magistrate who proceeded with a case after he had been shown a telegram stating that a rule for stay of further proceedings had been granted by the High Court, observed that it was most injudicious of the Magistrate to have proceeded with the case after he had been credibly informed that the High Court had ordered stay.

In *Hem Chandra Kar* v. *Mathur Santhal* (5), the Magistrate refused to pay heed to a similar telegram, and the High Court considered that the Magistrate acted injudiciously in summarily rejecting the application for adjournment and that he ought to have directed the party to verify the statement contained in the telegram. See also *Babu Ratnessari Narayana Singh* v. *Empress* (6).

In *Ramanathan* v. *Arunachalam* (7), Spencer, J., takes the same view and refers to the Calcutta cases with approval.

Mr. T. R. Ramachandra Aiyar, who appeared for the respondent, in the course of his able argument, contended that under the decisions of this High Court his client could not be held to be guilty of contempt and relied on *Queen-Empress* v. *Viraswami* (8), *Muthukumaraswami Rowther* v. *Kuppuswami Aiyangar* (9) and *Venkatachalapathi Rao* v. *Kameswaramma* (10). Whatever the view taken in the English decisions or the Calcutta cases may be, I am, of course, bound by the rulings of this Court. But, after having carefully considered the latter, I have come to the conclusion that they have no bearing upon the present question and that it will be wrong to say that the Madras cases have by implication introduced a new doctrine as regards the law of contempt, a doctrine which is at variance with the established rule as laid down in Engligh Text Books and English cases of great authority.

In *Queen-Empress* v. *Viraswami* (8), the Sessions Judge was justified in the circumstances in not believing the telegram and refusing to act upon it.

In *Muthukumaraswami Rowther* v. *Kuppuswami Aiyangar* (9) the question to be decided had reference to the validity of a sale, and it was held that, although there was an order by the appellate Court for a stay of sale, inasmuch as the order was not communicated to the lower Court, the sale was valid. There is nothing in the report to show that the lower Court was in fact aware of the order made by the appellate Court, and in any event, this cannot be treated as an authority on the question of contempt.

Venkatachalapathi Rao v. *Kameswaramma* (10) had similarly to deal with the validity of an attachment effected after an order of stay of execution made by an appellate Court, and it was held that the attachment was legally valid. In the first place, I may observe that neither the decree-holder nor the Court of first instance had notice in fact of the order of the appellate Court. The Full Bench approved of *Bessesswari Chowdhurany* v. *Hurre Sundar Mozumdar* (11). It is to be noted that the judgment in the latter case

(3) (1912) 15 C.L.J 335=14 I.C. 808.
(4) (1900) 5 C.W.N. 110.
(5) (1913) 16 C.W.N. 103=13 Cr.L.J. 766=17 I. C. 78.
(6) (1898) 2 C.W.N. 498.
(7) (1914) 38 Mad. 766=1914 M.W.N. 46=15 M. L. T. 151=26 M.L.J. 275=1 L.W. 22=22 I.C. 99.
(8) (1896) 19 Mad. 375=6 M.L.J. 195.
(9) (1908) 33 Mad. 74=6 M.L.T. 159=3 I.C. 82.
(10) (1918) 41 Mad. 151=33 M.L.J. 515=(1917) M.W.N. 785=22 M.L.T. 330=6 L.W. 617=48 I.C. 214 (F.B.).
(11) (1897) 1 C.W.N. 226.

expressly states that neither the decree-holder nor the Court executing the decree was aware of the stay order made by the appellate Court. In the second place, there is no point connected with contempt argued before the Full Bench and I cannot therefore accept *Venkatachalpathi Rao* v. *Kameswaramma* (10) as an authority on this point.

Having so far stated the law as I understand it, I have next to deal with the question, did the respondent wilfully disobey the order of the High Court? In other words, did he refuse to adjourn the case knowing or having reason to believe that the High Court had stayed proceedings? [On the facts His Lordship held that the intention to defy the order of the High Court was not made out and proceeded.]

I must add that it is a redeeming feature of this case that the Magistrate has not persisted in justifying his conduct, but has on the contrary, himself and through Mr. Ramachandra Aiyar most frankly admitted its impropriety and expressed in unqualified terms regret for what has happened. I have held that the Magistrate has not been guilty of contempt but I have been able to arrive at this conclusion only by rigidly excluding every hypothesis inconsistent with his honesty even where circumstances are suspicious and I cannot therefore direct the petitioners to pay the respondent's costs. The accused had ample justification for making this application, and I may also remark that it has not been shown to me that they were guilty of obtaining any delay at any stage of the case. I should therefore dismiss this application, but make no order as to costs.

Petition dismissed.

1924 Madras 396.

RAMESAM, J.

A. Sudarsana Rao—Petitioner-Respondent

v.

J. A. Christian Pillai and others—Respondents-Petitioners.

C. R. P. No. 252 of 1923, decided on the 21st September, 1923.

(a) *Office—Resignation ends connection on acceptance.*

Resignation of an office ends the incumbent's connection with it on acceptance.

Quaere:—Does resignation of an Honorary Magistracy or other honorary office take effect before acceptance?

It may be that the need for acceptance does not apply to honarary appointments and it is a question of fact in each case whether the resignation amounts to renunciation without acceptance and may depend to a certain extent on the contents of the letter of resignation.

(b) *Madras Local Boards Act XIV of 1920, Ss. 4 and 57—Filing a petition under S. 57 is not one of the ordinary functions of a member.*

A member who has not taken his seat can file a petition under S. 57. Filing a petition under S. 57 is not one of the ordinary functions of a member of a Taluq Board.

A member of Taluq Board who has not taken his seat is not incompetent to file a petition under S. 57 of the Local Boards Act. [P. 397, C. 1.]

P. V. Ranga Rao—for Petitioner.

Ch. Raghava Rao—for Respondents.

Judgment:—The first point argued is whether the petitioner ceased to be a Honorary Magistrate prior to his election on the 21st September, 1922. I agree with the District Judge's finding that the appointment of the petitioner as President was made on 21-9-1922 though it was to take effect from 1-10-1922. This view has not been questioned before me.

The contention before me is that the petitioner resigned his office of Honorary Magistrate on 21-9-22 and that, though it was accepted on 17-10-22, he ceased to be a Honorary Magistrate from 21-9-22. Paine on Elections, page 201, shows that without acceptance, resignation amounts to nothing and the person resigning remains in office. To resign is not a matter of right. This is not inconsistent with the passage from Rogers on Elections, Volume II, pages 27, 28, 29, where it was said that there must be substantial renunciation. In the case cited at page 29 (*Lanarkshire*, 2 Doyl. 367) it is clear that the resignation was accepted though informally before the election. In the other case cited at pages 28-29 (*Aberbrothok*) the facts are not fully stated and there is nothing to show that the resignation was not accepted before the election. It may be that the need for acceptance does not apply to honorary appointments and it is a question of fact in each case whether the resignation amounted to a renunciation without acceptance and may depend to a certain extent on the contents of the letter of resignation which is not filed in this case. But it is unnecessary to pursue this line of argument further as the petitioner never contended in the Court below that he resigned on the 21st September. All that he

said in the counter-petition was that he was appointed on 1st October, 1922, and that he ceased to be an Honorary Magistrate before that date. There was no suggestion in it that he ceased to be an Honorary Magistrate on 21-9-22. In the course of the argument before the District Judge, the importance of this point became more patent and even then all that was said was that "he had sent his resignation on the 21st or 22nd." It is therefore clear that up to the filing of the Revision Petition, the petitioner had no definite case as to the date of the resignation. In the absence of an affidavit I am not satisfied that any point was conceded in the Court below and that the petitioner did not adduce his evidence under the impression that the date was conceded to be the 21st September.

The next point is whether respondents had any *locus standi* to file the petition under section 57, Madras Local Boards Act. It is conceded before me that the effect of the words "shall cease to hold office and his seat shall be deemed to have been vacant" in section 4 (2) of the Amending Act of 1922 is that they did not cease to be members. But the contention is that they are unfit to exercise the functions and duties of a member of the Taluk Board and an unreported decision of Spencer and Devadoss, JJ. is relied on. But filing a petition under section 57 is not one of the ordinary functions and duties of a member of the Taluk Board. It may be that, until he takes the oath, he is unfit to take his seat and therefore to discharge all the ordinary functions and duties of a member which can be discharged only by his taking seat at meetings. But if he continues to be a member (as conceded before me) who has not taken his seat, he is not incompetent to file the petition under section 57.

On both the grounds the petition fails. It is unnecessary to consider the point whether they are questions of jurisdiction and material irregularity in the disposal of the case. The petition is dismissed with costs.

Petition dismissed.

1924 Madras 397.

KRISHNAN, J.

The Public Prosecutor—Appellant

v.

Pachiappa Mudali—Accused.

Cr. Appeals. Nos. 516, 517 and 518 of 1923, decided on the 16th August, 1923, against the acquittal of the 2nd Class Magistrate, Arni, North Arcot, in C. C. Nos. 2 to 4 of 1923.

Madras Local Boards Act of 1920, S. 129—House-owner allowing sewage water to flow across the road into the opposite channel is liable despite failure on the part of the Local Board to provide culvert.

The failure of a Local Board to provide a drain is not an excuse for letting one's sewage water flow over the neighbouring road. S 129 which creates the liability is not governed by any condition that the liability shall not exist if there is no drain or cesspool in the street.

J. C. Adam—for the Crown.

V. Ramaswami Aiyangar — for the Accused.

Judgment:—*Criminal Appeal No.* 516 *of* 1923 (*C. C. No. 2 of* 1923). The accused has been prosecuted by the Union Board of Arni, under section 129 of the Madras Local Boards Act (XIV of 1920) for having allowed his sewage water to run over the adjoining Union road. The Magistrate has found that the sewage water runs into the street and that apparently it gets into a drain on the other side of the street, because the Magistrate says that there is a drain on the side of the street, opposite to where the accused's house stands. The Magistrate has acquitted the accused, on the ground that he cannot be expected to construct a culvert or a channel to let the sewage water from his house to flow into the opposite channel, without spreading into the street. The Magistrate thinks that it is the duty of the Union to construct such a channel and as they have not done so, the accused must be acquitted.

Now my attention has not been drawn to any section in the Madras Local Boards Act, which imposes upon the Union any obligation to construct a drain or cesspool, in every street, though ordinarily one would expect that such a work would be done by the Union for the benefit of the inhabitants of the Union. The absence of a drain does not seem to me to be any

excuse or justification under the Act, for letting one's sewage water flow over the neighbouring road. Section 129, which runs thus :—"No owner or occupier of any premises shall allow the water from any sink, drain, latrine, or stable, or any other filth, to flow out of such premises to any portion of a public road, except a drain or a cesspool," is not governed by any condition that he can do this if there is no drain or a cesspool in the street. Apparently the idea is that if there is no drain into which the sewage water of the house can be led, without overflowing into the neighbouring road, some arrangement must be made by the house-owner, to have some place in his own premises to collect and retain the sewage water and whether with the help of the Taluq Board or the Union Board, under section 127 of the Act or by some other means, see that it is disposed of, so that it does not cause nuisance to the neighbours.

A similar question had to be considered, with reference to section 222 of the District Municipalities Act (IV of 1884), in two cases, the first reported in *Queen-Empress* v. *Sevudappayyar* (1) and the second in *Emperor* v. *Nagan Chetty* (2). In both these cases, it was held that the absence of a drain or cesspool did not justify the owner of the premises to let his sewage water overflow on the road. The obligation is placed upon him by that section, just in the same manner as it is placed by section 129 of the Madras Local Boards Act (XIV of 1920), to see that the neighbouring roads are not spoiled by the sewage water, and it was held that if the house-owner broke that obligation he was liable to be convicted and punished, though the absence of a drain or a proper place into which the drainage or sewage water might be allowed to flow, could be taken into consideration, in assessing the penalty. The position is just the same under section 129 of Madras Act XIV of 1920, with which I am now dealing.

I must therefore hold that the Magistrate was wrong in acquitting the accused, on the ground he took, and that the accused is really guilty of an offence under section 129. In the circumstances of the case, I think, a nominal fine is sufficient. I would therefore convict him of an offence under section 129 and impose upon him a fine of one rupee.

Criminal Appeal No. 517 *of* 1923.

In this Criminal Appeal, the circumstances are exactly the same as in the previous appeal, and for the same reasons, I convict the accused of an offence under section 129 and sentence him to pay a fine of one rupee.

Criminal Appeal No. 518 *of* 1923.

In this case, the finding of the Magistrate is that the back door of the house opens upon a street, which is three feet lower in level than the adjoining street; and as there is no way of carrying the water, which flows into that street, it must be necessarily soaking there and the accused is not responsible; but that consideration is quite irrelevant in this matter; for the obligation that is vested upon the accused is that he should not let his drainage or sewage water to run into the street at all, and if he does run it he is guilty of an offence under section 129. It is not necessary to consider, therefore, what happens to the water, after it flows into the street. He is also convicted under section 129 and sentenced to pay a fine of one rupee.

Acquittal cancelled.

(1) (1892) 15 Mad. 91.
(2) (1907) 30 Mad. 221 = 17 M.L.J. 372 = 6 Cr.L.J. 129.

1924 Madras 398.

SPENCER and DEVADOSS, JJ.

Premchand Indoji—Petitioner

v.

Soleti Gopalappa—Respondent.

Cr. P. No. 584 of 1923, decided on 10th August, 1923, revising the order of the Sessions Judge, Bellary.

Provincial Insolvency Act, S. 3 - Creditor's petition by District Judge to Sub-Court is ultra vires in absence of notification.

Under S. 3 of the Provincial Insolvency Act the District Court is the only Court having jurisdiction to deal with creditor's petitions in the absence of any notification of the local Government investing Subordinate Court with jurisdiction over this classes of cases. In a case in which there was no such notification,

Held, that the District Judge's order transferring a petition to the Sub-Court for disposal was *ultra vires*.

T. M. Krishnaswami Aiyar — for the Petitioner.

L. A. Govindaraghava Aiyar — for the Repondent.

Judgment:—Under section 3 of the Provincial Insolvency Act, the District Court is the only Court having jurisdiction to deal with creditor's petitions, in the absence of any notification of the Local Government investing Subordinate Courts with jurisdiction over this class of cases. The District Judge's order transferring the petition to the Sub-Court for disposal was therefore *ultra vires*. We set it aside together with the Sub-Judge's order and direct the District Judge to take the case on his file and dispose of it according to law.

As the objection to jurisdiction was not pressed till the want of jurisdiction was noticed by this Bench and as this petition was put in $2\frac{3}{4}$ years after the date of the order, while excusing the delay on account of the petitioner having through incorrect advice mistaken his remedy, we direct that each party bear his own costs in this petition.

Order set aside.

1924 Madras 399.

KRISHNAN and WALLACE, JJ.

B. V. Satyanarayana Varaprasada Rao —Petitioner-Petitioner

v.

B. V. Bhashyakarulu Rao—Respondent.

Civ. Mis. Petition No. 1594 of 1923, decided on the 18th August, 1923, against the order of the High Court, in C. R. P. No. 361 of 1922.

Civ. Pro. Code, S. 111—Letters Patent, Ss. 39 and S. 44—No appeal lies to the Privy Council from the decree or order of one Judge of a High Court.

By S. 44 of the Letters Patent, the Letters Patent are subject to Imperial legislation. So S. 39 of the Letters Patent fails as against S. 111 of the Civ. Pro. Code. Hence, though since the amendment of the Letters Patent, the judgment of a single Judge sitting in revision is not appealable to two Judges and therefore may be regarded as a final decree of a High Court from which a right of appeal to the Privy Council is given in all cases by S. 39 of the Letters Patent. S. 111 of the Civ. Pro. Code, prevails and no appeal lies to the Privy Council from the decree of a single Judge of a High Court.

C. V. Ananthakrishna Aiyar and *M. Ramachandra Rao*—for Petitioner.

V. Ramadoss and *C. Krishna Mohan*—for Respondent.

Order:—This is an application for leave to appeal to the Privy Council, against an order passed by one of us, sitting as a single Judge, under section 115 of the Civil Procedure Code and section 107 of the Government of India Act. That order confirmed the order of the lower Court and dismissed the Civil Revision Petition filed in this Court. The present petitioner, who was the petitioner in the Revision Petition has applied to us to grant him leave to appeal to the Privy Council.

A preliminary objection is taken to this application, on the ground that section 111, Civil Procedure Code, bars any such application. Section 111 says, notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council, among other things, from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861. This is manifestly an application for an appeal from such an order. It is difficult to see how the petitioner can escape the obstacle placed in his way by this section. His learned Vakil says, however, that under section 39 of the Letters Patent a right of appeal is given in all cases of final orders or decrees of this High Court to the Privy Council, and since the amendment of the Letters Patent, whereby the right of appeal to two Judges from the judgment of a single Judge, sitting in revision, has been taken away, this order, which was passed in such proceedings, has become final; and therefore he contends that he is entitled to ask for leave. Section 44 of the Letters Patent expressly provides that any provision in the Letters Patent can be altered or controlled by the legislation of the Governor-General in Legislative Council; and such an enactment is the Civil Procedure Code and when there is express provision in that Code, we must hold that that provision must be given effect to even if it is possible to bring the case under the general wording of section 39 of the Letters Patent. In these circumstances we have no other alternative, but to dismiss the application with costs.

Memorandum of costs will follow.

Leave refused.

* 1924 Madras 400 (1).

SPENCER AND DAVADOSS, JJ.

K. P. S. Karuthian Chettiar—Petitioner-Appellant

v.

R. M. M. Raman Chetty—Respondent.

Civil Misc. Petition No. 2042 of 1923, decided on 6th August, 1923, against the order of the District Judge, Ramnad, Madura, in C. F. No. 63 of 1919.

(a) *Provincial Insolvency Act, S. 78—Delay in applications may be excused for sufficient reason.*

Delay in application for leave to appeal may be excused under S. 78 and the fact that no appeal was necessary under the old Act is a sufficient reason for doing so.

(b) *Provincial Insolvency Act, S. 78—Interpretation—Retrospective effect may be given.*

Retrospective effect may be given to S. 78 as it relates merely to procedure and not any substantive right.

C. S. Venkatachariar—for the Appellant.

L. A. Govindaraghava Aiyar—for the Respondent.

Order :—The application has been made nearly 3 years after the order sought to be appealed against was passed. It is contended that section 5 of the Indian Limitation Act cannot be applied, because section 78 of Act V of 1920 conferred a new right after the inception of these insolvency proceedings. We consider that this section did not create for the first time or take away any substantive right, but that it merely regulated the procedure applicable to appeals and applications under the Provincial Insolvency Act. We have therefore power to excuse the delay and the fact that leave to appeal was not necessary under the old Act (III of 1907) is a sufficient reason for doing so.

Leave to appeal is granted under section 75 (3) of Act V of 1920.

Leave to appeal granted.

1924 Madras 400 (2).

KRISHNAN AND RAMESAM, JJ.

Narayanan Chetty alias *Ranganathan Chetty and others*—Defendants-Appellants

v.

Elayaperumal alias *Lakshman Chetty and others*—Plaintiffs-Defendants-Respondents.

Appeal No. 179 of 1919, decided on 25th October, 1922, against the decree of the Temporary Sub-Judge, Sivaganga, in O. S. No. 5 of 1917.

Hindu Law—Religious endowment—Family God installed by one member—Idol installed by another member on new site purchased in his name—One who originally installs is the founder.

Where a family God was installed by an ancestor of the family in his house, but subsequently the idol was installed by another member of the family in a temple whose site was purchased in his name, *held*, the new temple was only an enlargement of the original institution and the real founder is the person who originally installed the idol.

T. Rangachariar, T. R. Srinivasa Aiyangar, C. S. Venkatachariar and *E. Doraiswami Aiyar*—for Appellants.

S. Swaminathan, A. Krishnaswami Aiyar, N.S. Ramaswami Aiyangar, T.R. Srinivasa Rajagopala Aiyangar and *V. Rajagopala Aiyar*—for Respondents.

Judgment :—This is an appeal from the decree of the Temporary Subordinate Judge of Sivaganga, in O.S. No. 5 of 1917. The suit refers to the *hukdarship* or trusteeship of a temple in Ariyakudy in the District of Ramnad called the Tiruvengadam Udayan Temple. Plaintiffs claim that they and defendants 5 to 11 are the hereditary trustees and sue to recover the temple and its properties and for other subsidiary reliefs. The Subordinate Judge having substantially decreed the plaintiffs' claim, defendants 1 to 4 have appealed to us and have contended that the suit should have been dismissed.

The relationship of the parties is explained by the genealogical tree attached to the judgment, which the Subordinate Judge says in paragraph 8 of his judgment, he has prepared from the evidence of the 5th plaintiff. It has been accepted as substantially correct by both the parties; and we shall adopt it for the purposes of this appeal and refer to the various individuals in it in the same manner as the Subordinate Judge has done. It will be seen from it that the original ancestor

of the family was one Murugappa. He had among others, two sons, Santhappa and Sevuga I. Santhappa's branch does not come into this suit, as none of its members is a party here. Sevuga I, had four sons, Murugappa II, Alagiavana I, and Venkatachala I and one Arunachala who was adopted away from the family, and with him and his branch we are not concerned. The other three sons have all left descendants. 1st to 3rd plaintiffs represent the first branch of Murugappa II. The 1st to 4th defendants and defendants 5 and 6 represent the second branch of Alagiavana I; but the position of defendants 1 to 4 depends upon the validity of the adoption of the 1st defendants to Alagiavana II by his widow; 4th to 6th plaintiffs, 8th, 10th and 11th defendants represent the 3rd branch of Venkatachala I. The original 7th and 9th defendants were subsequently transposed as 5th and 6th plaintiffs and so they do not appear among the defendants.

Plaintiffs disputed the adoption of the 1st defendant and treated him and his descendants, defendants 2 to 4 in their plaint, as not being members of the second branch. The Subordinate Judge has, however, held that adoption to be true and valid and though a memorandum of objections has been filed against that finding, the adoption was not seriously disputed before us and we have no doubt that the finding of the Subordinate Judge is right. The adoption was over 40 years ago and it was not disputed till 1901; the Subordinate Judge has referred to the numerous documents wherein the adoption has been recognised from 1874 onwards. He has also accepted the oral evidence of the defence witnesses 1, 3, 7 and 10, who speak to the adoption and we see no reason to discredit them in appeal. We attach no weight to non-production of *Isaipidimanam* and *Muri* in this case, in the face of the evidence on the defendants' side. Accepting the finding that the 1st defendant's adoption is true and valid, we treat defendants 1 to 4 as proper members of the second branch.

On the main question raised, the plaintiff's case in the plaint is that the site for the plaint temple was purchased by the "fore-fathers" of plaintiffs and defendants 5 to 11 and that the temple was built and consecrated by them and that they endowed the temple and were carrying on the management; subsequently the major members among plaintiffs and defendants were managing as hukdars, on behalf of all the decendants of the original man Sevuga Chettiar, *i.e.*, Sevuga I. They claim that all the three branches are entitled to the hukdarship and they ask that the amicable arrangement made under Ex. A, in 1914, by the three branches jointly, by which two representatives of each branch, in all six persons, were to manage the temple affairs in rotation each managing for a year at a time should be confirmed. The case of defendants 1 to 6 on the other hand is that the hukdarship is confined to their branch alone, as the temple was founded by Sevuga II of their branch on behalf of himself and his two brothers.

The Subordinate Judge held on a consideration of all the evidence, and relying to a large extent on the way in which the parties interested acted with reference to this institution for the last 50 years or more, that Sevuga I was its founder and therefore all his descendants were entitled to the hukdarship. This finding has been attacked before us by the appellants, mainly on the ground that the sale-deed, Ex. I (*d*) of 1828, for the site of the plaint temple in favour of Sevuga II was wrongly discredited by the lower Court. Though the observations of the Subordinate Judge with reference to it are not without force we think that he has not correctly appreciated the effect of Ex. XXVI, with reference to it. That was a written statement, filed in O.S. No. 138 of 1903 by a number of members of this family; it is signed among others by the 5th plaintiff and the fathers of plaintiffs 3 and 6; and as 3rd plaintiff's father died soon after, the 3rd plaintiff has adopted it. In it they refer to a sale by the Mahajanams, 75 years before now, (that is 1828), of the temple site to one Sevuga Chetti. This by itself no doubt does not fix the reference to be to Ex. I (*d*), though the description in it, so far as it goes, applied to it exactly. In that suit, Ex. I (*d*) was filed on the very day the written statement was put in, as appears from the endorsement on it and it is now produced in the present suit from the file of the District Munsiff in that suit 138 of 1903. There can be hardly a doubt that the written statement was referring to Ex. I (*d*). That it was the same document, that was filed in 1877, is shown by the

endorsement on it, about the collection of penalty in January, 1878. Ex. XXVI therefore does seem to contain an admission on the plaintiffs' side about the truth of Ex. I (*d*). The reference in it to Sevuga Chetty is thus clearly to Sevuga II. We are, therefore, inclined to think that in spite of the adverse criticism of the Subordinate Judge, Ex. I (*d*) is a genuine document and that the site on which the plaint temple stands was purchased in Sevuga II's name. The temple was subsequently built on that site.

The question then, is :

"Does it follow from those two facts that Sevuga II was the founder of the temple and only his descendants are entitled to the hukdarship ?"

We do not think so. To draw such an inference, several assumptions will have to be made for which there is no warrant. There is no deed of foundation in this case. To give exclusive rights to his descendants, we will have to assume that Sevuga II himself paid his own moneys for buying the site and for building the temple, that he got it consecrated as a new institution and not as the continuation of an existing one and that he acted for himself in all these matters and that he left no rules or instructions to regulate the succession to the trusteeship. We cannot assume all these things without evidence, particularly as such an assumption is inconsistent with the conduct of the parties, which we shall refer to presently. In the first place, it is not the appellants' case that Sevuga II acted entirely for himself in getting the temple established ; for they say that he acted on behalf of himself and his brothers, Arunachala II and Ramasami VII. In Ex. I (*d*), there is not a word about the purchase being, on behalf of any others, or as the manager of any joint family and yet admittedly the purchase was on behalf of a joint family. Whether that joint family consisted of Sevuga II and his two brothers only, or of the members of all the three branches, there is no direct evidence to show. Ex. I (*d*) is therefore quite inconclusive about the nature of the foundation, or the rights of the parties in the hukdarship.

The 5th plaintiff who seems to be well acquainted with the family has given an account of this foundation, from which it would appear that there was originally a *Kovil Veedu*, or temple house where Sevuga I used to carry on the worship of the family deity. This *Kovil Veedu* is referred to in Ex. XXVI. He says that Sevuga I used to go to Tirupathi, another famous temple in Southern India dedicated to the same God, to hand over the money offerings he received in his *Kovil* to the deity there, and that on a certain occasion an Archaka in Tirupathi, who had an inspiration, told him that thereafter it was the Tirupathi God's wish that a temple should be built for him in Ariyakudi and that from it the idea of building the plaint temple originated. He also says that Sevuga I died, before the plaint temple was built out of subscriptions collected by the members of the family. The same family God that was worshipped in the *Kovil Veedu* was installed in the new temple. If this is true and there is nothing to contradict it, it would seem that the new temple was only an enlargement of the original institution in the *Kovil Veedu* and according to *Mahomed Ismail Ariff* v. *Ahmed Moola Dawood* (1), the *Kovil Veedu* of Sevuga I should be taken as the original foundation and he as the founder. We think, however, it would be safer to take this case, as one in which there is no direct evidence of who the founder is and what the rules of succession to the trusteeship are and we must therefore infer them from the practice of the institution and the conduct of the parties.

The earliest document after Ex. I (*d*) is Ex. VII, a deed of purchase of certain lands for the temple in 1855, by Arunachala II, the brother of Sevuga II, from Venkatachala VII. The identity of the parties appears from the oral evidence. This deed shows that by that time Arunachala had apprently become the manager of the temple; but in what right he so became, we do not know, whether as the senior most of the second branch or of all the three branches put together. That this purchase was from the funds of the temple appears from the extracts from the Inam Register, Ex. XXVIII (*c*), paragraph II; and also from Ex. XXVIII, which shows that the lands were purchased for the temple, in the names of Srinivasa Iyengar and Aurnachalam Chetty, both described as

(1) (1916) 43 Cal. 1085=43 I. A. 127=14 A.L.J. 741=(1916) 1 M.W.N. 460=20 C.W.N. 1118=20 M.L.T. 110=18 Bom. L.R. 611=31 M.L.J. 219=24 C.L.J. 198=4 L.W. 269=9 Bur. L.R. 141=8 L.B.R. 517=35 I.C. 30 (P.C.).

servants of the temple. Ex. XXVIII (*a*) shows that as early as 1849, an endowment was made to the temple by one Sathappa Chetty. See paragraph 5 in it. The lands purchased from the temple funds for the temple will naturally be in the name of the manager, or hukdar and Ex. VII therefore merely shows that Arunachala II had probably succeeded Sevuga II in the management. The next documents, the extracts from the Inam Register, have already been referred to.

The next piece of evidence we have is Ex. K series. Ex. K is a plaint filed by Arunachala II and in it is joined as the second plaintiff Sevuga III of the third branch and he is described as hukdar. It is dated 1866. The suit was on a mortgage executed to the 1st plaintiff, probably on behalf of the temple and it is very significant that in that suit a member of the third branch, described as a hukdar, in the same manner as Arunachala, was added. Ex. K-2 is the judgment and in it the same description appears. Exs. K-3, K-4 and K-5 refer to another suit of a similar kind of 1870, where Sevuga III is again the 2nd plaintiff and he is described in it also as hukdar. There is no reasonable explanation why Sevuga III of the 3rd branch was added as a party and described as the hukdar, if as defendants contend the hukdarship was confined to their second branch. These proceedings in Court clearly show that Sevuga III was recognised as a hukdar, so early as 1866.

We have also about this time, in January, 1871, a sale-deed in favour of Arunachala II, Sevuga III, and Ramasami IV, representatives of all the three branches,—Ex. M-1, wherein they are all described as hukdars (according to the correct translation of the deed) for some lands bought for the temple. Again in Ex. M, Venkatachala VII is described as hukdar.

Now, it is argued that Arunachala II's action in joining the other branches should not be given much weight, because in 1874, in his will, Ex. I (*b*), he repudiated their rights and that he tried also in the same year to bring in the members of Sathappa's branch as well, who according to both plaintiffs and defendants have no rights in the hukdarship: see Ex. XIV. As the Subordinate Judge has pointed out, disputes arose between the parties in 1872, as Ex. G indicates Any action of Arunachala ater that against the other two branches cannot be treated as of much weight, or as affecting his previous admissions. In Ex. G itself, Sevuga III was admitted as a party to the suit as a hukdar, though the second petitioner Ramasami IV, of the 1st branch was not. As the Subordinate Judge notices, Ex. M-1 was not apparently filed in that suit; if it had been, possibly, Ramasami IV may have also been added as a party.

Now it appears from Ex. H-2 to H-4 of 1872 that Sevuga III and Ramasami IV tried to resist the opposition of the second branch to their rights to hukdarship in the temple, by getting the rights on to their side and by collecting the rents due from the temple lands; they tried also to exclude the 2nd branch from management altogether, as the Subordinate Judge explains in paragraph 19 of his judgment.

At this time, in 1874, Arunachala II died and left the will Ex. I (*b*), already referred to. In it he asserted that Sevuga II consecrated the plaint temple and that he was the Darmakartha or the trustee and after his death his son Ramasami (No. 8) should be Darmakartha. We have already dealt with the value of this document as a piece of evidence. After Arunachala's death Ramasami VIII applied for succession certificate in 1875, for outstandings due to the temple: *vide* Ex. R-13. Sevuga III and Ramasami IV and Vyravan of Sathappa's branch were made counter-petitioners; and though these opposed the grant of the certificate to the petitioner, the District Judge held that as Ramasami VIII was admitted to be the heir and personal representative of the deceased, while two of the counter-petitioners were divided cousins and the third a yet more distant *dayadi*, the certificate should go to the petitioner. He did not consider the question of the hukdarship of the temple at all, as the proceeding before him was a summary one. In fact, the certificate was given to collect "debts due to the estate of the said Arunachala Chetty deceased" and not statedly of the temple: *vide* VI-*a*. This order cannot be treated as of much value against the 1st and 3rd branches, as there was no adjudication in it, even in a summary way, to the rights of hukdarship.

In 1876, Venkatachala VII and Sevuga III describing themselves as hukdars, brought a suit, O. S. No. 570 of 1876, on the mortgage Ex. M; and similarly they

and Ramasami IV brought S. C. Suit 1892 of 1876, excluding the second branch, *vide* Exs. M-12 and K-10. And we also find Sevuga III executing a will, Ex. N, in the same year, asserting that the temple site was bought by the ancestors of his family and that he and his elder brother and his son built the temple and endowed it. He gives the hukdarship to his adopted son Lakshmana. Similarly in 1879, Ramasami VIII also executed a will, Ex. I (*c*). Except as evidence of assertions of right, these wills are of little value in this case.

The disputes went on between the parties, as fully explained by the Subordinate Judge, in paragraphs 21 and 29 of his judgment; it is hardly necessary to repeat what each party did in detail again. In the meanwhile, we find several properties of considerable value, purchased and endowed to the temple by the first and the third branches, Exs. M-2 of 1873, and M-3 to M-11 from 1875 to 1888. Suits were brought sometimes by first and third branches alone and sometimes by all the three and sometimes by strangers against them. See Ex. R series, as an example of the last, where only first and third branches were added. In 1886, a criminal complaint was filed by a servant of Srinivasan Chetty, the 5th defendant, against the 5th plaintiff, Ramanathan Chetty and his men, and in that case the Magistrate found that the possession of the temple properties were with Ramanathan. The disputes culminated in a regular suit, brought by the 1st defendant, through his agent, O. S. No. 14 of 1901, Ex. XI for rent, in which he asserted Sevuga II was the man who purchased the temple site and built the temple. Soon after, fearing a breach of the peace, on account of this dispute, the Magistrate interfered under the Criminal Procedure Code to prevent it and locked up the doors of the temple, so that no puja could be done there. When matters came to such a pass, the parties seem to have come to an amicable arrangement by Ex XII, in June, 1901, at the mediation of the important members of the community. It is signed by the 1st plaintiff and by the father of 3rd plaintiff of the first branch, by the 1st defendant for himself and as guardian of Ramasami IX, by his agent Vengusami Aiyangar, and the 5th defendant of the second branch, and by the 5th plaintiff and father of 6th plaintiff of the third branch. They are all admitted to be hukdars. By it they appointed three strangers as trustees to take charge of the temple and its properties and carry on the worship, till they could all unite together and take over the management themselves. The suit, O. S. No. 14 of 1901, was to be withdrawn and the key of the temple to be obtained from the Magistrate, and Ramasami IX was to refund Rs. 2,800 collected by him. This arrangement, however, was declared invalid by the Courts as it amounted to an alienation of the trusteeship to third parties. Nevertheless, the acknowledgment by the representatives of all the three branches of the right of hukdarship in the other branches in a solemn deed loses none of its force.

As the transaction fell through, the third branch brought O. S. No. 58 of 1911 to recover the properties from the three stranger trustees: *vide* Ex. XVI; and in it the members of the first and second branches were made parties. The suit was based on the existence of the rights of hukdarship in all the branches, which was expressly asserted and yet the members of the second branch did not care to deny it and allowed the case to go *ex parte*. The decree, Ex. B, was in favour of all the branches jointly; but it was executed and possession obtained by the third branch.

Then in 1914, the parties again met together and made an arrangement, Ex. A, for the management of the temple affairs temporarily. The nature of the arrangement has already been referred to. Though the scheme they adopted was a temporary one, till a proper scheme was settled by Court, still Ex. A is based on an admission, as to the rights of hukdarship of all the three branches.

We have now referred to all the important documents in connection with the management of this temple. The appellants have adduced some oral evidence of the temple servants and others, to show that in spite of all disputes the members of their second branch always continued in management. The Subordinate Judge has refused to accept the evidence, or attach importance to it, in the face of the documentary evidence, showing that each party was trying to assert his rights ever since 1871, when the quarrel began and we agree with him. There is further a series of kist receipts for temple lands, all in the name of the 5th plaintiff of the third branch. Ex. O series.

To sum up the evidence, we have the sale-deed for the site of the temple in the name of Sevuga II and the temple was built on it during his time. Admittedly he acted on behalf of himself and others; but there is no direct evidence to show whether he so acted, only for his branch or for the whole joint family consisting of all the three branches. There is no evidence that the three branches had become divided from one another at that remote period. The earliest reference we have to any division is in Ex. VI (*b*), of 1875. There is also no definite evidence as to how the money for the purchase of the site and for the building of the temple was found. There is some evidence that prior to that building of the plaint temple, Sevuga I, the common ancestor of all the three branches, had a place of worship for the same deity, as was afterwards installed in the plaint temple, in a *Kovil Veedu*, or temple house and that the idea of building the new temple probably arose with him, though he was not able to carry it out and it is not unlikely that the new temple was treated as an enlargement of the old institution. The fact that there is an effigy of Sevuga I in the temple, while there is none of any other ancestor of Sevuga II, has some significance in this connection.

It is, however, clear on the evidence that the rights of hukdarship in the first and third branches were recognised by Arunachala II of the second branch, so long ago as 1866 and this state of affairs continued till at least 1871 when quarrels began and each side tried to oust the other. During that period, we find numerous documents where the rights of first and third branches were asserted. The quarrels were once settled by Ex. XII, each branch recognising the right of the other branches but unfortunately the arrangement fell through. Again a settlement was made on a similar footing. Ex. A, and though it was a temporary one, it is still in force and will continue so, till the Court frames a scheme.

Now on all this evidence we are inclined to hold that the plaintiffs have established their case, that they and the defendants are all equally entitled to the hukdarship of the plaint temple, either because Sevuga I was accepted as the real founder, as the Subordinate Judge has found, or because Sevuga II was acting on behalf of all the three branches of the family.

The learned vakil for the appellants contended that the second alternative was not put forward in the plaint and if it is to be allowed to be raised, he should have an opportunity of meeting that case. The plaintiffs merely stated in their plaint that their "forefathers" purchased the land and built the temple and consecrated it and that subsequently all the descendants of Sevuga I were managing the temple affairs, as hukdars under hereditary right. They did not confine their case to proving that Sevuga I bought the site and built the temple. In the written statement, though it is asserted that Sevuga II bought the land and built the temple, the issue framed, *viz.*, the first part of issue 1 is quite general in its terms; it is "whether plaintiffs and defendants 7 to 11 are hereditary trustees" —no doubt the Subordinate Judge says in his judgment that the question turns upon whether the temple was founded by Sevuga I or II. As he was finding that Sevuga I was the founder, there was no other question for him to consider. Though we are not dissenting from his finding, we have considered that the case might be put on the alternative ground also, namely, that if Sevuga II was to be treated as the founder, he was acting on behalf of not only his brothers but all the members of three branches, who apparently were then a joint family. That case was made in the lower Court and is not a new case; for, otherwise, there would have been no need to adduce the volume of evidence that has been adduced, regarding the conduct and admissions of the parties. It is not suggested by the appellants that there are any new documents or other evidence, which they could have produced, but did not, to meet the alternative case. We think the objection is unsubstantial and we overrule it.

We agree with the Subordinate Judge in his finding that plaintiffs and defendants are all entitled to the hukdarship of the plaint temple.

The learned vakil for the appellants did not argue any other point before us; but the learned vakil for the plaintiffs argued that the question of the right to the trusteeship of the plaint temple was *res judicata* between the second and third branches, by reason of the decision in O. S No. 58 of 1911. In the view we have taken of the case, it is not necessary to decide this question. We have already dealt with the question raised in the memorandum of

objections. In the result, the appeal and the memorandum of objections, both fail and are dismissed with costs of 1st and 4th plaintiffs in the appeal and of the defendants 1 to 4 in the memorandum of objections.

Appeal dismissed.

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* * 1924 Madras 406.

KUMARASWAMI SASTRI, J.

Abdul Wahab Sahib—Plaintiff

v.

M. Rokia Bibi Sahiba and others—Defendants.

Civ. S. No. 661 of 1920, decided on 16th March, 1922.

(a) *Civ. Pro. Code, S. 2 (2)—Order simply referring to Official Referee to take accounts is not a decree—Letters Patent (Madras), cl. 15.*

In a suit for dissolution of partnership and accounts, when the suit came for trial, the Court without determining any of the matters in controversy in the suit passed the following order:—"The whole case is referred to the Official Referee to determine what share the plaintiff had in the business carried on by the deceased H, and having determined that to take a full account as in an ordinary partnership action and report to this Court." *Held* that the order is not an *interim* decree or even a judgment within the meaning of cl. 15 of Letters Patent. (35 Mad 1 (F.B.), *Ref.*) [P. 407, C. 2]

(b) *Civ. Pro. Code, O. 26, r. 11—Official Referee's powers are those of a Commissioner—Madras High Court Original Side Rules, O. 14-A.*

The Official Referee has no power to decide questions as to the terms of partnership, its duration or the shares of the partners. There are no provisions about his powers in the Code or in the Original Side Rules analogous to O. XXXVI of the Rules of the Supreme Court which deals with Referees and O. LV, which deals with the powers and duties of Masters. There is no statute constituting the office of the Official Referee, and his powers have therefore to be determined with reference to the provisions of the Civil Procedure Code and the Original Side Rules. The rules do not confer on the Official Referee any higher powers than those conferred on the Commissioners. The Official Referee is only a permanent Commissioner whose duty is to take accounts and make enquiries contemplated by the Code and the Rules. The function of the Court in such cases is to determine the rights of the parties where the rights of the parties or the terms of the partnership are disputed and to decide in what manner and from what date accounts have to be taken The function of the Official Referee is to take accounts, having regard to the declarations of the rights of the parties made by the Judge in passing the preliminary decree and his powers to deal with the questions are not limited simply to matters of arithmetic but he has for the purposes of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at conclusions as to the state of accounts between the parties, power to take evidence and deal with matters auxillary thereto. He is not a Judge of the Court but only a Commissioner and the adjudication by him of these questions which under the Code and the Rules form part of the functions of a Judge would be *ultra vires*. [P. 408, C. 1 and 2. P. 409, C. 1.]

(c) *Madras High Court Original Side Rules—English practice—Rules as to—Do not apply en bloc.*

It would be a novel and a dangerous proposition to hold that the Rules of Practice in English Courts apply *en bloc* to the Original Side except in so far as the High Court Rules modify them. [P. 409, Cs. 1 and 2.]

(d) *Civ. Pro Code S. 11*—Res judicata *in the same suit possible.*

The principle of *res judicata* is applicable to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit. (48 Cal. 409 (P.C.), *Foll.*) [P. 410, C. 1.]

(e) *Decree—Order—Though without jurisdiction, can't be treated as nullity by the same Court.*

An order without jurisdiction passed in a suit which the Court had jurisdiction to entertain and try, cannot be treated as a nullity by the same Court in subsequent proceedings. [P. 410, C. 2.]

C. P. Ramaswami Iyer, Advocate-General—for Plaintiff.

T Ethiraja Mudaliar—for Defendant.

Judgment:—This matter arises out of a report submitted by the Official Referee in pursuance of an order dated the 8th of April, 1921. The suit was filed by the plaintiff for a dissolution of partnership and for the taking of the partnership accounts, the case for the plaintiff being that he and his father, the deceased Hajee Abdul Ghani Sahib, were trading in partnership from the 1st of September, 1915, on the terms mentioned in the plaint. The defendants are sued as the legal representatives of the deceased Hajee Abdul Ghani Sahib. Defendants Nos. 1 and 3 filed written statements denying that the partnership was carried on on the terms mentioned in the plaint and alleged that the plaintiff worked in the business only up to the end of October, 1917, and that he had overdrawn his share of the profits. The 2nd defendant filed a written statement putting the plaintiff to the proof of his claim. The 4th defendant is the plaintiff himself and is on record as one of the legal representatives of his father.

The following issues were settled:—

(1) What were the terms of the partnership between the plaintiff and the deceased Hajee Abdul Ghani Sahib?

(2) What was the duration of the said partnership?

(3) Are the sums referred to in paragraphs 9 and 10 of the plaint assets of the partnership?

(4) What are the shares of the parties as heirs in the estate of the deceased Hajee Abdul Ghani Sahib?

(5) To what relief are the parties entitled?

When the suit came for trial, Coutts-Trotter, J., without determining any of the matters in controversy in the suit passed the following order on the 8th of April, 1921:—"The whole case is referred to the Official Referee to determine what share the plaintiff had in the business carried on by the deceased Hajee Abdul Ghani Sahib and having determined that, to take a full account as in an ordinary partnership action and report to this Court." The first defendent states that this order was passed by consent of all parties, but this is not admitted by the plaintiff nor does the order purport to have been passed by consent. In pursuance of this order what is called an *interim* decree was drawn up by the office.

Objections have been filed to the Official Referee's report by the plaintiff. The Official Referee in the report submitted has not taken an account but has confined his report to the determination of Issues Nos. 1, 2 and 4, *viz.*, as to the terms of the partnership, its duration and the shares of the parties. The objection taken by the plaintiff is that the Official Referee had no jurisdiction to go into these questions; that the order referring the whole suit to him by Coutts-Trotter, J., was without jurisdiction and is *ultra vires*, and that, even if the Official Referee had power to go into these questions, his decision is wrong on the merits. It is contended for the defendants (1) that the Official Referee has power to go into the matter; (2) that, even if he has no power, the order of Coutts-Trotter, J., referring the whole suit to him cannot be questioned in this suit so long as it remains in force and has not been set aside either by review or by way of appeal; and (3) that section 97 of the Civil Procedure Code prevents the correctness of a preliminary decree not appealed against from being disputed in appeal from any final decree that may be passed and so *a fortiori* bars any objection to proceedings in the suit necessary for the obtaining of the final decree.

As regards the objection founded on section 97 of the Civil Procedure Code, the order is not an *interim* decree or even a judgment within the meaning of the Letters Patent. Rule 15 of O. XX of the Civil Procedure Code provides that where a suit is for the dissolution of a patnership, or the taking of partnership accounts the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken, and other acts to be done, as it thinks fit. Section 2, sub-clause (2) of the Civil Procedure Code, defines decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and the explanation states that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. In order, therefore, for an order to be a preliminary decree the Court should dispose off finally some at least of the matters in controversy. In the present case there is nothing disposed of. All that the learned Judge states is, that the whole work is to be done by the Official Referee, no rights of the parties having been adjudicated upon. Nor is the order of the 8th of April a judgment within the meaning of clause 15 of the Letters Patent, as there is no adjudication on any matter. I need only refer to *Tuljaram Row* v. *Alagappa Chettiar* (1), where the definition of judgment is fully discussed by a Full Bench of this Court. Sir Arnold White, C.J., observed as follows:—"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding,

(1) (1910) 35 Mad. 1 (F.B.).

I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

As regards the powers of the Official Referee to go into the questions, I am of opinion that he has no power to decide questions as to the terms of partnership, its duration or the shares of the partners. So far as the Official Referee is concerned, there are no provisions in the Civil Procedure Code or in the Original Side Rules analogous to O.XXXVI of the Rules of the Supreme Court which deals with Referees and O. LV, which deals with the powers and duties of Masters, and, therefore, it is not necessary to consider the procedure in English Courts or the English decision based on those rules in arriving at a conclusion as to the powers of the Official Referee of this Court. There is no Statute constituting the office of the Official Referee, and his powers have, therefore, to be determined with reference to the provisions of the Civil Procedure Code and the Original Side Rules. So far as the Code is concerned, section 75 enacts that, subject to such conditions and limitations as may be prescribed, the Court may issue a Commission to examine any person to make a local investigation; to examine or adjust accounts; or to make a partition. Order XXVI refers to Commissions issued in pursuance of the powers conferred by section 75, and rules 11 and 12 refer to Commissions to examine or to adjust accounts. Rule 11 enacts that in any suit in which an examination or adjustment of accounts is necessary, the Court may issue a Commission to such person as it thinks fit directing him to make such examination or adjustment, and rule 12 enacts that the Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings, which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination. Clause (2). The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further enquiry as it shall think fit. Rules 15 to 18 contain general provisions as to the expenses of the Commission, the powers of the Commissioner to examine parties, witnesses and documents and the appearance of the parties before the Commissioner. Prior to the appointment of the Official Referee in the year 1914 the practice of the Court was to appoint Commissioners *ad hoc*, whenever accounts had to be gone into in partnership, partition and administration actions. The practice was usually for a Vakil to be appointed who submitted his report, and the matter was disposed of by the Judge in Chambers in the Reference Court. This procedure having been found to be dilatory and inconvenient, it was thought desirable that there should be an officer of Court to do what was usually done by the Commissioner appointed and an Official Referee was appointed; but the rules do not confer on the Official Referee any higher powers than those conferred on the Commissioners, Order XXIII of the Original Sides Rules refers to the procedure in cases of reference to a Judge in Chambers and the provisions of that Order relate to cases where the Judge takes the accounts himself. Order XXIV relates to reference to Commissioner or arbitrator. Order XXIV-A refers to proceedings before the Official Referee and rule 1 provided that, subject to the rules hereinafter contained, Order XXIV of the Original Side relating to accounts and enquiries referred to a Commissioner shall, as far as practicable, apply to all proceedings before the Official Referee. Order XXIV-A while it prescribes the procedure to be followed by the Official Referee does not give him the powers which are conferred by the English Supreme Courts Rules on the Official Referee or Master. Rule 4 of Order XXIV-A has been referred to but it does not confer on the Referee all the powers of a Judge or constitute him a Judge of the Court. All that it states is that in matters within his competence he shall conduct the enquiry in the same manner as a Judge in Chambers hearing references. It seems to me that the Official Referee's powers limited as they are must be sought for in the Civil Procedure Code and the Original Side Rules and that, having regard to the provisions referred to by me above, the Official Referee is, in partnership suits, only a permanent Commissioner whose duty is to take accounts and make enquiries contemplated by the Code and

the Rules. There has to be a sharp division between the function of a Judge disposing of a suit and a Commissioner who is to aid the Judge in taking accounts rendered necessary for the passing of a final decree. I think that the function of the Court in such cases is to determine the rights of the parties where the rights of the parties or the terms of the partnership are disputed and to decide in what manner and from what date accounts have to be taken. The function of the Official Referee is to take accounts having regard to the declarations of the rights of the parties made by the Judge in passing the preliminary decree and his powers to deal with the questions are not limited simply to matters of arithmetic but he has, for the purposes of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at conclusions as to the state of accounts between the parties, power to take evidence and deal with matters auxillary thereto. He is not a Judge of the Court but only a Commissioner and I think that the adjudication by him of these questions which, under the Code and the Rules, form part of the functions of a Judge would be *ultra vires*. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights of the parties are solely within the province of a Judge and matters of detail, *i.e.*, the working out of those righs either by taking out accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee. While it is conceded by Mr. Ethiraja Mudaliar for the defendants that there is nothing in the Code or in the Rules which gives the Official Referee powers to dispose of questions in dispute as to the substantive rights of the parties, his contention is that in the absence of any provisions in the Code or in the Rules, the English Rules of Practice should apply, but no authority is cited for the proposition that the Rules of Procedure of the English Courts form part of the substantive rules on the Original Side. It will be a novel and, in my opinion, a dangerous proposition to hold that the Rules of Practice in English Courts apply *en bloc* to the Original Side except in so far as our own rules modify them.

The question, however, remains as to how far I have power in these proceedings to treat the order of Coutts-Trotter, J., and the report of the Official Referee as mere nullities. It is contended by the Advocate-General for the plaintiff that, if Coutts-Trotter, J., had no jurisidiction to pass the order referring the whole suit to the Official Referee, no consent of parties, even if it was given at the time of the passing of the order, would affect the question, and that the proceedings before the Official Referee would be a nullity thereby leaving the whole matter in the same position as it was when the order was passed and reference is made by him to *Ledgard* v *Bull* (2), *Minakshi Naidu* v. *Subramanya* (3), *Rajlakshmi Dasi* v. *Katayanee Dasee* (4), *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (5), and *Raja Har Naram Singh* v. *Chaudhrain Bhagwant Kuar* (6). There can be little doubt that, so far as the authorities go, want of jurisdiction in a Judge to try a suit renders the proceedings void and that no amount of consent could confer jurisdiction where no jurisdiction exists. The principle has thus been laid down by their Lordships of the Privy Council in *Ledgard* v. *Bull* (2): "When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit." The authorities cited, however, refer to objection being taken either in appeal from the decision or in subsequent suits or proceedings. The cases cited by

(2) (1887) 9 All. 191 (P.C.).
(3) (1888) 11 Mad. 26 (P.C.).
(4) (1911) 38 Cal. 639.
(5) (1824-57) 6 M.I.A. 134.
(6) (1891) 13 All. 300 (P.C.).

the Advocate-General do not touch the question as to how far in the same suit and in the same proceedings, it is open to the parties to get behind an order passed, however incorrect that order may be. No authority has been cited in favour of the contention of the Advocate-General that I ought to go behind the order of Coutts-Trotter, J., and the authorities I shall refer to are against the contention. In *George Henry Hook* v. *Administrator-General of Bengal* (7), their Lordships of the Privy Council held, that the principle of *res judicata* is applicable to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit. The order of Coutts-Trotter, J., standing as it does unreversed or unmodified either by appeal or review, must, I think, be taken to bind the parties in subsequent proceedings in the suit, and that the only remedy of the plaintiff is to carry the order in appeal. I have already pointed out that in the present case no appeal lies at present, but under the Code an order passed which is not subject to appeal can be objected to after the passing of the final decree which under the Code can be appealed against. I think also, that a distinction has to be drawn between cases where the Court has no jurisdiction to try the suit and cases where the Court having jurisdiction passes an order which it is incompetent to pass. It cannot be disputed that in the present case Coutts-Trotter, J., had jurisdiction to try the suit though, in the view I take, he had no jurisdiction to refer the whole suit to the Official Referee for disposal In *Mangul Pershad Dichit* v. *Grija Kant Lahiri* (8) it was held by their Lordships of the Privy Council that where a Court having jurisdiction to try an issue has given an erroneous decision, such decision must, if unreversed, be treated as valid. I may also refer to *Sukhnath Rai* v. *Nehal Chand* (9). It has been held that where a decree is passed by a Court not having jurisdiction and the decree is not appealed against objection cannot be taken in execution proceedings which forms a continuation of the suit. In *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (10) a suit on a mortgage was instituted in a District Munsif's Court, which was competent to try a suit of its nature and value, but the mortgaged lands were situate, outside the jurisdiction of the District Munsif, who would, therefore, have had no jurisdiction, if objection was taken, to pass a mortgage-decree affecting the lands. Such a decree was passed and when the decree-holder applied for an order absolute and for execution of the decree objection was taken that the Court had no jurisdiction to entertain the suit and that the decree passed by it could neither be made absolute or be executed. It was held that the decree was not a nullity and that the judgment-debtor should not be allowed to object to the validity of the decree in the course of its execution. In *Tuljaram Row* v. *Gopala Aiyan* (11) it was held that erroneous orders should be vacated by proper proceedings and should not be made the subject of collateral attack by the parties. In *Sashikanta Acharyya* v. *Raja Sarat Chandra Rai Chaudhuri* (12) it was held that the validity of an order at one stage of a litigation, unless forthwith challenged by appropriate proceedings in a Superior Tribunal, must be regarded as conclusive between the parties and cannot be questioned or collaterally attacked at a later stage, and reference was made to *Kishana Behari Roy* v. *Bunwari Lall Roy* (13), *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (8), *Ram Kirpal* v. *Rup Kuari* (14), *Beni Ram* v. *Nanhu Mal* (15), *George Henry Hook* v. *Administrator-General of Bengal* (7) and *Rajeswara Sethupati Avergal* [*Raja of Ramnad*] v. *Velusami Tevar* (16). I may also refer to *Ex parte Manohar Bhivrav* (17) and *Sadasiva Pillai* v. *Ramalinga Pillai* (18).

It is argued by the Advocate-General that a distinction should be drawn between processual irregularities and fundamental defects of jurisdiction, but it seems to me that the decisions I have referred to above do not support the view that an order without jurisdiction passed in a suit which the Court had jurisdiction to entertain and try, can be treated as a

(7) (1921) 48 Cal. 499 (P.C.).
(8) (1882) 8 Cal. 51 (P.C.).
(9) (1920) 42 All. 661.
(10) (1904) 27 Mad. 118.
(11) (1917) 32 M L.J. 434.
(12) 1921) 34 C.L.J. 415.
(13) (1875) 1 Cal. 144 (P.C.).
(14) (1884) 6 All. 269 (P.C.).
(15) (1885) 7 All. 102 (P.C.).
(16) (1921) 40 M.L.J. 197 (P.C.).
(17) 2 B.H.C.R. 374.
(18) 15 B.L.R. 393 (P.C.).

nullity by the same Court in subsequent proceedings.

In the view I take of the case, I think that, so far as the proceedings on the Original Side are concerned, I must treat the order passed by Coutts-Trotter, J., as valid. The reference will proceed on that footing. The objections to the Official Referee's report will be considered on the merits.

Order accordingly.

1924 Madras 411.

(SPECIAL BENCH.)

SCHWABE C.J, COUTTS TROTTER AND KRISHNAN, JJ.

In the matter of *A. N. B. Balusamy Iyer and others*—*Insolvents*.

Insolvency Petitions Nos. 201 of 1919 and 179 of 1921, decided on 8th October, 1923.

Hindu Law—Debts—Son is liable for father's debts which are not illegal or immoral even during fathers' life-time and hence official assignee of father is in same position as father.

The Official Assignee, though it cannot be said that the shares of the minors actually vest in him has nevertheless the same rights of disposition of the family property in satisfaction of the debts of the manager as the manager would himself have been entitled to exercise, if he had not been adjudicated an insolvent. Thus the Official Assignee can sell the joint ancestral estate of the insolvent and his sons to pay such of the debts of the insolvent as are not shown by the sons to be illegal or immoral debts even during the lifetime of the (father) insolvent. (39 All. 437 (P C.), 44 All. 309 (P.C.), *Expl*; 46 Mad. 54, 43 Bom. 612, 13 Cal 21 (P.C.); 44 Cal. 524 (P.C.), *Foll.*; 42 Mad. 711 (F.B.), *Disappr.*; 45 All. 90, *Dist.*) [P. 415, Cs. 1 and 2.]

M. A. Thirunarayanachari—for Petitioners.

The Advocate General (O. Madhavan Nair)—for Respondent.

Schwabe, C.J.:—The petitioners are the infant sons of two brothers who traded in partnership and became insolvents. They were in possession of joint family property, to shares in which the sons had on birth become entitled.

The question raised in this insolvency petition is whether the sons' shares in the joint family property of a Hindu governed by the Mitakshara Law can be made liable, during their fathers' life-time to the father's debts other than *Avyavaharika*, that is, those tainted with illegality or immorality; for the fathers having become insolvent, the Official Assignee claims to have recourse to the joint family property including, if necessary, the sons' undivided shares therein. He alleges that the fathers could themselves alienate the property and pay such debts and that he can exercise that right in the interests of the fathers' creditors.

There can be no doubt that this has been supposed to be in accordance with the Hindu Law for a very long time past and that Indian Courts have acted upon this view, so regularly and continously, that it has been accepted as a well known principle of law, and that a very large number of titles to property, where there had been sales of joint property by a father's creditors, or by the Official Assignee on his Insolvency has been accepted as good and not in any way open to question.

We are now asked to say that all this is wrong and that the son's obligation to pay his father's debts comes into operation only on his death and that the son's share in the joint family property is immune until such time, except when the debt was incurred by the father for the benefit of the family, that is to say, as agent acting within the scope of his authority. It is said that the principle on which the law has proceeded is that a son is under a pious obligation to pay his father's debts and so save his father's soul, from the penalties which the Hindu religion recognises as falling to the lot of those who leave this world with debts unpaid, and that it having been pointed out in two recent decisions of the Privy Council that as it cannot at any time be predicated with certainty that any one will die, without himself having discharged his debts, that pious obligation cannot come into operation during the lifetime of the father, and it must follow that the son's share in the joint family property cannot during the father's lifetime in any way be made liable for the father's separate debts. Logical though this may be, it is by no means a convincing argument. Once a proposition of law has been established and acted upon over a period of time, it is too late to uproot it, by a re-examination of the *rationes decidendi* of the cases, by which the proposition was first established and a conclusion that those *rationes* were erroneous, at the time, and no longer bring conviction to the existing judicial mind. Further, the

principles enunciated by Lord Halsbury, in *Quinn* v. *Leathem* (1), are particularly apposite, when trying to apply the rules of logic on a re-examination of the principles of the reported decisions on Hindu Law and their application to a particular set of circumstances. He stated them thus:

"There are two observations of a general character, which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decided. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

If this matter were coming before us, as a case of first impression, and without the large mass of authority with which it is surrounded, I should enquire by an examination of the original texts of the Smrities and Mitakshara and the commentaries thereon, whether it appeared that a son's property was or was not liable for his father's debts, during the father's lifetime. If I found that the answer to this question depended on pious obligation, I should wish to be satisfied, whether that pious obligation was such, that it only comes into operation, on the father's death. On general principles, a son's property cannot be taken to pay his father's debts and it would be necessary to show, first that the Mitakshara makes some exception, on account of which that general principle does not apply to Hindus, and then to discover how far that exception extends. I should on that enquiry soon come to a passage in Yajnavalkya, which has been rendered.

"If a father has gone abroad, or is dead, or is subdued by calamity, his debts shall be paid by his sons and grandsons."

Based on that passage, the author of the Mitakshara lays down:

"If a father, without paying the debt which is due, dies, or goes to a distant country, or is afflicted with an incurable disease and the like, then his debt must be paid by his sons and grandsons, by reason of their sonship and grandsonship, even if no assets of the father or the grandfather have been left;"

and later, to a statement in Jaganatha, which explains passages in Vishnu and Yajnavalkya which include the case of a father, being wholly immersed in vice, as referring to a state of "combined insolvency and insolence". The matter for consideration would be whether such expressions must not be taken to include a case of declared insolvency which view, if accepted, would be sufficient to determine the present case. But I think we are relieved from the burden of this enquiry, because certain principles have been too long established for this Court, at any rate, to question them. In 1886 in *Nanomi Babuasin* v. *Modhun Mohun* (2) Lord Hobhouse who delivered the opinion of the Board said:

"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority."

In 1916, in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3), Lord Buckmaster said:

"In every other event."

that is, except where the debt was incurred for illegal or immoral purposes:—

"It is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

Between those dates, the principle has been acted upon, by the Privy Council and all the Courts of India. It is true that in all the cases of the Privy Council, the question arose as between the alienees of the family property and the sons, or their representatives; but I can find no indication that those cases were decided, as has been suggested here, on the consideration of the rights of the alienees, as *bona fide* purchasers for value, without notice. Indian Courts have not understood those cases, as being limited in that way; for, they have applied the principle to cases of execution against the son's share in the family property and to the rights of the Official Assignee, on the father's insolvency and even to determining the forms of decree, in suits against the father, when

(1) [1901] A.C. 495.

(2) (1886) 13 Cal. 21 (P.C.).
(3) (1917) 44 Cal. 524 (P.C.).

it is desired to make the son's share answerable for the decree.

In 1917, came the decision in *Sahu Ram Chandra* v. *Bhup Singh* (4) This case actually decided that the rule already established, that an alienation by the father of family property can only bind the son's interest in that property, when the alienation was for the purpose of discharging an antecedent debt, must be limited in its application to cases, where the antecedent debt was incurred, wholly apart from the security of the joint family property. But their Lordships did state their view that the pious duty of a son to discharge his father's debts, only arose on his father's death. It is to be observed that in that case, the claim against the father for repayment of the money due was long since barred by limitation, and that the Board was, therefore, not considering the question, whether, if a decree had been obtained, in respect of that debt or the father had become insolvent, it was a debt, for which the son's share in the family property could have been made liable. Further, in recognising the principle that the father can alienate joint family property, to secure payment of an antecedent debt, it would seem that the Board must have recognised that the son's share can be made, in the father's lifetime, liable to pay his father's debts, although such debts were not incurred, for the benefit of the family. Indeed, in my view, this case is really an authority in favour of the Official Assignee, who is dealing with antecedent debts; for, if the father can alienate the family property, to pay those debts, it seems to follow that the Official Assignee, standing in his shoes, can do the same. Based, however, on the statement in this case, that the pious obligation only arises on the death of the father, attempts were made all over India to raise once more the question, which it was thought had been set at rest, by *Nanomi Babuasin* v. *Modhun Mohun* (2), and to get a finding that in no case, where the debt was not incurred on behalf of the family, could the son's share be reached, during the father's lifetime. These attempts failed; see, for instance, *Peda Venkanna* v. *Srinivasa Deekshatulu* (5), *Kandasawmy Goundan* v. *Koppu Moopan* (6), *Subramania Aiyar* v. *Messrs. Shaw Wallace & Co., Madras* (7) and *Hanumat Kashinath* v. *Ganesh Annaji* (8). *Sahu Ram Chandra* v. *Bhup Singh* (4), was followed by the Privy Council in *Jogi Das* v. *Ganga Ram* (9), where Lord Haldane quoted it, as authority for the proposition, that the mere circumstance of a pious obligation did not validate the mortgage, otherwise invalid. In 1922, in *Chet Ram* v. *Ram Singh* (10), it was held, following *Sahu Ram Chandra* v. *Bhup Singh* (4), the mortgage of the family property, not being for an antecedent debt, the mortgage and the subsequent sale of the equity of redemption did not bind the sons or grandson's shares in the family property and it was further held that the grandsons were not under a pious obligation to repay, to the vendees of the equity, as a condition of recovering the property, the money received by their grandfather. Lord Shaw, in delivering the opinion of the Board, quoted with approval, Lord Haldane's interpretation of his, Lord Shaw's judgment in *Sahu Ram Chandra* v. *Bhup Singh* (4), but he added:

> "In the present case, the doctrine" (that is, of pious obligation) "is invoked against grandsons and in the lifetime of sons. Nothing more need be said. In the invocation of the doctrine entirely fails."

Based on this observation, attempts, once more, have been made, in all the Indian Courts, to throw doubt on the principle established in *Nanomi Babuasin* v. *Modhun Mohun* (2) and I think opportunely restated in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3), by Lord Buckmaster. In Calcutta and Madras, this has failed: see *Madhusudhan Das* v. *Iswari Dayi Debi* (11). *The Official Assignee of Madras* v. *Ramachandra Aiyar* (12), and *Sama Rao* v. *Vannapi* (13).

By reason of the numerous cases pending in insolvency and otherwise, this petition has been referred to a Bench, and I have directed it to be heard by this Court as at present constituted. In my judgment, the cases of *Sahu Ram Chandra* v. *Bhup Singh* (4) and *Chet Ram* v. *Ram Singh* (10) were not intended to and did not alter the law,

(4) (1917) 39 All. 437 (P.C.).
(5) (1918) 41 Mad. 136.
(6) (1920) 43 Mad. 421.
(7) (1920) 12 L W 117.
(8) (1919) 43 Bom. 612.
(9) (1917) 21 C.W.N. 957 (P.C.).
(10) (1922) P C. 247 (P C).
(11) (1921) 48 Cal. 341.
(12) (1923) Mad. 55.
(13) (1923) Mad. 36.

as laid down in a long series of cases referred to above, and the Official Assignee is entitled to succeed on this petition. On this point, until the Privy Council has definitely otherwise decreed, the law in this presidency must be considered to remain unaltered in this respect.

Since the argument in this case, a judgment of the Allahabad High Court in *Kishen Singh* v. *Chhajju Singh* (14) has been published. In that case, in a suit against a father, and sons in respect of rent due, under a lease to the father, it was held that the lease was not taken for the benefit of the family and was a speculative and risky transaction not binding on the family and the sons were accordingly dismissed from the suit and a decree was given against the father alone and in execution of that decree certain family property, which had been hypothecated by the father, as security for payment of the rent due under the lease, was attached and the sons' interest therein was sought to be brought to sale in satisfaction of the decree. It was held that this could not be allowed and in my judgment this decision is right, in that the debt having been held as *avyavaharika*, execution could not be allowed against the sons in any form, it being a debt for which they had expressly been found to be not liable and for which their property could not be made liable. But as I read the judgment, it goes much further and indeed seems to accept as correct practically all the arguments which had been so clearly and ably addressed to us in this case by Mr. Tirunarayanachari. It seems to lay down definitely that the pious obligation of a Hindu son to pay his father's debt does not arise, until after the death of the father and it treats the cases of *Sahu Ram Chandra* v. *Bhup Singh* (4) and *Chet Ram* v. *Ram Singh* (10), as being authorities for this proposition and speaks of cases, such as *Girdharee Lall* v. *Kantoo Lall* (15) and cases following *Nanomi Babuasin* v. *Modhun Mohan* (2), as having their authority shaken by these later Privy Council decisions, and with those parts of the judgment, for the reasons given above, I do not agree. Where a suit having been brought on a mortgage, by the father, of family property, in which his sons are joined as parties, it is held that the sons' shares are not liable, on the ground that the debt was not an antecedent debt properly so called, and a further suit being brought in time against the father and a decree obtained on the personal covenant in the mortgage, or for the money lent, whether the sons' shares in the family property could nevertheless be taken in execution of the decree against the father, is a point on which it is not necessary to express an opinion and I should not desire to do so, without having the matter fully argued. It would no doubt be a curious and anomalous position, if the sons' shares were not bound by the mortgage, but were liable to be taken in execution for the mortgage debt. But that is not a question which we are called upon to decide.

I. P. No. 179 of 1921 : The petition will be referred back to the Insolvency Judge with these directions. He will deal with the costs.

I. P. No. 201 of 1919 is referred back to the Insolvency Judge for disposal, as we have not sufficient facts before us to deal with it.

Coutts-Trotter, J.:—In the year 1917, the case of *Sahu Ram Chandra* v. *Bhup Singh* (4) was decided by the Privy Council. I set out the head note, as it appears in *Sahu Ram Chandra* v. *Bhup Singh* (4), as clearly showing the propositions, which the learned reporter conceived that case to establish. The father of a joint Hindu family governed by the Mitakshara can only sell or mortgage the joint family property, so as to bind his sons in two cases, namely, (1) where the alienation is for family necessity, and (2) where the alienation is made to discharge a debt, which (*a*) was antecedent to the alienation, (*b*) was incurred wholly apart from the security of the joint family property, and (*c*) is not proved to have been incurred for immoral purposes. Further, during the father's life, an alienation by him is effective, only in the first case, since its validity in the second case rests upon the pious duty of the sons, to discharge their father's debt, and that duty arises only 'upon his death'. As to the first main proposition, there has never been any question, nor as to the proposition 2 (*c*). As regards the proposition 2 (*a*), their Lordships refer to the conflict of authority, which existed in India, as to whether money paid in consideration of a mortgage

(14) (1923) All. 206.
(15) (1912) 14 Bom. L.R. 187 (P.C.).

of ancestral property, effected by the father, could be treated as being antecedent within the meaning of the rules and they hold that it could not and that the debt must not only be antecedent, in time, but must be a dissociated and distinct transaction. The proposition 2 (*b*) may or may not have been new law, when it was promulgated. But it is safe to say that it embodied a principle, which was not present to the mind of the Indian Courts and had not been applied by them. A Full Bench of five Judges of this Court in *Arumugham Chetty* v. *Muthu Koundan* (16), was so much impressed with the possible effect of the application of this principle, upon existing titles, that they treated that proposition as an *obiter dictum* and upheld a mortgage, where the antecedent debt relied upon was a prior mortgage of the joint family estate, independent in fact and prior in time, to the mortgage sued upon. The decision of the Board in *Chet Ram* v. *Ram Singh* (10) re-affirmed the proposition and although they do not expressly overrule the decision of the Madras Full Bench, it was cited to them by Mr. De Gruyther in argument, and I cannot doubt that they must be taken to have disapproved it. But we are really concerned in this case, with the last proposition, namely, that the pious obligation, as it is commonly called, of the sons to discharge their fathers' debts, which the Hindu Law undoubtedly imposes upon them and grandsons does not arise, till the death of the father.

The difficulty which we are called upon to solve arises in this way. The Official Assignee seeks to alienate the joint family property of the family, of which the insolvents were the managers, including the assets of the minor sons, in satisfaction of the debts of the insolvents, so far as they are neither immoral nor illegal, within the meaning of the rule. The minor sons seek by this motion to restrain him from doing so. It was decided by a Bench of this Court, consisting of two members of the present Bench in *The Official Assignee of Madras* v. *Ramachandra Aiyar* (12) that the Official Assignee, though it cannot be said that the shares of the minors actually vest in him, has nevertheless the same rights of disposition of the family property, in satisfaction of the debts of the manager, as the manager would himself have been entitled to exercise, if he had not been adjudicated an insolvent. I think that we should follow that decision, which was only a re-statement of the effect of a long series of decisions in India, beginning with the well-known judgment of Latham, J. in *Fakirchand Motichand* v. *Motichand Harruckchand* (17). Indeed I do not gather that the correctness of that decision was challenged in the lucid and able argument of Mr. Tirunarayanachari. His contention really is that, on the true view of the authorities, the father himself would not in the circumstances have the right to alienate these properties. There can be no doubt that a series of decisions of the Privy Council has established that a sale of the family property by the father to his creditor, or in execution levied by the father's creditor on the family property, cannot be set aside by the sons. That has been interpreted by the High Courts of India, to involve the further proposition that the sons are not only bound by the completed sale or execution proceedings, when the property purports to have passed to the creditor, but cannot resist the steps taken by the creditor to bring about the transfer of the ownership of the property to himself. The cases are set out in note C (1) at p. 410, section 307 of the 9th edition of Mayne on Hindu Law. Mr. Tirunarayanachari's argument falls mainly under two heads. (1) He contends that all these decisions whether of the Privy Council or of the Indian Courts are based on the supposition that the pious obligation devolves upon the sons, not only upon the death but during the lifetime of the father. It is only just to observe that the leading case of *Girdharee Lall* v. *Kantoo Lall* (15), undoubtedly appears to proceed on that footing. He contends that as the pious obligation has been authoritatively denied by the latest Privy Council decisions, to exist during the father's lifetime, these cases are no longer to be regarded as binding, where the father is alive. (2) He argues that even if the older decisions of the Privy Council, which are set out at page 410 of Mayne on Hindu Law, are binding, they are all cases, where the property, by alienation or execution, had already come into the hands of the creditor

(16) (1919) 42 Mad. 711, (F.B.).

(17) (1883) 7 Bom. 438.

and that the liability of the sons should be confined to such cases. He supports this by saying that *Sahu Rama Chandra* v. *Bhup Singh* (4), has given a new ground of which a liability of the sons can be supported, in cases of a completed transfer and excluded in cases where the transfer is not yet completed. He has been at a little difficulty to find a proper legal label for his position, speaking some times of an equity and sometimes of a doctrine in the nature of estoppel. However, let us turn to the passages in the judgment of the Board in *Sahu Ram Chandra* v. *Bhup Singh* (4), on which he relies. At p. 132, the Board say this :

"They desire in the first place to make it clear, that much, if not all, of the law on the subject has arisen from the necessity of protecting the rights of third persons, say, the purchasers of the property, who have taken their title for onerous consideration and in good faith ;"

and at page 133 is the following passage :

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up, with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

Their Lordships then refer to the well-known summary of Sir James Colvile in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (18), which begins with the words, "where joint ancestral property has passed out of a joint family," words repeated by Sir John Stanley, C.J. in the case *Chandradeo Singh* v. *Mata Prasad* (19). So far as I can ascertain, it is the fact that all the Privy Council cases do deal with executed sales and not with mere proceedings to enforce the creditors' rights. But it is difficult to see in principle, what reasons there can be, for holding that such a distinction should be drawn. If a creditor can hold what he has got, it is difficult to see, why his hand should be stayed, in attempting to get it.

The argument that because the decision in *Sahu Ram Chandra* v. *Bhup Singh* (4), has removed the basis, which underlies the earlier decisions of the Privy Council beginning with *Girdharee Lall* v. *Kantoo Lall* (15), therefore the decisions themselves are to be disregarded, is one that I confess does not appeal to me strongly. The last thing I look for in Hindu Law is logical consistency compounded as that law is, of ancient texts, thousands of years old, qualified and interpreted by a series of commentaries and by decisions of the Indian Courts and the Privy Council, to temper and modify their application to the conditions of modern Indian life. It seems logically unanswerable to say, that, as the pious obligation of the son is based on the duty to remove his father from hell, that obligation cannot arise, until the father, by means of his death, has reached hell. But the matter is not so simple as that; for, Vishnu and Yagnavalkya, as cited by Jagannatha, both accept the father's becoming a sanyasi, or being wholly immersed in vice, or his suffering from incurable disease, or being mad, or being extremely aged (these last three qualifications come from Katyayana and Vrihaspati), as also giving rise to the son's liability to pay his father's debts. It is possible enough to say that the early authorities treat these conditions as equivalent to physical death ; but, at any rate, the doctrine of actual residence in *put* is gone, and it may be that that is the solution of this difficulty, namely, that one is entitled to treat insolvency, as equivalent to a kind of civil death of the father, which would thereby invoke the pious obligation of the sons. It is worth remarking that Jagannatha, in his comment on the phrase "immersed in vice," includes, under that head, a state of insolvency and insolence, in which the father has abandoned all attempt to satisfy his creditors. He does not, of course, use "insolvency" in the technical sense of a person who has been actually adjudicated by a Court of law. If this enunciation of the Hindu Law is correct, it seems to me that it will apply *a fortiori* to a case where there had been such a formal adjudication.

The next observation I have to make is that there are at least two decisions of the Privy Council, in which the son's liability was enforced, during the lifetime of the father, although it is true that it was after the property had passed to the creditor. One was *Nanomi Babuasin* v. *Modhun Mohun* (2), and the other was *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3). In each of these cases language was used, which appears to imply that their Lordships, who decided it had no intention of restricting the son's obligations to cases where property has actually passed. And

(18) (1880) 5 Cal. 148 (P.C.).
(19) (1909) 31 All. 176.

in each case, the decisions contains statements, which, if they are correct law, establish the liability of the sons in such a case as the present. In *Nanomi Babuasin* v. *Modhun Mohun* (2), Lord Hobhouse says this at page 35 :

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tained with immorality."

In *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3), Lord Buckmaster say this, at page 4 :

"In every other event", (that is except where the debt was incurred for illegal or immoral purposes), it is open to the execution creditor to sell the whole of the estate, in satisfaction of the judgment obtained against the father alone."

It seems to me impossible to hold that these pronouncements mean that the creditor can hold the property against the sons, if he has actually got it, but can be resisted in his attempts to take the legal steps necessary to get it. I have already said that I do not look for logic in Hindu Law ; but I think that such a state of things is repugnant not merely to logic but to a sense of practical justice and convenience. I think that the matter is admirably put by Shah, J., in *Hanumat Kashinath* v. *Ganesh Annaji* (8) :

"I am therefore of opinion that in the absence of a definite and explicit pronouncement on the point, this Court is bound in spite of the observations in *Sahu Ram Chandra* v. *Bhup Singh* (4), to follow the Indian decisions and the decisions of the Privy Council, to which I have referred and to hold that the decree-holder's right to proceed against the ancestral immoveable property in execution, during the debtor's life-time is co-extensive with the debtor's power to alienate it, under the Mitakshara, for the satisfaction of his antecedent debts, not tainted with illegality or immorality."

Since the argument was concluded, our attention has been drawn to the case of *Kishen Singh* v. *Chhajju Singh* (14) and it is indisputable that the reasoning, on which the judgment in that case proceeds, is opposed to the conclusion and reasoning of Scott, C. J., and Shah, J., in *Hanumat Kashinath* v. *Ganesh Annaji* (8) and in effect adopts the line of argument, taken by Mr. Tirunarayanachari in this case before us. The actual decision can be distinguished on a very simple ground. The decree was passed in a suit, in which the sons and grandsons had been made parties and the Court which passed the decree expressly exempted them and gave judgment against the father only. It was then sought, notwithstanding the decree, to bind the sons' and grandsons' shares in execution, the decree not having been appealed from. I conceive that the decision can be upheld on the ground that even supposing the decree to be wrong, as long as it stood execution would not be sought on the footing that it was to be treated as a nullity, in so far as it exonerated the sons and grandsons.

I respectfully agree with the High Court of Bombay that the only course open to a Court in this country is to follow the earlier decisions and hold that the father manager, or the creditor, or the Official Assignee, standing in his shoes, has the power to alienate joint family property, in satisfaction of an antecedent debt of the father manager not tainted with illegality or immorality. If the Privy Council had thought that the earlier decisions of the Board and the mass of the decisions of the Indian Courts, which had been built upon them, were erroneous or were to be restricted in the manner suggested in *Kishen Singh* v. *Chhajju Singh* (14) they could easily have said so, as the whole subject has been before them for review, in *Sahu Ram Chandra* v. *Bhup Singh* (4) and *Chet Ram* v. *Ram Singh* (10). They would then have pointed out, that the *dicta* of Lord Hobhouse and Lord Buckmaster in *Nanomi Babuasin* v. *Modhun Mohun* (2) and *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3) respectively which entirely support the decisions in the Indian Courts, down to *Sahu Ram Chandra* v. *Bhup Singh* (4) travelled outside their legitimate scope in the decisions involved. They have not done so and until we are given further guidance, I think that our plain duty is to take it, as a settled rule, that the father during his life-time and any one, who during his life-time stands in his shoes, can validly alienate the whole of the joint family property, in satisfaction of antecedent debts, not tainted with illegality or immorality and that would be travelling outside our legitimate function, to consider a rule so well established as abrogated, because the supposed basis on which it rests has been disturbed by the more recent pronouncements of the Privy Council.

Since I wrote this judgment and submitted it to my Lord the Chief Justice, I have had the advantage of perusing his

judgment, and I desire to say that I respectfully agree with his observations on the case of *Kishen Singh* v. *Chajju Singh* (14).

Krishnan, J.:—In this case, the question for our decision is whether the Official Assignee is entitled to sell the whole of the joint ancestral estate of an insolvent Hindu father, including the shares of his sons, the parties being governed by the Mitakshara Law, in realising the assets of the insolvent for distribution among the creditors. It is not disputed that if the father has the right to sell the whole joint estate to pay off his antecedent debts that power can be exercised by the Official Assignee. This was so decided recently by this Court in *The Official Assignee of Madras* v. *Ramachandra Aiyar* (12). The question for our consideration then narrows itself into whether a Hindu father is entitled to alienate the joint ancestral estate of himself and his sons to pay off an antecedent debt of his. As pointed out by the learned Chief Justice, it has been taken as the settled law in this country that he could do so, provided that the debt was not an illegal or immoral one, ever since the decisions of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (15) and in *Nanomi Babuasin* v. *Modhun Mohan* (2), the latest ruling of the Privy Council on the point being in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3). Now it is contended before us that the recent decision of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (4) followed in *Chet Ram* v. *Ram Singh* (10), have altered the law on the point and has abrogated the doctrine of the Hindu father's right to alienate the joint ancestral property of himself and of his sons to pay off a proper antecedent debt of his.

To decide this question, we have to consider the cases of Sahu Ram and of Chet Ram very carefully. Taking *Sahu Ram Chandra* v. *Bhup Singh* (4) first, that was a suit brought to enforce a mortgage given about 20 years prior to suit by one Bhup Singh to one Baghirathi for Rs. 200 paid in cash. Sahu Ram, the plaintiff, obtained the rights under that mortgage, by paying off Bhagirathi's mortgage and sued Bhup Singh and his sons and grandsons and others to recover Rs. 15,000, by sale of the property mortgaged, which consisted of joint ancestral properties, belonging to Bhup Singh and his sons and grandsons. It was found by the lower Court that no legal necessity for the mortgage had been proved. Before the Privy Council, it was argued however, that even though legal necessity was not proved, as there was no proof by the sons that the debt was of an illegal or immoral character, they had no defence to the suit, as the father was entitled to mortgage the ancestral estate for an antecedent debt of his, quite apart from any legal necessity. The Privy Council had to consider then the scope of the doctrine of "antecedent debt" to see if it applied to the facts of the case and their Lordships held that a mortgage debt borrowed on the security of the ancestral property itself cannot be treated in any way, as an antecedent debt, within the meaning of that doctrine and they accordingly repelled the argument that the case was one to which the doctrine applied. They did not, however, say that the father could not sell or charge the joint ancestral estate, where the debt was not only antecedently incurred by him, but incurred wholly apart from the security of the joint property. In fact, if they were holding that the father could not sell the joint estate for an antecedent debt of his, because the son's pious duty arose only after the father's death, they would have said so in clear terms and there would have been no necessity to consider the scope of the rule of "antecedent debts." On the other hand, their Lordships have in more than one place in their judgment stated that they make an exception in favour of the father's power to sell for an antecedent debt. Their Lordships on page 444 of *Sahu Ram Chandra* v. *Bhup Singh* (4), says this :

> "athough the correct and general principle be that the debt was not for the benefit of an estate, then the manager should have no power either of mortgage or sale of that estate, in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father, in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded."

Here, they clearly recognise the existence of the rule of antecedent debts and do not in any way abrogate it as suggested. Again on page 447 their Lordships say :

> "In their Lordships' opinion, these expressions which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged, in such a manner as to bind

the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate, or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of authorities it must be, it appears to their Lordships to apply, and to apply (only) to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets, which do not personally belong to him, but are joint family property."

I have quoted these passages at length to show that their Lordships expressly exempted from the purview of their decision, the exceptional case of the father being able to alienate joint ancestral property of himself and his sons for a proper antecedent debt. How after such expressions of opinion by their Lordships themselves in their judgment the case could be treated as an authority for doing away with the doctrine of antecedent debt altogether, I entirely fail to see.

The main decision in *Sahu Ram Chandra* v. *Bhup Singh* (4), was that a mortgage on ancestral property could under no circumstances be treated as an antecedent debt, to justify an alienation of ancestral property and that beyond the power given to the father by this doctrine to deal with the son's share in the joint estate, neither the father nor his creditors could rely merely upon the general rule of the son's pious duty to pay his father's debt, to have recourse to the son's share of the joint estate, to pay the father's debt. These propositions were re-affirmed in *Chet Ram* v. *Ram Singh* (10), and any attempt like the one made by the Full Bench of this Court, in *Armugham Chetty* v. *Muthu Koundan* (16), to treat the ruling of the Privy Council as an *obiter dictum* must be abandoned. I agree with Coutts Trotter, J., that that Full Bench decision must be treated as erroneous, for though it is not expressly overruled by the Privy Council, it is clearly in conflict with their Lordships' view which has been re-affirmed in *Chet Ram* v. *Ram Singh* (10).

The passage that has given trouble, in dealing with the question before us, is the one on page 444 of *Sahu Ram Chandra* v. *Bhup Singh* (4), where their Lordships say that the pious obligation of the sons to pay off their father's debt cannot and does not arise till the death of the father. Now, it is argued that the father's power to sell the ancestral estate, including the shares of his sons, for an antecedent debt, and the creditor's right to have recourse to such estate for payment of his debt are founded upon the theory of the son's pious obligation and if that pious obligation is treated as not arising during the father's life-time, the father cannot deal with the son's shares in the joint estate, nor the creditor while the father is alive.

The doctrine of antecedent debt was no doubt evolved from the pious obligation theory; see *Nanomi Babuasin* v. *Modhun Mohan* (2), and that theory originally was that the son was under a duty to save his father's soul, from the penalties prescribed by Hindu Sastras, for a man who dies without paying off his debts. Such a duty would only arise after the father's death, as the Privy Council justly point out. But the theory was extended at a very early stage, even by the Hindu Smriti writers themselves, like Vishnu and Yagnavalkya, to cases of persons, who became Sanyasins, or suffered from incurable disease, or went away to a foreign country and so forth. These are all cases where the pious obligation was taken to arise before the death of the debtor, father. Other restrictions and changes were introduced into the doctrine, by the case law of the country till it has now become crystallised, as the doctrine of the antecedent debt. That doctrine has become a definite and independent doctrine in Hindu Law, which has been acted upon for many years and any attempt to do away with it now, by referring to its origin and arguing that its development was illogical, can hardly be supported. In the paragraph referred to in page 444 of *Sahu Ram Chandra* v. *Bhup Singh* (4), as I read it, the Privy Council was repelling the attempt to base a claim against the sons, merely on account of their pious obligation to pay off their father's debt, quite apart from any antecedent debt. Their Lordships use the word "merely" in that paragraph and again lower down use the same word when they say "accordingly the case founded merely upon pious obligation . . . . fails." I understand their Lordships to refer in that paragraph to the attempt to enlarge the scope of the son's liability, beyond the limits of the doctrine of "antecedent debt", by recourse to their pious duty, as originally understood. Those observations, in my opinion, do not touch the doctrine of antecedent debt, as

otherwise the judgment will become self-contradictory.

Chet Ram v. *Ram Singh* (10) does not advance the position any further. It was a case of a sale by a father of ancestral estate being set aside. The mortgage, which formed part of the consideration for the sale, was according to their Lordships' view already expressed in *Sahu Ram Chandra* v. *Bhup Singh* (4), not an "antecedent debt." The balance of the sale price was paid in cash; that of course was not a debt at all. The sale not being for proper legal necessity, or for antecedent debts, necessarily failed. It was argued that where the sale failed, a debt arose, at least as regards the cash paid, which the father was bound to re-pay and that that constituted an antecedent debt, for which the creditor could have recourse to the ancestral estate and were it not for the fact that their Lordships were abrogating the doctrine of antecedent debts, they would have given a decree for that amount against the ancestral estate. This is not so; there was no debt at all in existence to apply the doctrine of antecedent debt; the application of the doctrine of the sons' pious duty by itself to make the sons liable during their father's life-time, their Lordships had repudiated: see also *Jogi Das* v. *Ganga Ram* (9).

The conclusions, I have come to, agree with the conclusions of the Calcutta and Bombay High Courts: see *Madhusudan Das Mohant* v. *Iswari Dayi Debi* (11) and *Hanumat Kashinath* v. *Ganesh Annaji* (20) and are in accordance with the previous rulings of this Court, cited by the learned Chief Justice, in his judgment. Our attention was, however, drawn to a recent case in the Allahabad High Court, *Kishen Singh* v. *Chhajju Singh* (14), which is in petitioner's favour. In that case it was decided at the trial of the suit itself that the sons and grandsons, who were parties to the litigations that their estate was not liable for the suit debt. The question could then hardly be re-opened in execution. I, therefore, agree with the learned Chief Justice that the decision is right; but in so far as the views of the learned Judges are against the views I have expressed above, I regret with all respect I am unable to follow them.

I have come to the conclusion that the Official Assignee can sell the joint ancestral estate of the insolvent and his sons to pay such of the debts of the insolvent as are not shown by the sons to be illegal or immoral debts and I agree to the order proposed by the learned Chief Justice.

Reference answered.

[The view taken in this case has since been affirmed by the Privy Council in *Raja Brij Narain Rai* v. *Mangla Prasad Rai*—1924 P.C. 50.]

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* * **1924 Madras 420.**

(FULL BENCH.)

SCHWABE, C. J., COUTTS-TROTTER AND RAMESAM, JJ.

Best & Co., Ltd.—Appellant

v.

The Corporation of Madras—Respondent.

Referred Case No. 1 of 1923, decided on 19th October, 1923.

(a) *Madras City Municipal Act (IV of 1919), S. 111, Sch. 4, rules 7 and 17.*

Incorporated Company having its paid up capital in sterling is taxable.

(b) *Interpretation of statutes—Taxing statute—Ordinary rules are to be applied—Words with clear meaning must be given effect to.*

The principle of construction to be applied to taxing statutes, is that, if the words of the statute are capable of two otherwise equally opposite constructions, the construction to be adopted is that in favour of the tax-payer; but, to ascertain whether the two possible constructions are equally opposite, the ordinary rules of construction of statutes are to be applied. The maxim that clear words are necessary in order to tax the subject does not mean, as often contended that words are to be unduly restricted against the taxing authority. It simply means that in a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. A Taxing Act is not to be construed differently from any other Act. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act, by seeming considerations of hardship or business convenience or the like. Courts have to give effect to what the legislature has said.

R. N. Aingar—for Appellant.

P. Duraiswami Aiyangar—for Respondent.

ORDER OF REFERENCE TO A FULL BENCH.

Spencer, J.:—I have perused the judgment of my learned brother and I regret

that I am unable to agree with his conclusions.

I agree with the opinion of the learned Chief Judge of the Court of Small Causes that Madras Act IV of 1919 does not either expressly, or by implication, confer on the Commissioner of the Corporation power to determine the value in the currency of British India of any sum, expressed in any currency, other than that of British India and that under rule 7 he can only impose assessment under section 110, in respect of those companies, the paid-up capital of which is expressed in rupees. In this view, the first two questions of the case stated for the opinion of the High Court, under rule 17 of Sch. 4, will have to be answered in the negative and it becomes unnecessary to express an opinion on the third question.

On three points, I am constrained to differ from my learned brother. In the first place, I do not consider that it is legitimate for us to hazard a conjecture, as to what the legislature may have intended, when they framed the Act and the rules in this manner. For it probably did not occur to anybody at the time that some day a difficulty might arise, from the omission to provide means for converting capital stated in foreign currency into rupees, and as Rowlatt, J., observed in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1) :

> "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Next it has been suggested that the Commissioner in a particular case might estimate whether the capital of a foreign company would, if calculated in rupees, amount to more than twenty lakhs of rupees or less than one, and that it would always be open to the company to show that his estimate was wrong. But if the rate of exchange is not fixed and if the date when the calculation is to be made is not given, with a varying exhange, who is to say whether the Commissioner was right or wrong? In cases on the border line, a company might be liable to taxation on one day and not liable the next day.

Then lastly, my learned brother finds that section 110 is very clear; and, if I understand him rightly, he thinks that the Madras City Municipal Act as compared with the Madras District Municipalities Act gains in clearness by the omission in the City Act to define the meaning of "Company" in the definition clauses. I do not appreciate the suggestion that the omission to define a technical expression makes the matter more clear. But I agree that the important question here is to decide what is meant by the words in section 110 "every incoporated company transacting business within the city." In the absence of any definition, I do not see why we should not give the word "company" the same meaning as it has in the Indian Companies Act, section 2 (2), *viz.*, a company formed and registered, under that Act, or an existing company. Section 15 of that Act provides for the registration of companies and section 23 for the certifying of incorporation; and it is, therefore, only reasonable to suppose that by an "incorporated company" in section 110 of Madras Act IV of 1919, a company registered under section 15 of the Indian Companies Act and incorporated under section 23 is intended. Section 253 declares what companies are authorized to be registered. Section 277 deals with the requirements of the Act, as to companies established outside British India, which proceed to establish a place of business within British India. As under section 22, only the Registrar of a province, in which the registered office of the company is situated can register a company and as the schedules to the Act apply only to companies whose capital is in rupees, I conceive that a Registrar would find considerable difficulty, if not inability, in dealing with the application for registration of a company whose registered office was not in India and whose capital was not stated in rupees.

By section 20 of the Indian Stamp Act, the legislature provided that *ad valorem* duty, expressed in a foreign currency, should be calculated, according to the current rate of exchange on the day of the date of the instrument. But the Indian Companies Act and the Madras City Municipal Act contain no provision for converting foreign currencies into rupees. If the machinery for conversion of currency is lacking, it becomes impossible to say what the provisions of the Act, including the schedules—for the rules must always be read in conjunction with the body of an Act

(1) [1921] 1 K.B. 64.

—see *Mani Mohan Mandal* v. *Ramtaran Mandal* (2), mean, when they speak of rupees, in relation to companies whose capital is not expressed in rupees.

I am, therefore of opinion that the Indian Companies Act and the Madras City Municipal Act cannot be applied to companies, which have not a place of business, situate in British India, as they cannot get themselves registered in British India, until they open a place of business in this country; and so they cannot become "incorporated companies" within the meaning of section 110 of Act IV of 1919.

Mr. Aingar conceded that as "persons" include "companies" under section 3, clause (39) of the General Clauses Act, such companies are liable to pay taxes, under section 111. Therefore the result of my conclusion will not be that they will escape making any contribution whatever to the revenues of the Corporation, and the equity of the claim made by the assessed company has thus no bearing on the decision of the question, that has been raised and referred to us.

Devadoss, J. :—The Chief Judge of the Small Causes Court, Madras, has submitted the following questions of law for the opinion of the High Court :—

1. *Whether or not incorporated companies, which transact business in the City of Madras and whose paid-up capital is in a currency, other than that of British India, are liable to be assessed to the tax on companies, under S.* 110 *and rule* 7 *of the taxation rules in Sch.* IV *of the Madras City Municipal Act,* 1919 ?

2. *Does the proviso to rule* 7 *apply to all companies transacting business within the city, irrespective of their capital being in British Indian currency or any other currency* ?

3. *What is the meaning of expressions "gross income," and "gross income received in or from the city", in the proviso to rule* 7 ? *Does the latter expression include income arising out of business, transacted outside Madras, the proceeds whereof are transmitted to and received by the agents of the incorporated company in Madras, where they have their head office?*

This reference arises out of an appeal presented by Messrs. Best and Co., Agents of the Noble's Explosives Company, Limited, against the levy of companies' tax, by the Commissioner of the Madras Corporation on the grounds :

(1) that the paid up capital of the Nobel's Explosives Company, Limited, being in sterling and not in rupees, the scale of assessment under rule 7 of Sch. IV of the Act, does not apply and the company is not therefore liable to the tax on companies under the aforesaid rule (2), that if contrary to the above contention it is held that the company can be assessed under rule 7, this assessment can be made under the proviso to that rule and the proper assessment to be imposed for the half-year in question is Rs. 25 only, as the gross annual income of the company did not exceed Rs. 5,000.

The learned Chief Judge held that the Noble's Explosives Company, Limited, was not liable to be assessed, under section 110 and rule 7 of Sch. 4, and allowed the appeal. He is :

"of opinion that the power to determine the value in currency of British India of any sum expressed in any currency other than that of British India, has not either expressly or by implication been conferred on the Commissioner and that under rule 7, the Commissioner can impose assessment, in respect of those companies only, the paid-up capital of which is expressed in rupees."

The first question submitted for the opinion of the High Court has been argued at considerable length. The contention of Messrs. Best & Co., Agents of the Nobel's Explosives Company, Limited, is that only companies whose share capital is expressed in terms of Indian currency are liable to assessment, under rule 7 of Sch. 4 of the Madras City Municipal Act and the Nobel's Explosives Company, Limited, being an English Company, whose share capital is expressed in terms of British currency, cannot be brought within the operation of rule 7 of Sch. 4. The Nobel's Explosives Company, Limited, has a paid-up capital of £2,793,412. It was incorporated in England and it carries on a world-wide business. The question is whether an English Company, such as the Nobel's Explosives Company, Limited, is not liable to be assessed, under the Madras City Municipal Act, section 110, by reason of its share capital being expressed in terms of English currency and not in terms of the currency in India. Section 110 is under the heading "Tax on Companies" and is in the following terms :—

"Every incorporated company, transacting business within the city for profit, or as a benefit society, shall pay, by way of license fee, in addition to any other license fee that may be leviable under this Act, a half-yearly tax on its paid-up capital, on the scale shown in the taxation rules in Sch. 4; but in no case exceeding one thousand rupees, if and as soon as it has transacted business in the city, for the period prescribed in S. 113.

Explanation.—Whenever a company has an office, agent or firm to represent it for purpose of transacting business in the city, such company shall be deemed to transact business in the city, and such office, agent, or firm shall be liable for

(2) (1916) 43 Cal. 148.

the tax, in respect of the company's business, whether or not such office, agent, or firm has power to make binding contracts, on behalf of the company."

Rule 7 of Sch. 4 is headed :

" Part 2.—Assessment of Companies—S. 110 "

and is in the following terms : —

" Companies shall be assessed by the Commissioner, on the following scale."

It has two sub-headings : " paid-up capital " and " half-yearly tax : " then another heading ;

Lakhs of rupees and a scale.

		Rs.
A.	More than twenty.. ...	1,000
B.	More than ten, less than twenty	500
C.	More than five, less than ten ...	250
D.	More than three, less than five,	150,
		etc., etc.,
G.	Less than one ...	30

There is also a proviso to the effect : " Provided that any company, the head office, or a branch, or principal office of which is not in the city and which shows that its gross income received in or from the city has not in the year immediately preceding the year of taxation exceeded,

(*a*) Rs. 25,000—shall pay only Rs. 125.
(*b*) Rs. 15,000—shall pay only Rs. 75.
(*c*) Rs. 5,000—shall pay only Rs. 25.

It has been conceded, and I think very rightly, by Mr. R. N. Aingar, who appeared for Messrs. Best and Co., that if section 110 stood alone, Nobel's Explosives Company, Limited, would be liable to pay the tax on companies ; but he contended that inasmuch as rule 7 had referred only to paid-up capital in lakhs of rupees, the scope of section 110 had been narrowed by rule 7. He further contended that there was no provision in the Act, for converting capital expressed in terms of foreign currency, into the British Indian currency, such as that contained in section 20 of the Stamp Act, and it must therefore be taken that the legislature intended that only companies, whose capital was expressed in rupees should be assessed. He further contended that it would be very inconvenient to assess companies under rule 7, when the exchange is fluctuating, as it is now, and a German, Company with a capital of two million marks, may, at the present rate of exchange, not have a capital of more than a few rupees.

The real question is whether a company not registered in British India and whose capital is not expressed in terms of Indian currency is outside the scope of section 110. Section 110 is very clear in its terms. It make every incorporated company transacting business within the city for profit, or as a benefit society liable to pay, by way of license fee, a half yearly tax on its paid-up capital, on the scale shown in Schedule. The scope of section 110 being wide and the provisions being so clear, can it be said that the scope of that section has been narrowed by rule 7 ? Rule 7 does not contain any expression to the effect that the paid-up capital should be in rupees. All that it says is that if the paid-up capital is more than twenty lakhs, a certain amount of tax is payable and if it is more than ten and less than twenty, a certain other amount is payable and it gives a scale. Can it be said that Nobel's Explosives Company, Limited, has not got a capital of twenty lakhs of rupees ? The Commissioner has authority to assess the tax and in his opinion, if a company has a capital of more then twenty lakhs, that company is liable to pay a certain amount half-yearly. Any foreign company, whose capital in foreign currency is known, can be easily said to possess a capital of more than twenty lakhs or less than twenty lakhs, or any other sum. Looking at the history of this legislation, it cannot be reasonably contended that the legislature intended, only to assess companies registered in India. In the Madras City Municipal Act, 1884, provision was made for levying professional tax in section 103 in these terms :

" If the Commissioners determine to levy a tax on arts, professions, trades and callings (not being a military profession or calling), and on offices or appointments, every person, who within the city exercises any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments, specified in Sch. A, shall pay, in respect thereof, the sum specified in the said schedule, as payable by persons of the class, in which such person is placed."

The relevant portion of Sch. A is as follows :—

" Joint stock companies and other companies carrying on any trade or business having gain for its object, or as benefit societies, and the capital of which exceeds twenty lakhs of rupees . . . 500 rupees."

In the Madras City Municipal Act of 1904, section 115, was enacted for the levy of taxes and tolls. Section 120 of that Act is in the following terms :—

" If the Corporation determine to levy the tax specified under Cl. A of S. 115, every person, who within the city exercises any profession, art, trade or calling or holds any office or appointment,

bringing him within one or more of the classes of persons specified in Sch. 5, shall pay the sum specified in the said schedule, as payable by persons of the class, in which such person is placed".

In Sch. 5 (A), the wording of the Act of 1884 is reproduced. In the present Act, the same wording is used, with a slight modification. Instead of repeating under the headings of A. B. C. etc., the provisions as to companies, an abbreviated form is introduced with a heading "lakhs of rupees" and the abbreviated forms, more than twenty, more than ten and less than twenty, more than five and less than ten, etc. It is clear from this that the legislature did not intend to alter the law as it stood, both under the Act of 1884 and under the Act of 1904. It is to be remembered in this connection that the tax on companies, levied by the Corporation, seems to have been paid without demur, and it is only now that objection is raised against the assessment under section 110, rule 7 of the present Act. Though the conduct of assessees does not estop them from, or stand in the way of, raising a legal objection, yet it shows how both the corporation and the companies understood the provisions of the Acts of 1884 and 1904. It is true that if the amount of tax be small, the companies may not take the trouble of objecting to the assessment. But where the half-yearly tax is such a large sum, as rupees one thousand, the companies naturally try to escape taxation, if they could.

Under the District Municipalities Act, companies, not registered in British India or in the British Dominions, are not liable to pay the companies' tax. The provisions of that Act are different from those of the Madras City Municipal Act. In the District Municipalities Act of 1884, tax on arts, professions, trades and callings was levied, by reason of the provisions, contained in section 53, Sch. A, clause I, begins thus:—

"Every person holding any office or appointment, public or private, or employed in any capacity, whose pay, salary or pension amounts to Rs. 2,000 a month or upwards, and every person falling under any of the following denominations, whose income is estimated to amount to Rs. 2,000 a month or upwards, carrying on business as a company, etc., etc."

The word "Company" is defined in the Act as meaning:

"a company registered under the Indian Companies' Act, 1882, or under the Acts of Parliament, known under the collective title of the Companies' Acts, incorporated by an Act of Parliament, or of the Governor-General in Council, or by Royal Charter or Letters Patent."

This Act was amended by Act III of 1897. The Amendment Act made no change in the law, as regards professional tax. The Madras District Municipalities Act of 1920 was passed to consolidate and amend the law, relating to District Municipalities. Section 92 of the Act is in these terms:

"If the Chairman publishes a notification, under S. 80 that a companies' tax shall be levied, every company transacting business within the municipality for profit or as a benefit society shall after the date specified in the said notification pay a half-yearly tax on its paid-up capital on the scale shown in Sch. 4, if and as soon as it has transacted business in the municipality for the period laid down in S. 95."

Schedule 4, rule 16 has the heading of "Assessment of companies." Companies shall be assessed by the Chairman on the following scale:—

Paid-up capital.	Half-yearly tax.
	Rs.
A, more than ten lakhs of rupees	... 250

and the wording is almost similar to the wording in the Madras City Municipality Act of 1919. In section 92 of the Act, the expression is "every company transacting the business" and the word company is defined as meaning:

'a company registered under the Indian Companies Act, 1913, or under the Acts of Parliament known under the collective title of the Companies Acts or incorporated by an Act or of Parliament, of the Governor-General in Council, or by a Royal Charter, or Letters Patent."

It is quite clear, therefore, that companies which do not come within the definition of the wording as given in the Act or not liable to pay tax on companies. It has been held by Kumaraswami Sastri, J., in C.S. Nos. 796 and 1055 of 1921, that companies like the Singer Sewing Machine Company and the Standard Oil Company of New York are not liable to assessment, under section 92 of the District Municipalities Act, in respect of business carried on within the limits of a municipality. In the Madras City Municipal Act, there is no definition of company and as section 110 speaks only of an Incorporated Company transacting business within the city I think that the intention of the Legislature is quite clear and that is to bring within the operation of section 110 all Incorporated Companies, transacting business within the city, whether they be incorporated in

British India, or in the British Isles, or anywhere else. The conditions necessary are: they should be incorporated and they should transact business within the city for profit or as a benefit society and should carry on business, as required by section 113, in order to make them liable to the tax on companies. When section 110 is so clear in its terms, can it be said that its scope has been narrowed by implication only, by reason of the expression "lakhs of rupees" being used as regards the paid-up capital in rule 7? The Commissioner is empowered to tax companies and he has to determine what the capital of a company is. I do not think that there is any insuperable difficulty, in the Commissioner arriving at a satisfactory decision, as regards the amount of the capital of a company in rupees, when the capital is expressed not in terms of Indian currency but of English, or foreign currency. Considering the wide margin that is given in the rule, it is not right to hold that companies, which have not got a capital expressed in Indian currency, are outside the scope of rule 7. Suppose a company is formed and registered in Travancore and its capital is expressed in the currency of the State, *viz.*, Chakrams, or a company is formed and registered in the Native State of Hyderabad and its capital is expressed in terms of Sicca rupees, could not the Commissioner easily ascertain whether such a company carrying on business in the city of Madras has or has not a capital of more than twenty lakhs, or less than ten lakhs of rupees, or any other sum? It is urged that the Madras City Municipal Act is a taxing statute and should be construed strictly. It is a well-established principle of construction that all penal statutes, statutes which impose a penalty, and taxing statutes should be construed strictly; that is, where it is not quite clear that a subject is liable to a tax or penalty, he should not be made liable by any extended or loose construction of the statute. But this principle does not stand in the way of considering whether a taxing statute embraces within its operation certain classes of persons. Mr. Aingar referred to the observations of Rowlatt, J., in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1).

"It is urged by Sir William Finlay that in a Taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Applying the observations of the learned Judge to the present case, can it be said that an incorporated company, carrying on business within the city of Madras, does not come within the operation of section 110 and rule 7? What is there in the rule to indicate either expressly or impliedly that the expression "Incorporated Company" should be held to mean incorporated only in British India? The words of the statute are clear and when there is nothing in it to imply an intendment to exclude any person or class, coming within the clear language of the section, it would be doing violence to that language, by importing something, not warranted by anything in it, or in any other portion of the enactment. The mere fact that the liability of the companies' tax is on its having a capital of certain number of lakhs is no justification for holding that the company should have its capital expressed in terms of Indian currency.

In *Corporation of Calcutta* v. *Standard Marine Insurance Company* (3), an argument was put forward that a company not registered in British India was not liable to be assessed. The learned Advocate-General of the day, Sir Charles Paul, urged this argument:—

"In the second schedule, the words used are: 'the paid-up capital of which amounts to 10 lakhs of rupees or upwards.' The word 'amounts' has been advisedly used. It means 'is equivalent to.' Companies with capital in foreign coin are intended to be included."

But the point was not decided and it is urged that the Bengal Act was subsequently amended by the introduction of the words 'equivalent to.' In my view, it is unnecessary to use the words 'equivalent to,' for all that the rule says is that if the capital is more than twenty lakhs a certain amount is payable, and if less than twenty lakhs of rupees, some other amount is

(3) (1895) 22 Cal. 581.

payable. The case of *Charles James Partington* v. *The Attorney-General* (4) was relied upon by Mr. Aingar in support of his contention. The observations of Lord Cairns as to the interpretation of fiscal statutes is entitled to the greatest weight:

"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient: because, as I understand the principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

A careful perusal of the judgment of the case shows that the House of Lords upheld the contention of the Crown that if two administrations are taken out, stamp duty is payable in respect of both. The facts of the case are: One Mary Shard died intestate in England in 1819. No one appeared to administer her estate and Mr. Maule, the then Solicitor to the Treasury, took out letters of administration for that purpose. The next of kin to the deceased was Mrs. Isabel Cook, the wife of Mr. Ellis Cook, both of whom had always been domiciled in the United States. Mrs. Isabel Cook died in 1825. She had not taken out letters of administration to Mrs. Shard. Her husband died in 1830. After his death, his children applied to Mr. Partington, to take proceedings against the Solicitor to the Treasury, to recover from him the property which had belonged to Mr. Shard and which they claimed under their mother. Mr. Partington took out separate letters of administration to the estate, . . . first of Ellis Cook and then of Isabel Cook. Each grant was dated on the 22nd July, 1855, and the form of each was as follows:—

"We do grant full power and authority to you to administer and faithfully dispose of the said goods, etc., which belong to his estate."

In the grant relating to the mother's estate, the concluding words were:

"For the use, etc., of James Cook now residing in Vermont in North America, one of the natural and lawful children of the said Isabel Cook deceased, etc., etc."

(4) 4 Eng. and Irish, App. Cases, 100.

Mr. Partington then instituted a suit in the Chancery, against Mr. Reynolds (who had in the meantime succeeded Mr. Maule as Solicitor to the Treasury) and the Court having found James Cook to be the next of kin declared Mr. Reynolds to be chargeable with the principal sums of the assets. The Commissioners of Inland Revenue claimed that stamp duty should be calculated on a value including all accretions from the death of Isabel Cook to the date of the administration, namely, the 23rd July, 1855, and also claimed that the grant of the letters of administration, for the effects of the late Ellis Cook, who survived his wife, should be stamped at the same rate. The Court of Exchequer Chamber held that duty way payable in respect of both the estates. The House of Lords affirmed the judgment of the Court of Exchequer Chamber; when two administrations are granted, stamp duty is payable on both. Whether the devolution of the estate of one deceased person has been reduced to possession or not, when administration is sought for the estate of a person, on whom some other estate has devolved, stamp duty is payable on the values of the estate of the person, who died intestate, as well as for the administration of the estate of the person, on whom the previous estate devolved, though he had not taken out letters of administration. Their Lordships construed the provisions of the statute strictly and upon the strict construction, both the estates were liable to pay stamp duty. Lord Chelmsford agreed with the Lord Chancellor, in the order proposed and observed:

"With respect to the liability to the full duty, upon both the administrations taken out by the appellant, it was admitted by his learned counsel that if the question had arisen with respect to subjects of this country, no doubt would have existed as to the double duty being payable. But it was contended, that as Isabel Cook and her husband Ellis Cook were domiciled Americans, it was not necessary to take out administration to Ellis Cook, in order to obtain administration to Isabel Cook: that the husband was not an interested party; that the wife's administrator might give a sufficient receipt and discharge; and that the whole of the duty of the adminstrator was to remit the money received by him, under the administration, to America, to be distributed there to the person entitled. I must confess my inability to follow this reasoning, or to understand how the question of domicile can enter into the consideration of the grant of letters of administration in this country."

Mani Mohan Mandal v. *Ramtaran Mandal* (2), was relied upon, as authority

for the contention, that rule 7 controlled the scope of section 110. In that case, the question was whether a Court had the power of remand, not expressly given to it, under Order 41, rule 23 of the Civil Procedure Code. Section 107 begins thus:

'Subject to such conditions and limitations, as may be prescribed, an appellate Court shall have power (*a*) to determine a case finally, and (*b*) to remand a case, etc.'

'As prescribed' means as prescribed by the rules to be framed hereunder, Under Order 41, rule 23, the power to remand a case is limited. Sir Lawrence Jenkins makes the following observations at page 152:—

"The body of the Code is fundamental and is unalterable, except by the legislature; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction, while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms; but it has to be read in conjunction with the more particular provisions of the rules."

Section 110 of the Madras City Municipal Act is not subject to the rules prescribed under that rule, or any other provisions of the Act. It simply says that the tax shall be on the scale shown in the taxation rule in Sch. 4. The liability to pay tax is imposed by section 110; the amount of the tax is to be determined according to the scale given in the schedule. So, the rules in Sch. 4 cannot take away the liability to pay the tax and a reasonable construction, should be placed both upon section 110 and upon rule 7, in order to avoid a construction, which is repugnant to the object of the section and the rule.

As a good deal of argument has been addressed to us, upon the construction of taxing statutes, I shall deal briefly with a few cases, which bear on the point. In Maxwell's Interpretation of Statutes, there is this passage at page 410:

"When one section enacted that if the plaintiff recovered a sum 'not exceeding' £5, he should have no costs, and another, that if he recovered 'less than' £5 and the Judge certified, he should have his costs: the literal meaning of the last clause leaving it inoperative where the sum recovered was exactly £5, it was held, to avoid imputing so incongruous and improbable an intention to the legislature, that the words 'less than' should be read as equivalent to 'not exceeding', the general principle being that Acts of of Parliament should be construed with a candid mind and with an intention to understand them—*Garby* v. *Harris*" (5).

(5) (1852) 21 L.J. Ex. 160.

At page 420 there is this following passage:—

"So, XXXV, Geo. III, *c*. 101, S. 2, which empowered Justices to suspend, in case of sickness, the order of removal of any pauper, who should be 'brought before them for the purpose of being removed,' was construed as authorizing such suspension, without the actual bringing up of the pauper before the justices, as the literal construction would have defeated the humane object of the enactment."

In these cases, the Court departed from the strict language of the enactment, in order to give full effect to the intention of the legislature, as expressed in the section and in order to avoid an absurd construction, or to prevent anything which is against humane practice.

I have referred to these cases, only for the purpose of showing that the Court is not debarred from giving a reasonable contruction to a statute. I am not overlooking the principle that taxing statutes should not receive an equitable construction. In Halsbury's Laws of England, Vol 27, page 148, the Law is summed up thus:

"It is the duty of Judges to give fair and full effect to statutes, without regard to the particular consequence in the special case and not to indulge in conjecture, as to what Parliament would have done, if a particular case had been presented to its notice, for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence".

It has been urged that there is no provision in the Act, for converting the foreign currency into Indian currency, as is contained in the Stamp Act, as the legislature did not intend to tax companies whose capital is not in rupees. By section 20 of the Stamp Act, an arbitrary date is fixed for conversion of foreign currrency into Indian currency. The Stamp Act imposes an *ad valorem* duty, on certain classes on documents, and it is necessary to calculate the duty as exactly as could be done, and for that purpose, the legislature has fixed a certain date for such calculation. Under the Madras City Municipal Act, section 113, the tax becomes payable, if the company carries on business for 60 days, and on the expiry of the 60th day, the tax could be demanded, and the Commissioner could after that date assess the company under section 110, rule 7. It is not likely that there could be any great fluctuations in the course of a month or two, and the extraordinary conditions, prevailing in Germany and in Austria now, should not be taken to be ordinary conditions prevailing in the

exchange market. Owing to extraordinary circumstances, the mark has depreciated very much and similarly the Austrian and Russian currency. But till two years ago, there were not such abnormal conditions prevailing and there would be no hardship, if there is a slight fluctuation, in the value of the foreign currency, in relation to the Indian currency, between the date on which the company becomes liable to pay the tax and the date on which it is assessed. In *Hyde* v. *Johnson* (6) the facts were :

" Plaintiff, in order to recover a debt, barred by the statute of limitation, offered in evidence at the trial, before the Under-sheriff a letter written by the defendant's wife, in her husband's name, at his request, offering to pay the duty by instalments and sent by him to the plaintiff. The evidence was objected to, as not signed by the party 'chargeable thereby ' within the meaning of 9 Geo. IV, C. 14, S. 1."

Tindal, C.J., upheld the contention and observed as follows :

" The question turns entirely on the construction of the statute and it amounts in other words to this : does the Statute 9 Geo. IV, C. 14, extend to a writing signed by an agent of the party, or is it confined in terms to a writing " signed by the party chargeable thereby ?" Looking at the words of the statute, it is confined in terms to a writing " signed by the party chargeable thereby." * * * * Some inconveniences have been pressed in the course of the argument upon our attention in cases, where a total inability of parties to sign may exist ; but the nature of the signature which is necessary to comply with the requisites of the statute is such as to make it almost impossible to suppose a case in which a party could not make such a signature, as would satisfy the statute. And after all, in construing a statute, we must not look to cases of very rare and singular occurrence but to those of every day experience, and whatever may be the consequence, we must interpret the statute, according to the plain import of the language employed in it."

In *Re Hall and others* (7), Cave, J., observes with regard to section 19 of the Patents, Designs and Trade Marks Act of 1883 :

" I am unable to see in what way our interpretation of the language of the section can work injustice. A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out, before the Court will construe a section, in a way contrary to the natural meaning of the language used ; and it will be no injustice, if the result of our decision be to deprive the person who infringes a patent of the right to set up a defence which does not go to the merits."

Earl Cairns gives the reason for a strict construction of Taxing Acts in the following terms in *Pryce* v. *Monmouthshire Canal and Railway Companies* (8) :

" My Lords, the cases which have decided that Taxing Acts are to be construed with strictness and that no payment is to be exacted from the subject, which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever may be the consequence."

It is contended by Mr. Duraiswami Aiyangar, on behalf of the Corporation, that for the privilege of trading within the city, the tax is payable. It is unnecessary to consider whether the amenities of the city are a sufficient *quid pro quo* for the tax payable by the company. In this connection, it may be instructive to see how American Courts construe legislation of this kind.

" In America, Revenue Laws are not regarded as penal laws, in the sense that it requires them to be construed with strictness, in favour of the defendant. They are regarded rather in their remedial character, as intended to prevent fraud, suppress public wrong and promote public good and so construed as to most effectually accomplish those objects:" See, Maxwell's Interpretation of Statutes, 6th Edn., page 509.

Without subscribing to the doctrine embodied in the above passage, I think a reasonable construction should always be adopted, without straining the language either in favour of one party or the other.

An argument has been advanced by Mr. Aingar that the Registrar of Joint Stock Companies would refuse to register the memorandum of a Company, in which the capital is expressed in terms not of British Indian currency, but of some other currency, on the ground that there is no machinery, by which he could convert the foreign currency into Indian currency and that the forms appended to the Act contain words and expressions which are applicable only to the Indian currency. Whether the Registrar would refuse to register a Company, whose share capital is expressed in a foreign currency or not, is a question which need not be considered here.

In the year 1884, there could not have been many companies registered under the

(6) 2 Bing. N.C. 776.
(7) (1921) 2 Q.B.D. 137.
(8) (1878-1879) 4 A.C. 197.

Indian Companies Act, trading within the city of Madras and the Legislature could not be said to have overlooked the fact that there were a number of English and American Companies, trading within the City of Madras, and that it intended that the scope of the enactment in 1884 should be limited to the Indian Companies only. Considering the long time that has elapsed since the Act of 1884 was passed, and considering the fact that no attempt was ever made, so far as it was brought to our notice, to dispute the liability of the Company to pay companies' tax, is it reasonable to suppose that the intention of the Legislature was not to tax all incorporated companies? The inconvenience that may be felt in one or two cases in converting foreign currency into Indian currency for the purpose of assesement need not stand in the way of a reasonable construction of the Statute. There may be companies incorporated, according to the law of Brazil or Japan, or any other country, but if it is an incorporated company, it is liable to pay the tax, if it comes within one of the clauses mentioned in rule 7. It is always open to the company to show that the estimate of the Commissioner is wrong, and there is an appeal provided to the Standing Committee, against the decision of the Commissioner. I think the Legislature used the expression "incorporated company" in section 110 of the Act, advisedly while it used the word "company" in the corresponding provision of the District Municipalities Act, 1920. In the City of Madras Municipal Act, 1884, and in the Madras City Municipal Act, 1904, the expression used is "Joint Stock Companies and other Companies." In the District Municipalities Acts of 1884, of 1897, and of 1920 the Legislature used the word "Company" in the Act and gave a definition to it. To uphold the contention of Messrs. Best & Co. would be to impute to the Legislature an intention to tax companies incorporated in England, if they carry on business within the limits of any Municipality in the mofussil and not to tax them, if they carry on business in the city. Surely such an intention cannot be imputed to the Legislature, when it is remembered that more British and foregin companies carry on business in the city, than in any Municipality in the mofussil.

After an anxious consideration of the question, I am of opinion that an Incorporated Company, in order to be liable to taxation under section 110 aud rule 7 of the Madras City Municipal Act, need not have its capital expressed in terms of the Indian currency and that all Incorporated Companies are liable to assessment under section 110 and rule 7. In the view I hold, it is unnecessary to express an opinion, as regards points 2 and 3.

By the Court.—As we have come to different conclusions and the matter falls within rule 2, clause (3) (*a*) of the Appellate Side Rules, we refer the first of the questions referred to us to a Full Bench for decision.

This case coming on for hearing on Wednesday, the 17th October and this day, upon perusing the letter of Reference and the material papers in the case, and the Order of Reference to the Full Bench, and upon hearing the argument of Mr. Nugent Grant and Mr. R. N. Aingar, counsel instructed by Messrs. King and Partridge, Solicitors for the appellant and of Mr. P. Duraiswami Ayyangar, vakil for the respondent, the Court expressed the following :—

OPINION OF THE FULL BENCH.

Schwabe, C.J. :—The question for decision is whether an English company, with sterling capital, is liable to assessment under the heading "Tax on Companies," under the Madras City Municipal Act IV of 1919. This depends on the proper interpretation of section 110 and of rule (7) of Sch. 4, which must be read together. That section runs :

"Every incorporated company transacting business within the City for profit . . . shall pay by way of license fee . . . a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in Sch. 4 but in no case exceeding rupees one thousand, if and so soon as it has transacted business in the city for the period prescribed in section 113."

Turning to rule (7) of Sch. 4 it runs :

"Companies shall be assessed by the Commissioner on the following scale :—

Paid up capital—lakhs of rupees	Half-yearly tax. Rs.
A. More than twenty ...	1,000
B. More than ten, less than twenty	500

etcetera.

That has been slightly amended by the Madras Act VII of 1922, which substituted "twenty and more than twenty" and "ten

and more than ten" for the words under (A) and (B), the object being to bring in to tax companies, whose capital was exactly twenty or ten lakhs which might have been excluded by the use of the words "more than" and "less than."

The principle of construction to be applied to taxing statutes is that, if the words of the statute are capable of two otherwise equally opposite constructions, the construction to be adopted is that in favour of the tax-payer : but, to ascertain whether the two possible constructions are equally opposite, the ordinary rules of construction of statutes are to be applied. As pointed out by Rowlatt, J., in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1) the maxim that clear words are necessary in order to tax the subject does not mean, as often contended,

"that words are to be unduly restricted against the taxing authority. It simply means that in a Taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

That was enunciating no new principle, and I think the matter was clearly stated by Lord Russel, C.J., in *Attorney-General* v. *Carlton Bank* (9), when he said :

"I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a Taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the legislature as that intention is to be gathered from the language employed, having regard to the context, in connection with which it is employed The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act, by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the legislature has said."

Now, in this case, we have to see what was the intention of the legislature, to be deduced from the words used and the surrounding circumstances. The Act purports to impose a tax on every Incorporated Company (which words, it is admitted includes, English Companies) carrying on business within the city, and in terms imposes on its paid-up capital, a tax on the scale shown in the rules in the schedule. So far, the language clearly indicates an intention to tax all Incorporated Companies. Turning to the rule in the schedule, we find that the company has to pay license fee at a varying rate in rupees, according as its capital is more or less in lakhs of rupees, or, in cases where the capital is an exact amount reckoned in lakhs, then, by the amended Act, on that amount. It is contended that that limits the application of the tax to companies whose capital is in shares of a rupee denomination. I do not think that that is the plain meaning of the words of the statute, or the proper interpretation to be put upon those words, even though they are capable of bearing that construction. I think it is merely stating the scale, in the terms of the currency of this country and I see no difficulty at all in answering the question how many lakhs of rupees is the capital of an English Campany with a capital, say, of a million pounds sterling. Given the rate of exchange, it merely provides a simple sum in arithmetic. I entirely fail to see how, in stating the scale by reference to the capital in the currency of the taxing country, it can be properly construed to exclude all companies, whose nominal capital is usually expressed in the currency of some other country. I am not sure that there would be anything illegal or impossible in an Indian Company registering itself under the Act, with its capital in pounds or francs, and if it could do so, it would, under the construction contended for, escape the tax. If it had been intended by the legislature to tax only Indian Companies with a rupee denomination of capital, the natural place for such limitation would have been in the section itself and the words would have been "Every Incorporated Company with a capital in rupees, etc.," or at the very least, if such exclusion was intended, one would expect to find it, when it is not in the section, then in the schedule by a definite explanation or proviso, that companies with capital denominated in foreign currency should not be liable to the tax. Nor is it in my view, an irrelevant consideration, that the construction contended for, would involve the intention of the legislature having been to give a preference in trade to foreign over local companies ; if it has done so by clear words, that consideration might be irrelevant : but in my view, so far from being clear in that direction, the words

(9) (1899) 2 Q.B. 158.

used are capable of, and indeed properly bear, the opposite construction.

The answer to the question referred to us must be in the affirmative and the Company is liable to be assessed to the tax.

Coutts Trotter, J.:—I do not think anybody could have any doubt as to what was the intention of the section and the rule which we are asked to construe. To my mind, to hold that the legislative body which passed this Act could have intended to discriminate against indigenous companies in favour of foreign companies, because that would be the inevitable result of the construction contended for, is one that is incapable of argument. Mr. Grant has, I think, very wisely put his case upon the ground, that the draftsman of the Act, owing to his carelessness, had in fact defeated the intention of the framers of the Act. How great that carelessness was, it is almost impossible to imagine. There was a case in *Corporation of Calcutta* v. *Standard Marine Insurance Company* (3), which was under the Calcutta Municipality Act of 1888, in which exactly the same point was argued, though not decided, as has been raised before us. That was in 1895, and in 1899 a new Act was passed for the Calcutta Municipality and in that Act *ex majori cautela* words were inserted to prevent the opportunity for an argument, such as we have heard to-day. That the draftsman of the Madras Act should not have taken the trouble to cast a glance over the Acts of other big Municipalities, before he set his hand to his task, is to my mind almost incredible; but so it appears to be and we are therefore left with a problem, which ought never to have arisen, had the Act been drafted with reasonable care. I do not accede to Mr. Grant's argument; because I think that the utmost that you find is the absence, so to speak, of a table for the commutation of foreign coinage into the coinage of the country; and it seems to me that that failure is not enough to defeat the plain intention of the governing section 110; because, it appears to me that the Act might well contemplate that any taxing authority in any country can always by a not very difficult feat turn the coinage of one country into the terms of the coinage of the country, where the Act is passed and where the tax is received. It appears to me therefore that, just as I should be prepared to hold in England that where an Act expresses the capital in pounds, a French company with capital in francs could be assessed; so here in India, where the rupee is the standard basis, the taxing authorities are not prevented, in the absence of an express provision to the contrary, from performing the feat of converting the coinage into different terms. I may add that, having regard to the rates of exchange, as they have been in later years, it is almost inconceivable to imagine an Act, fixing anything in the nature of a table, except by reference to some date on which the rate of exchange is to be fixed. It appears to me that it is quite clear that the Act supplies that omission, by giving a definite date, the date on which the tax falls due. For the purpose of rule 7 of Sch. 4, I take it that the rate of exchange at the date when the tax falls due must be taken into consideration. I may add that I entirely sympathise with the grievance of the company, with regard to the method of imposing the tax, for a more unjust method of taxing than to tax a company upon the whole of its subscribed capital in every place where it carries on trade is, to my mind, difficult to imagine. It is really a very great hardship but one that can only be set right by the legislature. I may add that, though there is a mitigation of the hardship in part, by the maxima fixed by rule (7), nevertheless those maxima do not apply to a very large class of cases as Mr. Grant has pointed out.

I agree with the answer proposed by my Lord.

Ramesam, J.:—I agree with the judgments just pronounced and the answer to the question referred to us must be in the affirmative.

Reference answered.

*** * 1924 Madras 431.**

(FULL BENCH.)

SCHWABE, C J., RAMESAM AND WALLER, JJ.

Rajagopala Aiyar—Appellant

v.

Ramanujachariyar and another — Respondents.

S. A. No. 45 of 1922, decided on 6th November, 1923, from the order of District Court of East Tanjore at Negapatam, dated 23rd January, 1922.

(a) *Civ. Pro. Code, O. 21, r. 22—Sale is void and not merely voidable where without applying Cl. 2 notice is not issued.*

Where on an application falling under O. 21, r. 22 and to which Cl.(2) of that rule is not applied, a sale in execution is held without issuing the notice provided for in Cl. (1), the sale is absolutely void and not merely voidable as against the person to whom notice should have been but was not issued.

(b) *Limitation Act, Arts. 166 and 181—Art. 181 and not Art. 166 applies where sale being void, relief is claimed under S. 47 Civ. Pro. Code.*

Where an execution sale is void as against a party and he applies for relief under S. 47, Civ. Pro. Code or otherwise, the article applicable is Art. 181 and not Art. 166.

(c) *Civ. Pro Code, O. 21, r. 90--Second appeal lies though application is only partly covered by r. 90.*

Where an application is made which is partly covered by r. 90 and partly not so covered, a second appeal will lie although the order purports to have been made under r. 92. Failure to give notice of the application for leave to attach and sell is not an irregularity in publishing or conducting the sale. (11 L.W. 59, *Foll.*).

V. Ramaswami Aiyar—for Appellant.

T. Narasimha Aiyangar and *N. S. Rangaswami Aiyangar*—for Respondents.

Schwabe, C. J.:—A preliminary point is taken that no second appeal lies, because it is said that this is an appeal on a petition based on there being a material irregularity in publishing or conducting the sale, within the meaning of Order 21, rule 90, that the order made under rule 92, setting aside the sale, was an order made by reason of that material irregularity or fraud, and that as no second appeal lies from orders made under rule 92, there can be no second appeal here. The answer is that it may be perfectly true as regards part of the appeal; but one of the grounds on which the appellant relies is that no notice was given of the application for attachment and order for the sale of the property and that, that comes under section 47 of the Civil Procedure Code and is therefore appealable as a decree.

The only direct authority on the point is the judgment of Oldfield and Seshagiri Aiyar, JJ., in *Neelu Neithiar* v. *Subramania Moothan* (1), where, under somewhat similar circumstances, which were not really so strong as this, because the failure to give notice was at a later stage, they held that, where an application is made, which is partly covered by rule 90 of Order 21, and partly not so covered, although the order purports to have been made under rule 92 of Order 21, a second appeal will lie.

There are dicta in other cases to the effect that, where there is absence of notice there is a remedy under Order 21, rule 90, or section 311 of the old Civil Procedure Code which corresponds with it, particularly in the decision of the Privy Council in *Malkarjun* v. *Narhari* (2); but, on looking carefully into that case, we note that this point was in no way before the Privy Council; but this apart, I think that the decision in *Neelu Neithiar* v. *Subramania Moothan* (1) is an authority, and I should myself come to the same conclusion as was come to, in that case, because looking at the words of Order 21, rule 90, they appear to me perfectly plain. What is being dealt with there is a material irregularity or fraud, in publishing or conducting a sale; and I cannot bring my mind to the view that the failure to give notice of the application, for leave to attach and sell, is an irregularity in publishing or conducting the sale. It seems to me that it is really a contradiction in terms. There is no sale to publish or conduct, until after leave of the Court has been obtained, (*a*) to attach the property and (*b*) to sell.

Whether or not that failure to give notice is an illegality, is a matter which is entirely irrelevant for the present purpose, because it is only certain kinds of irregularities that are covered by Order 21, rule 90. If the omission in this case was the other kind of irregularity or whether it renders wholesale a nullity, it is not brought within the wording of that rule. The preliminary point fails and this appeal must proceed.

Waller, J.:—I agree that a second appeal will lie.

[This appeal came on for hearing again, on the 24th and 25th days of September, 1923, before the Hon'ble The Chief Justice and Waller, J.]

ORDER OF REFRENCE TO A FULL BENCH.

The question in this case is as to the validity of a sale held in execution of a decree for maintenance. The appellant was the third defendant in the suit. The contesting respondent is the purchaser in execution. The Subordinate Judge found

(1) (1919) 11 L.W. 59.

(2) (1901) 25 Bom. 337 (P.C.).

that the sale was invalid, as notice of execution under Order 21, rule 22 had not been issued to 3rd defendant and that the application was in time under article 181 of the Limitation Act. Finding, further, that the property had been sold for considerably less than its proper value, he proceeded to set aside the sale under Order 21, rule 90. The District Judge, on the other hand, was of opinion that notice to the 3rd defendant was unnecessary, that the sale was not invalid and that the application was barred by limitation, presumably under article 166 of the Limitation Act. He added that there was no allegation of fraud or collusion, against the 1st defendant. Had he said that no fraud or collusion had been proved, he would have been more accurate. There were certainly allegations, no doubt, of a vague description, of fraud and collusion against the 1st defendant and the plaintiff in the suit. Nothing, however, was alleged against the auction-purchaser, though it is now suggested that he was a party to the fraud, as a result of which the property was sold for less than its proper value. There is no evidence of any collusion between these persons.

The auction-purchaser is not connected with the 1st defendant's family. It is not at all probable that the plaintiff and the 1st defendant, who were on opposite sides in the suit, would have colluded together. Plaintiff had no interest whatever, in getting the land sold for a low price. Her interest, if she had any, lay in the opposite direction. Nor is it apparent why the 1st defendant should have conspired to bring to sale only that part of the property in which she had a life estate.

The evidence as to the alleged inadequacy of price is not very satisfactory; but we accept the finding of the Subordinate Judge that the sale was in fact at an undervalue.

The finding that there was no fraud or collusion does not end the matter. The next question is whether the sale, as against the 3rd defendant's interest, is invalid or not. The 3rd defendant had undoubtedly a vested interest in the property sold and a notice should have gone to him, under Order 21, rule 22. It has been held in *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (3) that the omission to give such a notice renders the sale void. This decision has been approved by the Privy Council in *Raghunath Das* v. *Sundar Das Khetri* (4), and *Shyam Mandal* v. *Satinath Banerjee* (5). The last case has been dissented from in *Viswanathan Chetty* v. *Somasundaram Chetty* (1), where it has been decided that the non-issue of a notice under Order 21, rule 22 is a mere irregularity and not an illegality affecting the jurisdiction of the Court to execute the decree. The Judges refused to follow the Privy Council ruling, on the ground that it was passed under the old Civil Procedure Code, which had in it no provision, corresponding with the present sub-rule (2) of rule 22. The ruling in *Shyam Mandal* v. *Satinath Banerjee* (5) dismissed with the remark that it had not considered the effect of sub-rule (2). In *Doraiswami* v. *Chidambaram Pillai* (7) Spencer, J., arrived at the same conclusion; "so long" he said "as rule 22, clause (2) permits an executing Court to dispense with notice for reasons to be recorded, it is difficult to see how the issue of process without notice and without recording reasons would affect the jurisdiction of the Court, or would be more than an irregularity." We think that the decision in *Shyam Mandal* v. *Satinath Banerjee* (2), is correct and that the ruling in *Viswanathan Chetty* v. *Somasundaram Chetty* (1), has been too widely expressed. It may be that, where an application has been made under sub-rule (2) and the conditions contemplated by that sub-rule exist, the non-issue of notice without the recording of reasons would be a mere irregularity. But we are of opinion that when, as here, it is not even suggested that the conditions required by sub-rule (2) existed, or were under the consideration of the Court, the Privy Council ruling in *Raghunath Das* v. *Sundar Das Khetri* (4) should be followed. The ruling reported in *Malkarjun* v. *Narhari* (2) is not an authority to the contrary; for in that case, notice was issued on a particular person under the direction of the Court, but it was subsequently held that that direction was wrong and this, the Privy Council considered to be no more than an irregularity, which rendered the sale not void, but voidable. In another case, *Ram Kinkar* v. *Sthiti Ram* (8)

(3) (1893) 20 Cal. 370.

(4) (1915) 42 Cal. 72 (P.C.).
(5) (1917) 44 Cal. 954.
(6) 1924 Mad. 93.
(7) 1924 Mad. 130.
(8) (1918) 27 C.L.J. 528.

the Privy Council decision was followed. The Code applicable to it was, no doubt, that of 1882; but the opinion was clearly expressed that the law had not been altered by Order 21, rule 22 of the present Code. The ruling referred to above. *Doraiswami* v. *Chidambaram Pillai* (3), expressly dissents from *Ragunathaswami Ayyangar* v. *Gopaul Rao* (9). In view of the conflicting opinion on the point, we think that the best course is to refer for the decision of a Full Bench the following question :—

Whether, in a case where notice under Order 21, rule 22 has not been issued and the omission is due not to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, a sale held in execution is void or merely voidable, as against the person to whom notice should have been, but was not issued.

If the answer to the question above propounded is that the sale is void, as against the 3rd defendant, a further question arises—that of limitation, *i.e.*, whether the article of the Limitation Act applicable is 166 or 181 or some other and if so which article. On this point again, there is a considerable divergence of opinion. In the decision reported in *Seshagiri Rao* v. *Srinivasa Rao* (10), it has been held that, when a sale is absolutely void, for want of jurisdiction, the article applicable is article 181. The same conclusion was arrived at in *Ram Kinkar* v. *Sthiti Ram* (8). Both of these decisions have been dissented from by Sir Francis Oldfield and Venkatasubba Rao, JJ., in *Ganapathi Mudaliar* v. *Krishnamachari* (11), (where also a sale was impugned as void), the first on the ground that the decision was supported by reference to an unreported case and not by any independent reasoning and the second on the ground that the relevant part of the judgment was *obiter*. As to the Madras case, the *ratio decidendi*—which the Judges possibly considered too obvious to require statement—doubtless was that a void sale need not be set aside. In the Calcutta Law Journal Case, the decision, it is true, ultimately rested on section 18 of the Limitation Act; but the question of the Article of limitation applicable did arise directly in the suit and we think that the decision on it can scarcely be dismissed as *obiter*.

In another case, *Babu Das Narain Singh* v. *Muhammad Usuf* (12), but there it was held that what had occurred was a mere irregularity and the Court had jurisdiction to sell. In other words, the decision was that the sale was voidable and not void. It was no doubt, that article 166 governed all applications "on whatever grounds" to have an execution sale set aside, but that is not to say that the same article applies to cases, where the sale is void and need not be set aside at all.

In a Madras case, *Ramayya* v. *Ramamma* (13), it was held that article 166 governed all applications, under section 47, Civil Procedure Code, to set aside sales, on the ground either of illegality or irregularity. In *Neelu Neithiar* v. *Subramania Moothan* (1), it was a notice under Order, 21, rule 66 that was in question. The decision was that article 181 did not apply. There is, however, in the course of the judgment, a reference to the issue of the notice, required by Order 2, rule 22, as being a condition precedent to the validity of any execution proceedings. One of the Judges was a party to the decision in *Visvanathan Chetty* v. *Somasundaram Chetty* (6).

In *Ragunathasami Ayyangar* v. *Gopaul Rao* (9), the judgment in which Sir Francis Oldfield, J., concurred, was delivered by Ramesam, J., who laid down that where an execution sale is void, it need not be set aside. The question of limitation did not arise; but, if it had, presumably the decision would have been that article 166 did not apply. This decision was dissented from in *Doraiswami* v. *Chidambaram Pillai* (7), by Spencer and Krishnan, JJ. In A. A. O. No. 74 of 1922, Spencer and Devadoss, JJ., dissented from *Seshagiri Rao* v. *Srinivasa Rao* (10) and followed *Ganapathi Mudaliar* v. *Krishnamachari* (11). In A. A. O. No. 77 of 1921, Spencer, J., did not decide the question of limitation. Venkatasubba Rao, J., held that the sale in question is void. He held further that the application then under consideration was, in substance, one to declare that the sale was inoperative and that therefore article 166 could not govern it.

(9) 1922 Mad. 307.
(10) (1920) 43 Mad. 313.
(11) 1922 Mad. 417.

(12) (1921) 61 I.C. 823.
(13) 1922 Mad. 95.

I need refer to only two more Madras cases. In one of them, *Muthiah Chettiar* v. *Bava Sahib* (14), Oldfield and Tyabji, JJ., disagreed as to the applicability of article 166. Oldfield, J., was of opinion that the application, though it may have been made under section 47, Civil Procedure Code, was essentially one to set aside a sale and was therefore barred under article 166. In the other, *Payidanna* v. *Lashminarasamma* (15), the question we are now considering did not arise. Sadasiva Aiyar, J., however, did refer to it. His opinion was that, if the application he was dealing with was one to set aside the sale, as distinguished from one for a declaration of the invalidity of the sale as against the applicant's rights, it was barred by limitation, under article 166.

Only one other decision need be mentioned—that in *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad* (16), which is in favour of the view that article 166 governs all applications under section 47, Civil Procedure Code. As the correctness of the decision in *Seshagiri Rao* v. *Srinivasa Rao* (10) has been doubted, we think that the question should be referred to a Full Bench for final decision. Essentially the question is this—where a sale in execution is void against a particular person, is it a necessary part of his remedy that he should ask to have the sale set aside? If the answer is in the affirmative, then probably article 166 applies. If on the other hand, he need not get the sale set aside, but his application can be treated as one for a declaration that the sale is void as against him, article 181 would seem to govern the case. The question we would refer to the Full Bench is this:

Where a sale in execution is void as against a party and he applies for relief under section 47, Civil Procedure Code, or otherwise, what is the period of limitation that governs his application?

OPINION OF THE FULL BENCH.

Schwabe, C. J.:—If this matter were free from authority, I should incline to the view that non-compliance with the provisions of Order 21, rule 22 was a material irregularity, and not an illegality, which would make the subsequent sale a nullity. In England, there was a rule of Common Law that judgments, after the lapse of a year and a day, could not be executed unless an order for what was known as a *scire facias* was first obtained. There are authorities to the effect that the disregard of that rule rendered a subsequent sale in execution voidable and not void: See *Balanchenay* v. *Bart* (17) and *Good Title* v. *Bad Title* (18); and the same rule applies in America—see Freeman on Void Judicial Sales, page 97. But in my judgment, there are authorities here to the contrary which preclude such a view being taken here. In *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (3), their Lordships of the Calcutta High Court laid down that a notice under section 248 of the Code of Civil Procedure of 1882 was necessary, in order that the Court should obtain jurisdiction to sell a property, by way of execution as against the legal personal representatives of the deceased judgment-debtor. In *Raghunath Das* v. *Sundar Das Khetri* (4), the judgment-debtor had become an insolvent and a sale in execution took place without proper notice, under the sale section and their Lordships of the Privy Council held that the sale was a nullity. In the case before us, no notice has been given of execution proceedings to the infant petitioners although a year had elapsed since the decree; but I can see no difference in principle between the position of legal representatives of a deceased judgment-debtor, or the Official Assignee of the judgment-debtor's estate, and that of a party to the suit, who has not himself been served with notice of an application for execution, more than a year after the decree, and is ignorant thereof. The provision for notice in the two cases of legal representatives and of parties, when more than one year has elapsed, are contained in the same rule, Order 21, rule 22, which is in the same terms as section 248 of the Civil Procedure Code of 1882, and I do not think that it is possible to hold that in one case failure to give notice is a mere irregularity, while in the other it results in the Court having no jurisdiction to sell at all. In *Shyam Mandal* v. *Sitinath Banerjee* (5) Mookerjee and Cuming, JJ., held that

(14) (1914) 27 M.L.J. 605.
(15) (1915) 38 Mad. 1076.
(16) (1919) 46 Cal. 694 (P.C.).

(17) 4 Q.B. 707.
(18) 9 Dowling 1009.

a proper notice, under Order 21, rule 22, after the lapse of one year from the decree, was the very foundation of the jurisdiction itself, and that failure to give it rendered a sale inoperative, even as against a stranger. It is right to point out that in that case an application was made to prevent the confirmation of the sale, before it was completed, and no question of limitation arose, but the grounds of the decision are quite clear and unless we disagree with them they are conclusive of this point. In *Viswanathan Chetty* v. *Somasundaram Chetty* (6) a bench of this Court held that the non issue of notice under Order 21, rule 22 was a mere irregularity, and not an illegality, affecting the jurisdiction of the Court to execute the decree; and in *Doraiswami* v. *Chidambaram Pillai* (7) Spencer, J., took the same view: and Krishnan, J., stated that he would have been in favour of referring the matter to a Full Bench but for the decision of the Privy Council in *Malkarjun* v. *Narhari* (2) which he considered, rendered it unnecessary to do so. The ground, on which the Privy Council cases referred to above were sought to be distinguished from this case, was that Order 21, rule 22 differed from section 248 of the Civil Procedure Code of 1882, in that Order 21, rule 22 provides that the Court can issue process in execution, without issuing the prescribed notice, if, for reasons to be recorded, it considers that the issue of such notice, would cause unreasonable delay, or would defeat the ends of justice, while there was no such provision in the Code of 1882: and that as there is now a discretion in the Court to excuse the notice, it follows that the failure to give such notice must be a mere irregularity. I am not able to follow this reasoning. I do not appreciate how the failure to give such notice can have any different effect, under the new Code to what it had under the old Code, merely because the new Code provides that in certain cases the Court can dispense with the notice. In my judgment, the only effect of this sub-section is to give the Court jurisdiction in certain cases in which without it the Court would have none. *Malkarjun* v. *Narhari* (2) is not an authority to the contrary; for, in that case, notice was served on a person, whom the Court had ordered to be treated as the legal representative of a deceased party and who, it was subsequently held, was not the proper legal representative and the Privy Council held that this was a mere irregularity, as the Court was acting within its jurisdiction, though wrongly. *Rewa Mahton* v. *Bam Kishen Singh* (19) was relied upon, as an authority against this view. In that case, there were cross-decrees in separate suits and execution was ordered on one of them, without taking into account the other, although it was provided by section 246 of the Code of 1877, now Order 21, rule 18, that execution can only issue for the balance if any, between the two decrees, and it was held by the Privy Council that this was an irregularity and did not render the sale void. Their Lordships held that the Court had jurisdiction to sell, and that the purchaser was no more bound to enquire into the correctness of the order for execution than into the correctness of the judgment, upon which the execution was issued. This is an illustration of a case, where the Court was acting within its jurisdiction on the proper interpretation of the section of the Code applicable, and does not assist in arriving at the proper interpretation of another section. It follows that the answer to the first question referred is that the sale is void.

The other question referred is what is the period of limitation that governs an application for relief, where the property has been sold in execution and that sale is void? If the application is an application, under the Code of Civil Procedure, to set aside a sale in execution of a decree, the article of the Limitation Act of 1908, applicable is 166 and the period of limitation is 30 days from the date of the sale. If not, the application is one for which no period of limitation is provided elsewhere and it will be governed by article 181, the period of limitation being 3 years from the date when the right to apply accrued. Lord Davey delivering the judgment of their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (20), a case where the Court had sold without jurisdiction the property of persons who were not parties to the proceeding or properly represented on the record, said:

"As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded, without any proceeding to set them aside. If authority be desired for

(19) (1887) 14 Cal. 18 (P.C.).
(20) (1905) 32 Cal. 296 (P.C.).

these elementary propositions, it may be found in the judgment of Sir Barnes Peacock, in *Kishen Chunder Ghose* v. *Ashoorun* (21).

That is direct authority for the proposition that in such a case it is not necessary to apply to the Court to set aside the sale. If it is possible for the petitioner in this case to proceed without applying to set aside the sale, he could avoid the harsh limitation imposed by article 166. In my judgment, he can do so. He could, but for the provisions of section 47 of the Civil Procedure Code of 1908, bring a suit for possession of the property sold, and the purchaser would not be able to rely upon the Court-sale as a defence ; because that sale is a nullity and the Privy Council has held that it is not necessary to take any steps to set it aside. By reason of section 47, all questions arising between parties to the suit relating to execution ought to be determined by the Court executing the decree, and not by a separate suit ; and it has been held that the fact that a court purchaser is a necessary party would not prevent the application of this rule. But this is only a question of procedure and the Court may treat the proceeding under this section as a suit, subject to any objection as to limitation. It is unnecessary to consider whether the effect of this is that the period of limitation to be applied is the period provided by the Limitation Act, in respect of applications, or that provided in respect of suits. If the former, the period of limitation will be 3 years under article 181 ; and if the latter, the 12 years provided in the case of suits to recover possession of immoveable property. I cannot agree with the view that all applications under section 47 are governed by article 166 ; nor do I think that the statements in cases to that effect are more than *obiter dicta* ; the intention being to express the view, with which I agree, that if an application is an application to set aside a sale in execution of a decree, it matters not whether the application is made under section 47, or under Order 21, rule 90. *Seshagiri Rao* v. *Srinivasa Rao* (10) is a direct authority for the proposition that when a sale is absolutely void for want of jurisdiction, the article applicable is article 181 and in my judgment, in view of the decisions of the Privy Council referred to above, that case was rightly decided.

(21) (1863) 1 Marsh 647.

The petitioner is the guardian of infants, who were properly before the Court as defendants in the original suit, and their interest in the property was liable to be sold in execution in satisfaction of the decree, and they can only be permitted to recover possession of the property on payment to the purchaser of what he has paid, together with interest thereon, at 6 per cent, less any amount he may have received for mesne profits, and in the absence of agreement, this petition must go back to the Court of first instance, to ascertain the amount and fix the date of payment and make the necessary order for carrying out this direction. In view of the fact that the petitioner chose to frame his application under Order 21, rule 90, and to make unfounded charges of fraud against the respondent, there will be no costs here or below.

Ramesam, J :—The facts of the case and questions referred to the Full Bench are stated in the Order of Reference.

The first question is—whether the sale is void, no notice having been issued under Order 21, rule 22. Three possible views may be taken on the effect of want of notice under Order 21, rule 22 of the new Code.

(1) The want of notice is only an irregularity. This is the view taken by Oldfield, J , in *Viswanathan Chetty* v. *Somasundaram Chetty* (6) and I agree with his judgment.

(2) The sale is void. This is the decision of the Privy Council under the old Code in *Ragunath Das* v. *Sundar Das Khetri* (4), and it may be said that the addition of clause (2) in the new Code does not make any difference, when the mind of the Court was not applied to the need for notice.

(3) An intermediate view may be taken, *viz.*, if the case is one to which clause (*a*) of Sub-section (1) of rule 22 applies, then the want of notice is merely an irregularity ; and if clause (*b*) applies, the sale is void for want of notice. In this way, *Raghunath Das* v. *Sundra Das Khetri* (4), may be distinguished.

Now I confess there is something to be said in favour of each of these views. All that can be said in favour of (1) has been said by Oldfield, J., in *Viswanathan Chetty* v. *Somasundaram Chetty* (6), (with which

I agree) and by Spencer, J., *Doraiswami* v. *Chidambaram Pillai* (7).

Incidentally I may point out that the point does not strictly arise in *Doraiswami* v. *Chidambaram Pillai* (7). There, the sale took place on 17th January, 1916. The judgment-debtor died on the 16th December, 1915. The application for attachment for sale must have been ordered and the proclamation of sale must have been settled before his death. It does not appear that an application for execution had to be made or was made after his death ; and if there was none, it cannot be said that Order 21, rule, 22, was violated. If the sale in that case was void, it must be only on the ground that the judicial proceeding after the death of the judgment-debtor and without bringing any legal representative on the record was void, as held by Oldfield, J., and me in *Raghunathaswami Ayyengar* v. *Gopaul Rao* (9) ; but Spencer and Krishnan, JJ., dissented from this view. In the judgment of my Lord, my Lord has given reasons against adopting the reasons of the decision in *Viswanatham Chetty* v. *Somasundaram Chetty* (6), and of Spencer, J., in *Doraiswami* v. *Chidambaram Pillai* (7).

2. The second view was adopted in *Shyam Mandal* v. *Satinath Banerjee* (5), (dissented from by Spencer, J., in *Doraiswami* v. *Chidambaram Pillai* (7), is supported by the judgment of the Privy Council in *Raghunath Das* v. *Sundar Das Khetri* (4), and now by my Lord the Chief Justice. I understand that my brother Waller, J., also agrees with this view.

3. The third view was urged before Oldfield, J., and myself and was rejected by us in *Viswanathan Chetty* v *Somasundaram Chetty* (6). As my Lord now points out there is something to be said in its favour ; but the language of the Judicial Committee which does not make any distinction between clause (*a*) and clause (*b*) of section 248 of the old Code (corresponding to Order 21, rule 22 of the present Code) prevents us from accepting it.

With no strong inclination in favour of any one of the three views stated above, and in order that our judgment may be unanimous, I would formally drop the conclusion I adopted in *Viswanathan Chetty* v. *Somasundaram Chetty* (6), and agree with my Lord and Waller, J., on the first question referred to the Full Bench.

The second question referred to the Full Bench presents no difficulty. Once we are agreed that *Raghunath Das* v. *Sundar Das Khetri* (4) applies, that case is conclusive that the sale has not got to be set aside. Only if it has to be set aside, article 166 applies. If not, article 181, when the matter arises, under section 47; or article 144 when the question arises in a suit, as in *Raghunath Das* v. *Sundar Das Khetri* (4), would apply. I agree with my Lord's proposed answer to the second question and with the further order as to mesne profits and costs.

Waller, J. :—I agree entirely with the judgment of the learned Chief Justice and have nothing to add to it.

Reference answered.

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* * 1924 Madras 438.

(FULL BENCH.)

SCHWABE, C.J., OLDFIELD AND RAMESAM, JJ.

Sinnam Chetty and another—Appellants

v.

G. S. Alagiri Aiyar and others—Respondents.

L. P. A. No. 13 of 1922, decided on 23rd April, 1923, from the judgment of Krishnan, J., in A.A.O. No. 418 of 1921.

(a) *Insolvency—Petition is permissible in respect of liquidated demands.*

It is only in respect of liquidated demands that insolvency petitions can be presented.

(b) *Tort—Conversion—Judgment in conversion does not pass property until it is satisfied—Distinction between detinue and conversion or trover was pointed out.*

A judgment in conversion does not pass the property to the defendant unless and until it is satisfied. Mere proof in bankruptcy does not amount to satisfaction so as to pass the property nor, does it seem, would part satisfaction by execution or by receipt of dividend in bankruptcy have that effect. The plaintiff can after judgment elect to look only to this chance of obtaining satisfaction by execution or by proof in insolvency and give up his claim to the property. There are two distinct forms of action which could be brought against a defendant who has or should have moveable property of the plaintiff in his possession. They are known as detinue and conversion, the latter being in the old law also called trover. In the former the suit is primarily for the return of the chattel to which is usally added a claim for its value in default of its return. The decree in such an action takes two alternative forms with the same effect. One is for the return to the plaintiff within a limited time of the

chattel or its value together with damages, if any, for its detention and the other is for a sum being the value plus the damages for its detention to be reduced to the damages only if the chattel is returned in a certain time. In either case the option to return or to pay is in the defendant but the Court may in proper cases order the specific delivery of the chattel which the defendant must comply with on pain of contempt or it may order the issue of a writ of delivery to the Sheriff directing him to seize the chattel. The action for conversion or trover is for damages only and is as a a rule for the value of the chattel and is based on an allegation that the defendant has converted the chattel to his own use by some wrongful dealing with it. ((1871) L.C. 6 C.P. 584; (1920) 11 K.B. 426 at 436, *Foll.*)

(c) *Transfer of Property Act, S. 43—Specific Relief Act, S. 18—Principle applies in case of moveables.*

If there is a sale or pledge to a *bona fide* purchaser or pledgee for value by one who has no title, if that person subsequently obtains a title, it enures to the benefit of the purchaser or pledgee.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Iyer*— for Appellants.

S. Panchapagesa Sastri—for Respondents.

Schwabe, C. J. :—This suit having been dismissed on the ground that on the facts stated by the plaintiff there was no cause of action, we must assume for the purpose of this appeal that those facts are correct. On this assumption the plaintiff was the owner of a ring of the value of Rs. 1,000 and lent it to the 1st defendant. The plaintiff was liable to the 1st defendant on a promissory note for Rs. 2,500 and the 1st defendant was liable to the plaintiff for Rs. 2,072-8-0 being the 1st defendant's contribution in respect of a joint bond which the plaintiff had discharged. The 1st defendant assigned the promissory note to one Mikka Pillai who brought an action on it, O. S. No. 21 of 1915 in the Salem District Court against the plaintiff. On the 7th March, 1913, the plaintiff presented an insolvency petition against the 1st defendant. In that petition he alleged that the 1st defendant was indebted to him in Rs. 3,072-8-0 made up of the Rs. 2,072-8-0 and Rs. 1,000 the value of the ring which he alleged the 1st defendant refused to return. He alleged that there was no consideration for the assignment of the promissory note to Mikka Pillai and that it was a fraud on the creditors and he proposed to set it off against his claim, which would thereby be reduced to Rs. 572-8-0. Three days after the presentation of the petition the 1st defendant pledged the ring with the 2nd defendant, who is now represented by the 5th and 6th defendants, it is said for Rs. 725. The 2nd defendant took it without notice of any claim to it by the plaintiff. In O. S. No. 21 of 1915 the plaintiff set up against Mikka Pillai's claim on the promissory note the Rs. 2,072 due by the 1st defendant and also Rs. 1,000 the value of the ring no doubt on the basis that Mikka Pillai was not a holder in due course of the note.

The insolvency petition was heard, the 1st defendant not appearing and he was on the 2nd of December, 1915, adjudicated insolvent; the District Judge holding that the assignment of the promissory note to Mikka Pillai was fraudulent and also holding, though he gave no reasons, that the plaintiff was entitled to Rs. 1,000 in respect of his ring with the result that he became a creditor of the insolvent for Rs. 572-8-0 instead of being his debtor in Rs. 427-8-0 the difference against him in respect of the two other cross claims for Rs. 2,500 and Rs. 2,072-8-0.

In due course the plaintiff put in his proof for Rs. 572-8-0 and it has been admitted. Subsequently he alleges that he discovered that the ring was in possession of the 2nd defendant and brings this suit for its recovery. Owing to certain criminal proceedings the ring is in fact in the custody of the Magistrate's Court at Attur, but for the purpose of this suit it must be treated as still in the possession of the pledgee, the 2nd defendant. The 2nd defendant contends that the plaintiff has definitely elected to treat the ring as the property of the 1st defendant, first by his petition in insolvency and subsequent proof whereby he has treated the value of it as a debt due to him and used part of it as a set off against the balance of the insolvent's claim against him, and on the other part has filed his insolvency petition, and that the Court by allowing the petition and subsequently admitting the proof has accepted his contention, and that this involves a decision that the property in the ring has passed to the 1st defendant, from which it follows that the plaintiff has no longer any claim to it. Secondly reliance was placed on the plaintiff having in the suit by Mikka Pillai used the Rs. 1,000 or part of it as a debt due from the 1st defendant and therefore available for him as an answer to Mikka Pillai's claim on the promissory note. I think there is nothing in the latter contention. Appa-

rently Mikka Pillai had no claim at all, and no such set off has in fact been allowed against him, it being unnecessary to consider the question in view of the fact that the negotiation to Mikka Pillai has been held to be fraudulent. We have not got the full facts as to this before us. But I assume this to be the position from the fact that the plaintiff has only been allowed to prove on the basis that he is indebted on the promissory note to the 1st defendant and not to Mikka Pillai. But the use that the plaintiff has made of his right against the 1st defendant in respect of the ring in the insolvency petition stands on a different footing and gives rise to a difficult question in respect of which there is little authority.

The District Munsif has held that the plaintiff has lost his title to the ring and the District Judge has held to the contrary, and on appeal Krishnan, J., agreed with the District Judge and Venkatasubba Rao, J., with the District Munsif.

The matter is not rendered more easy by the fact that in my judgment the 1st defendant ought not to have been adjudicated on this petition. I know of no principle on which a debtor can turn himself into a creditor for the purpose of presenting an insolvency petition by setting off the value of property unlawfully detained or converted by another against a liquidated claim by that other against him, and so leave a balance due to him in respect of the dealings between them. For it must be remembered that it is only in respect of liquidated demands that insolvency petitions can be presented. But he has been allowed to do so in this case and we must deal with it accordingly. The plaintiff cannot by this apparently irregular order of adjudication be in a better position than he would have been if he had recovered judgment for Rs. 1,000 damages for conversion of the ring, and in my judgment, we must look upon the adjudication as equivalent to such a judgment, for the conversion of his ring by failure to deliver it up on demand, and we must look upon that judgment as satisfied to the extent of Rs. 427-8-0 by being used to that extent to extingnish the balance, which would otherwise be due from the plaintiff to the 1st defendant. For the balance of this claim for Rs. 1,000 the plaintiff has attempted to obtain satisfaction by proof in the insolvency but so far has received nothing by way of dividend in respect thereof.

The question then arises whether a judgment in conversion passes the property to the defendant unless and until it is satisfied. I think not. The leading case on the subject is *Brinsmead* v. *Harrison* (1). In that case, there had been an action for conversion and detention of a piano which resulted in a money judgment for an amount presumably the value of the piano, and the judgment being unsatisfied, a second suit was brought in detinue to recover the piano from another person in whose possession it was. The defendant set up that by the judgment in the former suit the property in the piano passed to the defendant in that suit and that therefore the plaintiff could not sue. But the Court of Common Pleas held that the property did not pass under such a judgment without satisfaction, the judgment being treated as an assessment of the value and the satisfaction of the judgment as the payment of the price. This case has always been treated as good law. It is worth calling attention to the fact that there are two distinct forms of action which could be brought against a defendant who has or should have moveable property of the plaintiff in his possession. They are known as detinue and conversion, the latter being in the old law also called trover. In the former the suit is primarily for the return of the chattel to which is usually added a claim for its value in default of its return. The decree in such an action takes two alternative forms with the same effect. One is for the return to the plaintiff within a limited time of the chattel or its value, together with damages if any, for its detention, and the other is for a sum being the value plus the damages for its detention to be reduced to the damages only if the chattel is returned in a certain time. In either case the option to return or to pay is in the defendant, but the Court may in proper cases order the specific delivery of the chattel which the defendant must comply with on pain of contempt, or it may order the issue of a writ of delivery to the Sheriff directing him to seize the chattel. The action for conversion or trover is for damages only and is as a rule for the value of the chattel and is based on an allegation that the defendant has

(1) (1871) L.R. 6 C.P. 584.

converted the chattel to his own use by some wrongful dealing with it, one instance of which is the refusal to deliver upon demand, and on a decree of this kind the defendant has no option to deliver up the chattel nor has the plaintiff a right to demand it.

I have called attention to this distinction because it has been suggested that the rule in *Brinsmead* v. *Harrison* (1) applies only to actions in detinue and not to actions in conversion. I confess that to me the suggestion is attractive, but in my judgment the weight of authority is against it. *Brinsmead* v. *Harrison* (1) itself is a clear authority to the contrary. In *In re Gunsbourg* (2) Sterndale, M. R., says: "The order he has obtained amounts to nothing more than judgment in detinue or trover for the value of the goods and it has not been satisfied. It has been clear law since the case of *Brinsmead* v. *Harrison* (1) that such a judgment unsatisfied does not operate to transfer the property to the person against whom judgment was obtained or prevent the true owner from suing a third person, not the original wrong-doer for the return of the plaintiff's goods which that third person continues to detain from him. That was the exact point determined upon the new assignment in *Brinsmead* v. *Harrison* (1) and that decision is conclusive against the appellants on this point." It is true that Warrington, L. J., at page 447 says "I think it is settled that a judgment for the recovery of goods or their value or for the value of the goods to be reduced if the goods are delivered, does not of itself transfer the property to the defendant, but only if and when it is satisfied by actual payment of the value [*Brinsmead* v. *Harrison* (1)]," thus confining his judgment to cases of detinue. In *Ex parte Drake, In re Ware* (3), which is not unlike the present case in which *Brinsmead* v. *Harrison* (1) was followed, it was unnecessary to discuss this point as the previous action had been in detinue.

Some doubt, however, is thrown on the matter by *Bradley and Ooken, Ltd.* v. *Ramsay and Co.* (4). In that case Phillimore, J. held that the principle of *Brinsmead* v. *Harrison* (1) applied only to cases of detinue, and in Court of appeal, Kennedy, L. J., with whose judgment Cozens Hardy, M. R. agreed says that he agrees with Phillimore, J., on this point. But he adds that the earlier judgment obtained was for the price of the goods in question and that therefore the judgment obtained was different from the judgment in *Brinsmead* v. *Harrison* (1) and prevented the plaintiff suing again. But Buckley, L. J., points out that the judgment in that case was not a judgment for damages but for the price of the goods as on a sale, and he so explains the judgment of Phillimore, J. The defendant in the earlier case had at one time at any rate had the property from the plaintiff on sale or return, and I think that the decision in that case can be explained without in any way cutting down the effect of the judgment in *Brinsmead* v. *Harrison* (1), on the ground that the earlier judgment was based on the election by the plaintiff to treat a contract of sale or return of the goods, which had in fact been determined, as still alive and resulting in a sale, for the judgment was for the price and not for damages, as is quite clear from the fact that the value, as opposed to the price, which would be the measure of damages for conversion was not considered. It may be that if this point ever comes before the highest tribunal the operation of the principle of *Brinsmead* v. *Harrison* (1) will be confined to the judgment in detinue. But in the present state of authorities I do not think we can so limit it.

Mere proof in bankruptcy does not amount to satisfaction so as to pass the property. See *Ex parte Drake, In re Ware* (3). Nor does it seem would part satisfaction by execution or by receipt of dividend in bankruptcy have that effect.

It is however clear from *Ex parte Drake, In re Ware* (3) that the plaintiff can after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof and give up his claim to the property. In *In re a Debtor, Ex parte Petitioning Creditor* (5) the plaintiff obtained a judgment for the return of a cup forthwith or for payment of £50 its value and for £5-5-0 for damages and for costs. The cup not being returned he signed judgment for the full amount and issued a bankruptcy notice for non-compliance with that judgment. After that date the debtor sent up the cup to the plaintiff and on the hearing of the petition

(2) (1920,) 2 K. B. 426.
(3) 5 Ch. D. 866.
(4) (1912) 106 L.T. 771.
(5) (1907) 97 L.T. 140.

claimed that there was no longer a good petitioning creditor's debt as it ought to be treated as reduced by the value of the cup. The Court ordered adjudication and Bigham, J., said :—"It has been contended that the property in the cup is still in the petitioning creditor. I think, however, that by issuing the bankruptcy notice and presenting the bankruptcy petition the creditor finally elected to abandon the property in the cup to the debtor, and that it now vests in him and will form part of the estate in bankruptcy." This was not necessary for the decision of the case because the debtor failed to exercise the option that was given of returning the cup forthwith, with the result that the judgment became a money judgment and he having lost his option, was liable for the full amount of the judgment and could properly be adjudicated for non-compliance: and I am not satisfied that if the plaintiff had subsequently found the cup in the hands of a third party, he could not on the principle of *Brinsmead* v. *Harrison* (1) have sued that person for it. But however that may be I think there is much more here. The plaintiff when he petitioned in insolvency had no judgment at all nor anything equivalent to one. But what he did was to allege that the 1st defendant owed him Rs. 1,000 as a liquidated amount, and set off about half of that amount against a debt due from him to the insolvent and then used the balance as a liquidated amount to support his insolvency petition, and in my judgment that amounts to a definite election to abandon all right to the ring in favour of the 1st defendant and to look only to the advantage of getting rid of the balance of his own debt to the 1st defendant, and the hope by the pressure of insolvency proceedings of getting payment of the balance from the 1st defendant. It follows that at the date of the pledge to the 2nd defendant the 1st defendant had a good title to the ring and the plaintiff had none; or that at least on the date of the adjudication the plaintiff gave up all further interest in the ring and that if the 1st defendant had no title at the date of the pledge he got one on the date of adjudication on the principle of *feeding the title* as it is called in *White Horn Brother* v. *Davison* (2) or *forwarding title* as it is called by Phillimore, J., in 97 L. T. 140 the principle being that if there is a sale or pledge to a *bona fide* purchaser or pledge for value by one who has no title, if that person subsequently obtains a title, it enures to the benefit of the purchaser or pledgee.

On these grounds I think that the judgments of the District Munsif and Venkatasubba Rao, J., are correct and that the appeal must be allowed with costs throughout.

Oldfield, J. :—I agree.

Ramesam, J. :—I agree.

Appeal allowed.

1924 Madras 442.

(FULL BENCH.)

SCHWABE, C.J., PHILLIPS AND RAMESAM, JJ.

Abdul Sattar Sahib—Petitioner

v.

The Special Deputy Collector, Vizagapatam Harbour Acquisition and others—Respondents.

Civ. Rev. No. 683 of 1922, decided on 20th November, 1923, from the decision dated 30th June, 1922, of Special Deputy Colltctor, Harbour Acquisition, Vizagapatam.

Land Acquisition Act, S. 18—Order refusing to refer to Civil Court is not revisable by High Court (Case law discussed.)

High Court has no power under S. 115, Civ. Pro. Code or under S. 107 of the Government of India Act, to revise the order of a Collector acting under the provisions of the Land Acquisition Act refusing to refer to the Court, an application under S. 18 of the same Act by a person interested, requiring him to refer the matter for the determination of the Court. When Collector acts under part III, of which S. 18 forms part, he is acting in a different capacity because he has there to decide certain things but no revision petition lies to High Court because he is not a Court at all.

T. Richmond, I. V. Ramanuja Rao and *Y. Suryanarayana*—for Petitioner.

The Government Pleader—for Respts.

ORDER OF REFERENCE TO THE FULL BENCH.

Spencer, J. :—This is an application under section 115 of Code of Civil Procedure asking us to revise the proceedings of an officer acting as Collector under the Land Acquisition Act (Act I of 1894) wherein he refused to make a reference under section 18 to the District Court in a matter upon which he had passed an award under section 11.

The first question is whether a remedy lies by way of a revision petition. In *Best and Co.* v. *Deputy Collector of Madras* (1), it was observed by a Bench of this Court that the proceedings under the Land Acquisition Act until the matter came before Land Acquisition Judge were not judicial proceedings and that the proper remedy of a person dissatisfied with the Collector's order was to sue under section 45 of the Specific Relief Act for an order of *mandamus* and not to file a revision petition. This decision professed to be based on the ruling of the Privy Council in *Ezra* v. *Secretary of State for India* (2) confirming the opinion of the Calcutta High Court reported at page 619, that the proceedings resulting in the award were administrative and not judicial. So too in *Kasturi Pillai* v. *Municipal Council, Erode* (3), it was observed that the Collector in making his award was not acting judicially. It has however been decided by another Bench of this Court in *Parameswara Aiyar* v. *Land Acquisition Collector, Palghat* (4), that the Collector's proceedings under Part III of the Act dismissing an application for a reference to the Court regarding his award are judicial proceedings and are subject to revision, and I am not prepared to dissent from this view, seeing that it is quite consistent with what the Judicial Committee said in the case in *Ezra* v. *Secretary of State for India* (2). In *The Administrator-General of Bengal* v. *The Land Acquisition Collector* (5) and in *Krishna Das Roy* v. *The Land Acquisition Collector of Pabta* (6), the Calcutta High Court took a similar view to that of this Court in *Parameswara Aiyar* v. *Land Acquisition Officer, Palghat* (4). *The Administrator-General of Bengal* v. *The Land Acquisition Collector* (5) was followed by another Court in *Hari Das Pal* v. *Municipal Board, Lucknow* (7). In *British India Steam Navigation Co.* v. *Secretary of State for India* (8), the learnad Judges refrained from deciding this point. *The Deputy Colletor, Calicut Division* v. *Aiyavu Pillai* (9), merely decides that Government need not be made a party to a reference under section 18. There can be no doubt that Government is not a "claimant" or "person interested" in such proceedings. In *Balkrishna* v. *Collector, "Bombay Suburban"* (10), two learned Judges of the Bombay High Court expressed their dissent from the view taken by this Court in *Parameswara Aiyar* v. *Land Acquisition Officer, Palghat* (4), but as they have not in my opinion met the reasoning of the Madras Judges, I prefer to adhere to the opinions expressed in this Court and in Calcutta to the effect that a Collector proceeding under section 18 of the Act is performing a judicial function and, as such, is subject to the extraordinary jurisdiction of the High Court.

In Bombay the doubt is expressed whether a Collector acting under sections 18 and 19 is a Court and, even if he is so, whether he can be said to be subordinate to the High Court.

But if as Krishnan, J., observed, the proceedings under those sections are really part and parcel of the final award by the Judge under section 26 of the same chapter, there can be no difficulty in finding from section 54 of this Act and section 3 of the Code of Civil Procedure that they are proceedings of a Court subordinate to the High Court.

My learned brother desires to have the question of jurisdiction referred for the opinion of a Full Bench. For my part I should be content to follow the decision of this Court reported in the authorised reports seeing that it is the most recent pronouncement of this Court and it was made after a full consideration of the earlier cases and is not inconsistent with the judgment of the Privy Council. But as my learned brother is of opinion that the question should be referred and I admit that there is considerable conflict of judicial opinion on the point, I agree to the reference in the terms proposed by him.

Odgers, J.:—In this Revision Petition, the first point raised is whether this Court has power to revise the proceedings of an officer acting as Collector under the Land Acquisition Act refusing to make a reference under section 18 of the Act after making an award under section 11.

The question has not been decided uniformly by the Courts in India and there are authorities both ways.

(1) (1916) 20 M.L.T. 388.
(2) (1905) 32 Cal. 605 (P.C.).
(3) (1919) 48 Mad. 280.
(4) (1918) 42 Mad. 231.
(5) (1905) 12 C.W.N. 241.
(6) (1911) 16 C.W.N. 327.
(7) (1913) 16 O.C. 374.
(8) (1911) 38 Cal. 290.
(9) (1911) 2 M.W.N. 367.
(10) 1923 Bom. 290.

In *Best and Co.* v. *Deputy Collector of Madras* (1), Abdur Rahim, Offg. C.J., and Seshagiri Ayyar, J., agreed with the opinion of Mukerjee, J., in *British India Steam Navigation Co.* v. *Secretary of State for India* (8), and held that this Court could not revise an order of reference made by the Land Acquisition Collector. In *British India Steam Navigation Co.* v. *Secretary of State for India* (8), the learned Judges held (page 241) that the Collector when he holds an enquiry and makes an award under section 11 is not a Court and is undoubtedly not a Court subject to the appellate jurisdiction of the High Court. They relied on *Ezra* v. *Secretary of State for India* (11) [afterwards in the P.C. in I.L.R. 32 Cal. 605.] In *Ezra* v. *Secretary of State for India* (11) it was held that the Collector in making his award is not a judicial officer. The Privy Council held that the proceedings resulting in an award by the Collector were administrative and not judicial and that if the judicial ascertainment of value is desired by the owner, he can obtain it by requiring a matter to be referred by the Collector to the Court.

There is also the case in *Balkrishna* v. *Collector*, "*Bombay Suburban*" (10), where Macleod, C.J., and Crump, J., held that the refusal of the Collector to refer is not an order of a Court and not as such subject to the High Court's powers under section 115 of the Civil Procedure Code. They expressly dissent from *Parameswara Aiyar* v. *Land Acquisition Collector, Palghat* (4) (to which reference will be made immediate'y) and held that the remedy was by way of suit as the High Court has not been given power to interfere with the proceedings of the Collector.

On the other side we have *Parameswara Aiyar* v. *Land Acquisition Collector of Palghat* (4) (Ayling and Krishnan, JJ). The learned Judges there based their decision on the view that there is a material distinction between Parts II and III of the Act and that in rejecting an application under section 19 (which falls within Part III) the Collector acts judicially and his order is subject to revision by the High Court. They were pressed apparently by the fact that unless such an order was open to revision it was not clear what remedy a person aggrieved by it possesses. The Judges examined the cases *Best and Co.* v. *Deputy Collector of Madras* (1) and also *Ezra* v. *Secretary of State for India* (2) *and British India Steam Navigation Company* v. *Secretary of State for India* (8) and as they point out the two latter cases practically go no further than saying that proceedings resulting in the award are administrative and not judicial. In *The Administrator-General of Bengal* v. *The Land Acquisition Collector* (5), the Calcutta High Court *held* that the Collector rejecting an application made under section 18 (1) of the Land Acquisition Act acts judicially and his order is subject to revision. They based their ruling on the distinction between the Collector's functions under Parts II and III of the Act. *Krishna Das Roy* v. *The Land Acquisition Collector of Pabta* (6) follows this decision. This view has also been adopted by the Patna High Court (*Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran*) (12).

Although I am inclined to agree with the view expressed in *Parameswara Iyer* v. *The Land Acquisition Collector of Palghat* (4) (above) yet I feel that in the conflicting state of the authorities the law on this point should be settled. It may perhaps be alleged against the later Madras view that there is no authority in the wording of the Land Acquisition Act itself for drawing a distinction between the functions of the Collector under Parts II and III of the Act. The distinction appears to me to be necessary though it seems somewhat forced and artificial. We, therefore, decide to refer to a Full Bench this question :—

Has the High Court power under section 115, C.P.C., or under section 107 of the Government of India Act to revise the order of a Collector acting under the provisions of the Land Acquisition Act, 1894, refusing to refer to the Court an application under section 18 of the same Act by a person interested requiring him to refer the matter for the determination of the Court.

Judgment :—This is a reference to a Full Bench under the following circumstances : The Officer acting as Collector under the Land Acquisition Act, Act I of 1884 decided, in the first instance, that certain land to be acquired by the Government for harbour purposes was Government land and that, therefore, no compensation was payable to anybody. Being dissatisfied with that decision or

(11) (1902) 30 Cal. 36.

(12) (1917) 2 P.L.J. 204.

advice one of the persons claiming to be interested in the land, in effect asked the Collector under section 18 of the Land Acquisition Act to refer the matter to the District Judge. That application was refused on the ground that the land being Government land there was no right to compensation and that the Land Acquisition Act had no application at all. A revision petition was then brought to this Court to revise that order and a preliminary objection was taken that this Court has no revisional powers over such orders. There is a considerable conflict of authority on the point and the matter has accordingly been referred to a Full Bench.

The only power of revision this Court has got is under section 115 of the Code of Civil Procedure. By the terms of that section a High Court can revise any decision made in any case by any Court subordinate to such High Court, and in which no appeal lies thereto. It is argued first of all, on behalf of the Crown that the Collector exercising his functions under section 18 is not acting judicially; secondly, that he is not acting as a Court; and thirdly, that, if he is acting as a Court, he is not a Court subordinate to the High Court. The authorities on the point are in an unsatisfactory condition, for in Madras there is the decision of a bench in *Best and Co.* v. *Deputy Collector of Madras* (1), in which it was held that proceedings in the nature of Mandamus under section 45 of the Specific Relief Act lay, because, and only because, this Court had no revisional powers in the matter; consequently the revision petition in that case was dismissed and an application under section 45 of the Specific Relief Act was allowed. The matter came before this Court again in *Parameswara Iyer* v. *Land Acquisition Collector, Palghat* (4), where Ayling and Krishnan, JJ., having considered the early Madras case, differed from the conclusion to which it came and held that the proceedings were those of a Court subordinate to the High Court and granted the revision petition. In so doing, they were following two cases in Calcutta. *The Administrator-General of Bengal* v. *The Land Acquisition Collector of Pabta* (5). The same result has been arrived at by the Patna High Court in *Saraswathi Pattack* v. *The Land Acquisition Deputy Collector of Champaran* (12). Later the matter came before a Bench in Bombay in *Balakrishna Debi* v. *Collector of Bombay* (10), and having considered all these previous cases, the Bombay Court came to the conclusion that *Parameswara Iyer* v. *Land Acquisition Collector, Palghat* (4) was wrongly decided, and that there was no power of revision. With that conflict of authority we have to make up our own minds on the point.

In *Ezra* v. *Secretary of State for India* (2), the Privy Council has decided that the Collector, exercising functions under the Land Acquisition Act down to the point when he gives what is called his award, is acting only in an advisory capacity and is not exercising any judicial function at all; but in these later cases, which I have referred to, it is pointed out, and I think correctly pointed out, that when the acts under Part III of which section 18 forms part, he is acting in a different capacity, because he has there to decide certain things: he has to send the case to the District Court if certain provisions in that section have been complied with, one of which is the question of time; that is to say, he has to decide whether the application is barred or not; and in doing so, in my judgment, he acts judicially.

But the further question arises whether he acts as a Court. I think it is quite possible for persons to be given judicial functions or functions which they have to exercise judicially without their being made Courts properly so called, and I think a very clear instance is the case of registration authorities who have to decide whether or not they will accept registration of certain documents; and it has been held by a Full Bench of this Court in *Krishnammal* v. *Krishna Iyengar* (13) that in respect of a refusal of registration by a registration officer no revision petition lies to this Court because he is not a Court at all. I doubt if the Collector sits in a Court.

Further, the question arises, assuming that the Collector is a Court, is he a Court subordinate to the High Court within the meaning of section 115 of the Code of Civil Procedure? In my judgment, he is not. There is no power of appeal from his decision to any one, either to the District Court or to this Court. There is nothing in the Act to show that he is, in the true sense of the word in any way subordinate to the High Court. As far as

(13) (1912) 23 M.L.J. 50.

Madras is concerned, the Courts recognised are those Courts, which are referred to in various statutes, such as, the Madras Civil Courts Act. His Court, if a Court at all must be a Civil Court. The Civil Courts are enumerated in the Civil Courts Act, and the Court of the Collector sitting under the Land Acquisition Act finds no place in that enumeration. On the whole, I think I must come to the conclusion that, even if the Collector, exercising his functions under section 19 although those functions are, as I have pointed out, judicial functions, is a Court, he is not a Court subordinate to the High Court. Therefore, no revision lies to this Court.

I think, however, it is right to add that as far as one can see without having had the point argued before us, it should seem that the Collector was wholly wrong in the course that he took on this occasion. He himself had decided that it was Crown land. If he was wrong in that decision, then the applicant had a right to have his case heard on his claim for compensation. When he is asked to refer that matter—so I understand it—to the Court for a decision, that is to say to the District Court, he bases his refusal on his own previous decision that the land was Crown land, and assumes that, because he has decided that, that decision is final and conclusive and the party is not allowed under the Act to have that matter gone into by a Court; it being worthy of observation that, in so deciding, he was not acting judicially at all, because he was then at a stage of the proceedings when, according to the Privy Council decision referred to above, he was merely acting in an advisory capacity. It is not for us to say what the proper remedy is; whether he should move the Government to direct the Collector to do his duty, or whether he can take any and what form of proceedings to have his case heard, if he has a case which deserves to be heard.

The answer to the question referred to us is that the High Court has no power under section 115 of the Code of Civil Procedure or under section 107 of the Government of India Act, to revise the order of a Collector acting under the provisions of the Land Acquisition Act refusing to refer to the Court an application under section 18 of the same Act by a person interested requiring him to refer the matter for the determination of the Court. As the preliminary point is one going to the root of the whole matter, it is unnecessary for this case to go back to the Referring Bench and we dismiss this petition with costs.

Phillips, J.:—I agree.

Ramesam, J.:—I agree. I would only add that it is desirable that the Act should be amended so as to give a remedy to the subjects in respect of possible arbitrary acts of Land Acquisition Officers in declining to refer under section 19 and not to leave them to depend upon the action of the Government in advising their officers.

Schwabe, C. J.:—I agree with the observation just made by my brother Ramesam.

Petition dismissed.

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* * 1924 Madras 446.

(FULL BENCH.)

SCHWABE, C J., COUTTS-TROTTER AND RAMESAM, JJ.

J. R. Freer—Appellant

v.

H. A. Johnson—Respondent.

F. A. No. 416 of 1922, decided on 19th October, 1923, from the decree of District Court of Trichinopoly, dated 30th March, 1922.

Divorce—Damages — Principles governing the award of damages discussed—Damages are not punitive—Means of co-respondent are not relevant,

The damages in divorce are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him for seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife, whether the co-respondent can pay that loss or not is immaterial. When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with in pursuance of the Judge's order. They may be ordered to be paid out to the petitioner, but this course is the exception and not the rule. They may be settled on the wife, or on her children, or otherwise dealt with, in the discretion of the Court, on well established principles.

V. V. Srinivasa Aiyangar and *T Krishnasawmi Aiyangar*—for Appellant.

Schwabe, C. J.:—In this divorce case, the petitioner and the co-respondent are both engine-drivers. The trial Judge found the respondent guilty of adultery, on the evidence of her having given birth to a child, over a year after leaving the petitioner, and granted a decree for divorce. He has exonerated the co-respondent from

the charges of adultery brought against him, and dismissed him from the suit with costs. The petitioner asks that the decree be confirmed and appeals against the exoneration of the co-respondent and asks for damages and costs against him. There was a considerable body of evidence against the co-respondent, on which the trial judge refused to act, although he did in the course of his judgment say that in course of time the intimacy between the respondent and the co-respondent appeared to have overstepped the bounds of decency. There was fairly direct evidence of adultery given by the petitioner's mother and son, and this the judge definitely disbelieved, though, in my view, on inadequate grounds. There was also a considerable body of other evidence, directed to show inclination to, *plus* opportunity for adultery, acts of familiarity between the two, circumstances under which they were alone together when adultery may have taken place, constant association between the two, meetings arranged in out of the way places, and the like. To this, must be added the admitted fact that the respondent gave birth to an illegitimate child, and no evidence or suggestion of any other person, being the father, was given, and the somewhat curious denials given on oath, by the respondent and the co-respondent themselves. She gave no denial in examination-in-chief, but in answer to the co-respondent said :

"The co-respondent had nothing to do with me sexually. I have my own resources and live on them ;

and he said :

"I never did any thing to make the respondent misbehave, or leave her husband" and "I had no indecent relationship with the respondent when she was at Madura,"

and nothing else on the subject. Now, it was definitely alleged that they had for sometime been living together in the co-respondent's house. His answer was that his sister and others were living there and that the respondent was a friend of the sister ; but no evidence was called to coroborate this. Indeed the respondent devoted attention mainly to proving ill-treatment by petitioner and neither seems to have taken much trouble to disprove the adultery alleged. It is possible that this was partly due to expressions that fell from the judge indicating that he was not satisfied with the petitioner's case. On the evidence, there was an overwhelming case against the co-respondent, and loath as I am to disagree with the trial Judge's findings of fact, the reasons he gives for disbelieving the evidence are so unconvincing, that I think we must reverse his decision and find the co-respondent guilty.

There remains the question of damages. The damages in divorce are not punitive. The means of the co-respondent are an irrelevant consideration, except in so far as they were of assistance to him for seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife ; whether the co-respondent can pay that loss or not is immaterial. When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with in pursuance of the judge's order. They may be ordered to be paid out to the petitioner, but this course is the exception and not the rule. They may be settled on the wife, or on her children, or otherwise dealt with, in the discretion of the Court, on now well established principles.

In this case, I doubt if the petitioner has lost anything by the act of the co-respondent. The home was clearly an unhappy one, owing to the incompatibility between the wife and the husband and the husband's mother. The wife took little or no part in looking after the petitioner's house or his comfort ; and he derived little pleasure from her society. She left him long before he commenced proceedings, and it is not proved that the co-respondent in any way persuaded her thereto. She was of easy virtue and of a gregarious and pleasure-loving disposition. There were no children of the marriage to be provided for, or the burden of whose up-bringing has been left to the deserted husband. The husband has no doubt been put to some expense, in having his marriage dissolved. I do not accept his statement that he has injured his prospects with his Railway Company, owing to the co-respondent's association with his wife, and I can find no other element of damages present. He will get his costs here and below and Rs. 100 to cover any loss he has suffered.

The decree is confirmed as regards divorce, but varied by finding the co-respondent guilty of adultery with the respondent

The appeal will be allowed with costs here and below against the co-respondent. The costs of the co-respondent, if paid, must be returned and the co-respondent must pay Rs. 100 as damages, such damages to be paid to the petitioner.

Coutts-Trotter, J.:—I agree and have nothing to add.

Ramesam, J.:—I agree.

Appeal allowed.

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* * 1924 Madras 448.

(FULL BENCH.)

SCHWABE, C J., COUTTS-TROTTER AND RAMESAM, JJ.

Sattayya Padayachi and others—Appellants

v.

Soundarathachi—Respondent.

L. P. A. No. 9 of 1923, decided on 24th October, 1923, from the judgment of Venkatasubba Rao in A.A.O. No. 226 of 1922.

Civ Pro Code, O. 4 r. 1—Presentation of plaint to Judge outside Court and out of office hours is valid if accepted by Judge.

Where a Judge accepts a plaint presented to him outside Court and after the usual office hours, the suit must be deemed to have been instituted on the day on which the plaint was so presented. (34 All. 482, *Full*.)

K. Bhashyam Aiyangar—for Appellant.

S. Ramaswami Aiyar—for Respondent.

Schwabe, C J:—This is an appeal under the Letters Patent, Oldfield and Venkatasubba, Rao, JJ., having differed in A.A.O. No. 226 of 1922.

The point is a very short one. The Judge of a Court in the Mofussil having risen for the day went to his club. At his club he was approached by a Vakil who asked him to receive a plaint, it being the last day for the expiration of the period of limitation. The learned Judge accepted the plaint and cancelled the stamp on it by writing upon it the words "presented to me by" giving the name of the Vakil "at 7-30 p.m., and signed and dated it. It is argued that nevertheless that suit is barred, because it has not been instituted within the period limit. Section 3 of the Limitation Act runs thus: "Subject to the provisions contained in sections 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed." It is argued that the suit was not instituted on that day. Now turning to the Code of Civil Procedure, Order 4, rule 1 provides that "every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf." The Judge of the Court could appoint himself or any one else as the officer to whom a particular plaint was to be presented. There is nothing in the rule to show that the presentation must be within office hours, or must be to the officer appointed at the Court or at any particular place and I see no reason at all why if a Judge so chooses, he should not constitute himself the officer to receive the particular plaint at any place that he chooses. It is a matter which is not without authority, for precisely the same circumstances arose in *Thakur Din* v. *Hari Das* (1). In that case the memorandum of appeal was presented to the District Judge at his private residence after office hours and he accepted it taking the precaution to state that it would be admitted subject to his having got the power to do so. The Full Bench of Allahabad held that he had the power. The Division Bench here differs. Oldfield, J., stated that the ruling in *Thakur Din* v. *Hari Das* (1) had no application to Madras, because, although in Allahabad it might be the custom for judges to be approached outside Court, in his experience it has not been so in Madras. Venkatasubba Rao, J., on the other hand, gave instances of the numerous kinds of applications to his knowledge that had been made to Judges in Madras when away from the Court and outside ordinary office hours.

I agree with the Full Bench decision in *Thakur Din* v. *Hari Das* (1), and I see no reason at all to say that the same principle should not be applied in Madras. The appeal will be dismissed with costs.

Coutts-Trotter, J.:—I am of the same opinion. I think that what pressed Oldfield, J., was the idea that, if you state that a Judge may receive plaints in this way out of office hours, you are committed to the further proposition that he must. With great respect to the learned Judge, I think that that is a fallacy. I think that it is in the discretion of the Judge to act as he did in this case or refuse to do so; and, if the thing became a nuisance, I have no doubt that judges would refuse to oblige litigants

(1) (1912) 34 All. 482 (F.B.).

by taking documents in this way. I should like it to be understood that, so far as I am personally concerned, any such application would be received by me with great disfavour.

Ramesam, J.:—I agree with the judgments just delivered.

Appeal dismissed.

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* * 1924 Madras 449.

(FULL BENCH.)

SCHWABE, C.J. COUTTS TROTTER AND RAMESAM, JJ.

Venkatrama Aiyar—Appellant

v.

A. V. Rangiyan Chetty and another—Respondents.

L. P. A. Nos. 10, 11 and 12 of 1922, decided on 25th October, 1923, from the order and judgment of the High Court in C. M. A. No. 11 of 1921.

T.P. Act, S. 52—Puisne mortgagee's right to redeem prior mortgage is not lost where he is not made party—Lis pendens *affects execution sale but not where the decree expressly makes plaintiff's rights subject to execution sale.*

Where a first mortgagee sues on his mortgage without making the second mortgagee a party and brings the property to sale and purchases it in execution, the right of the second mortgagee to redeem the first mortgage is not extinguished by the proceedings in such a suit to which he was not a party. However this rule cannot apply where the so-called second mortgage did not exist either at the time of suit or decree or even at the time of the sale in execution of the decree on the first mortgage. The principle of *lis pendens* affects private alienations as well as execution sale of property in respect of which a charge is claimed in a suit for maintenance by a Hindu widow but not in a case where maintenance decree expressly subjects plaintiff's rights to rights of mortgagee decree-holder.

K. V. Krishnaswami Aiyar and *N. Swaminatha Aiyar*—for Appellant.

K. R. Rangaswami Aiyangar—for Respondents.

Ramesam, J.:—On 6-10-1888, a suit (O. S. No. 1 of 1889) was filed by a Hindu widow for maintenance. As to one of the defendants (14th) impleaded in that suit, she alleged that he held a mortgage over a portion of the property sought to be charged with the maintenance and that the said mortgage was obtained fraudulently and without consideration, was not for family benefit and could not affect her right to charge the maintenance on the mortgaged property. The 14th defendant pleaded that he held two hypothecation bonds from the 1st defendant and that he had sued on the latter in O. S. No. 16 of 1887, and obtained a decree (on 28-9-1887).

The District Judge found that the plaintiff had no cause of action against the 14th defendant. He gave a decree for maintenance which was made a charge against the *interest of defendants* 1 *and* 2 *in the plaint properties* subject to the lien claimed by the 14th defendant among others. (22-8-1890).

Meanwhile in execution of O. S. No 16 of 1887 the mortgaged property was sold on 28-11-1889 and the decree-holder purchased it and obtained delivery on 25-12-1889. The respondents before us are his assignees.

In execution of the maintenance decree the same property was sold on 10-3-1920 and the purchaser obtained delivery on 19-7-1920. He is the appellant before us. Objection was made by the respondents to the delivery and the matter came up to this Court under section 47, C. P. Code, in C.M.A. No. 11 of 1921. The two learned Judges who heard it having differed, the appeal was dismissed under section 98, C.P.C. Hence this Letters Patent Appeal.

The appellant, while conceding that his purchase was subject to the mortgage of the 14th defendant in O. S. No. 1 of 1889, claims that he can ignore the sale in execution of O. S No. 16 of 1887 and contends that his purchase is valid subject to the mortgage which he is entitled to redeem. This contention is raised in two forms:—

That the decree-holder in O. S. No. 1 of 1889 was in the position of a second mortgagee and that first mortgagee not having impleaded her in the sale proceedings of O. S. No. 17 of 1887, he is still liable to be redeemed by the second mortgagee or by the appellant who is subrogated to the second mortgagee's rights. It is true that, when a first mortgagee sues on his mortgage without making the second mortgagee a party, brings the property to sale and purchases it in execution, the right of the second mortgagee to redeem the first mortgage is not extinguished by the proceedings in such a suit to which he was not a party. *Mulla Veettil Seethi* v. *Achuthan Nair* (1). But the principle cannot apply in this case as the so-called

(1) (1910) 21 M.L.J. 213 (F.B.).

second mortgage did not exist either at the time of the suit or decree (O. S. No. 16 of 1887) or even at the time of the sale in execution of the decree. The charge granted by the maintenance decree in O. S. No. 1 of 1889 came into existence only at the date of the decree and not earlier. The charge can be made use of as if it existed at the date of the plaint only by the principle of *lis pendens*. This leads to the next contention.

By the doctrine of *lis pendens*, the 14th defendant in O. S. No. 1 of 1889 was prohibited from dealing with the property [or selling it in execution, *Kunhi Umah* v. *Amed* (2)] which was the subject of the maintenance suit [*Dose Thimmanna Bhutta* v. *Krishna Tantri* (3)], so as to affect the rights of the plaintiff under the decree therein. The appellant contends that the sale in execution of O. S. No. 16 of 1887, if upheld, will so affect the plaintiff's rights under the decree in O. S. No. 1 of 1889. This contention cannot be accepted. In O. S. No. 1 of 1889 it was held that the plaintiff had no cause of action against the 14th defendant, that his mortgage was perfectly valid and the charge given to the plaintiff was subjected to his rights. The decree used the word 'lien' but as the judgment made no distinction between the mortgage and the decree (which was also known to the Court) obviously all the rights of the 14th defendant under his decree were intended to be saved. This is the natural and proper construction of the decree in the light of the findings in the judgment and the pleadings. That being so, it cannot be said that the sale in execution of O. S. No 16 of 1887 affects the rights of the plaintiff in O. S. No. 1 of 1889 under the decree which saved the rights of the decree-holder in O. S. No. 16 of 1887. The consideration that the effect of this conclusion is to make the lien obtained by the decree-holder in O. S. No. 1 of 1889 illusory so far as the property mortgaged to 14th defendant was concerned, cannot affect the construction of the decree which *expressly* saved the rights of the 14th defendant and cannot, by *implication*, adversely affect such rights simply because it purported to give a charge to the plaintiff on the interests of defendants 1 and 2 which had ceased to exist.

(2) (1890) 14 Mad. 491.
(3) (1906) 29 Mad. 508.

The appeal is dismissed with costs.

Letters Patent Appeals Nos. 11 and 12 follow and are dismissed. In L.P.A. No. 12 with costs.

Appeals dismissed.

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* * **1924 Madras 450.**

PHILLIPS AND VENKATASUBBA RAO, JJ.

Loorthia Odyar—Appellant

v.

Gopalasami Aiyar and another—Respondents.

F. A. No. 257 of 1920, decided on 5th September, 1923, from the decree of Addl. Sub-Judge, Tanjore, in O. S. No. 93 of 1919.

T. P. Act, S. 53—Preference of one creditor over another does not make transfer void but it is valid to the extent to which the debts of transferor are discharged.

Although the effect of the transaction or even the intention of the debtor in making it may be to defeat another creditor it is not a fraud within the statute. A preference of one creditor to another is no ground for impeaching the deed even if the debtor was intending to defeat an anticipated execution by another creditor. In such cases effect is given to the deed to the extent to which the consideration was applied for the discharge of the transferor's debts. (43 Cal. 521, 44 Cal. 662, 55 Cal. 1051, 33 Mad. 334, 30 Mad. 6, *Diss.*) [P. 453, C. 1.]

A. Krishnaswami Iyer—for Appellant.

K. Bhashyam Aiyangar and *P. J. Kuppanna Rao*—for Respondents.

Venkatasubba Rao, J.:—The question to be decided in this appeal is : Is the mortgage (Ex. I) executed by the 1st defendant, in favour of the 2nd defendant, liable to be set aside, at the instance of the plaintiff, under section 53 of the Transfer of Property Act ?

The 1st defendant and her son had executed in favour of the plaintiff a promissory note and the plaintiff filed a suit for the recovery of the amount due under it. The 1st defendent filed a written statement in that suit, denying the execution of the promissory note. This statement was filed on the 7th of February, 1916. On the date of the hearing the 1st defendant did not appear and an *ex parte* decree was obtained by the plaintiff in about June, 1916.

In the meantime, that is, a few days after the filing of the written statement, but before the decree aforesaid was passed, the 1st defendant mortgaged her properties

to the 2nd defendant by Ex. I, dated 26th February, 1916. The 2nd defendant is the brother's son of the 1st defendant and it is admitted that the mortgage deed comprised every item of immoveable property, possessed by the 1st defendant. At the time of the mortgage, the suit against the 1st defendant was pending and a false defence was presumably put in, in order to gain time. The mortgage purports to be for Rs. 10,000; but it is in evidence that the 2nd defendant was not himself possessed of much property; but it is said that his father and mother were wealthy and that he was in management of his father's properties. The 2nd defendant also admits that before the date of this transaction, he had not lent any large sums of money and that the maximum amount lent by him on any single occasion was about Rs. 300 or Rs. 400. The admissions made by him clearly show that the mortgage was not taken in the usual course of business, but that it was a transaction of an unusual kind, from the point of view of the 2nd defendant. No explanation is forthcoming, as to why he suddenly turned a money-lender and lent such a large sum of money. As a fact, he admits that he had only with him Rs. 2,000, on the date of Ex. I, and that he had to borrow the major portion of the consideration from his maternal aunt's husband and it is remarkable that this man has not even been examined. It is also significant that the mortgage that was created was a usufructuary mortgage, for a period of 10 years. It seems to me that the object of creating such a mortgage was to diminish the value of the equity of redemption, even granting that it was worth anything at all. What necessity was there to create a mortgage over the entire property of the 1st defendant, which was to subsist for such a long period of time? It is stated in Ex. I that the object of executing the mortgage was to raise money to pay off several creditors of the 1st defendant. There is nothing in the evidence to show that there was any pressure brought to bear by the creditors, except in regard to one debt; whereas, so far as the plaintiff is concerned, he had actually filed a suit; but it is curious that the mortgage deed makes no provision whatsoever, for the payment of the debt due to the plaintiff. That the 1st and 2nd defendants intended to defeat the plaintiff's claim appears further from the circumstance that the mortgage deed was registered, not at the Registrar's office, not even at the residence of either the mortgagor or the mortgagee but at the house of one Dharmalinga Pillay in a place called Settiapuram. On a consideration of the probabilities of the case and of the evidence, I have come to the conclusion that the 1st defendant executed the mortgage, with the intention of defrauding the plaintiff and that the 2nd defendant was aware of that intention.

The consideration for the mortgage deed is said to consist of:

(1) Rs. 7,037-12-10, which is the aggregate amount of the debts, due by the 1st defendant to third parties and which the 2nd defendant claims to have discharged. The learned Subordinate Judge thinks that these debts were really not due and that the recital in the mortgage deed regarding their existence is false. I was first inclined to agree in this view; but on further consideration, I am not prepared to accept this finding. The transaction, as I pointed, is no doubt extremely suspicious; but documents were produced to evidence the previous debts and witnesses were examined to prove those documents, and I find that there was no cross-examination, directed to attack the genuineness of the documents. If they were seriously impugned, it would have been open to the 2nd defendant to produce further evidence and I cannot draw any inference adverse to him, from his omission to examine more witnesses on this point. As it is, he examined Ponnusami Pillai, who proves not only the promissory note, executed in his own favour, but also Ex. III-B, executed in favour of Radhakrishna Pillai. Sadasiva Pillai proves Ex. III-C and Narayanaswami Aiyar proves Ex. III-A. In the circumstances, I am disposed to think that the evidence adduced is sufficient to prove the existence of the debts and I therefore find that the consideration to this extent did really pass for the mortgage document.

(2) Rs. 1,873-8-0, said to be the amount, which was due by the 1st defendant, to the 2nd defendant, on a promissory note of a prior date, namely, 20th May, 1913. Has the 2nd defendant made out the existence of this debt to himself? I am satisfied that he has not. He was cross-examined, in regard to his capacity to advance money. He had also to admit that he did not keep any accounts. A specific question was put to him, as to whether he had lent any

monies before the date of Ex. I. In the plaint, it was expressly stated that the promissory notes, mentioned in the deed of mortgage, were not genuine. The 2nd defendant was therefore bound to give clear evidence of the debt, alleged to be due to himself. Beyond his word, no evidence has been adduced. The promissory note in his favour Ex. II, bears the attestation of Samiah Odayar and Srinivasa Aiyar. Neither of them has been examined. I may note that this Samiah Odayar has also attested Exs. I, III-A and V, and this shows that he is more or less intimately connected with the defendants. It is still more strange that the 1st defendant has not been examined at all. The 2nd defendant admits that the relations between him and the 1st defendant have continued to be friendly. There is another circumstance to which I may advert, though I do not propose to base my finding upon that. From a comparison of the documents filed in the suit, Ex. II appears to have been written by D. W. 4, and although he was examined, with reference to the other documents, with which he was connected, not a single question was put to him bearing on Ex. II. The mortgage document having been executed in circumstances which show that the object of the transaction was to defeat the plaintiff, the onus was heavily upon the 2nd defendant, to prove the existence of the debts, alleged to have been discharged, from and out of the consideration for the mortgage. In *Palamalai Mudaliyar* v. *The South Indian Export Co.*(1), Wallis, J., (as he then was) states the law thus :—

"Now, if the sale was executed with the object of preferring these two creditors to the plaintiffs and the other creditors, it is clear and is admitted, that the sale would not be voidable, under section 53 of the Transfer of Property Act; but the burden of proving this, where the sale appears otherwise to be voidable, is on the defendant and should be established by satisfactory evidence."

This principle was also accepted by Mitra and Casperz, JJ., in *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (2). I have come to the conclusion that there was no debt, due by the 1st defendant to the 2nd defendant, previous to Ex. I and that the recital in it to the contrary is false.

(3) Rs. 1,088-11-2, alleged to have been paid by the 2nd defendant to the 1st defendant, at the time of the registration of the document. Aiyasami Odayar, the 2nd defendant's father is stated to have paid this amount before the Sub-Registrar. This man was not examined. According to the evidence, adduced on behalf of the defendants, the mortgage was taken for his benefit. He is not only alleged to have paid the amount, at the time of the registration; but he is said to be the person who was responsible for the recitals in Ex. I. Moreover, he attested Exs. III, III-A, and III-B. In the circumstances, I think that the failure to examine him as a witness was deliberate. Once again, I may advert to the fact that the 1st defendant was not examined and she also could have given material evidence on this point. Payment before the Sub-Registrar quite often signifies nothing; because to give the transaction an appearence of reality, the parties not unusually resort to this device. I am therefore not satisfied that this sum was really paid to the 1st defendant. Even assuming that it was paid, I have not the least doubt that the object of the payment was to defraud the 1st defendant's creditors; because as, pointed out in *Palamalai Mudaliyar* v. *The South Indian Export Co.* (1), converting immoveable property into cash is the most obvious and effective method of defeating and delaying creditors.

Having thus found on facts, I must now consider what the law on the subject is. In *Chidambaram Chettiar* v. *Sami Aiyar* (3), it was held that where a transfer, though in part was for valuable consideration, was, as regards the other part only, an arrangement to defeat creditors, it was wholly void under section 53 of the Transfer of Property Act. In that case, the assignment that was impeached was in favour of the creditor and the money obtained by the assignor was partially utilised for the payment of his debts. Nevertheless, it was held that as the arrangement was to some extent a device, intended to defeat the assignor's other creditors, the transaction was entirely invalid and no effect could be given to it. The reason for this decision, as I understand it, appears to be this. A mere preference of one creditor to another does not render the transaction voidable under section 53 of the Transfer of Property Act. But if it

(1) (1910) 33 Mad. 334.
(2) (1908) 35 Cal. 1051.
(3) (1907) 30 Mad. 6.

is shown that the object of the transaction is not merely to prefer a creditor, but in addition is to defeat or to delay the other creditors, it then ceases to be a transaction by which merely a creditor is preferred, but becomes a transaction to which section 53 is directly applicable. The next step in the argument seems to be that the inclusion of a fictitious debt furnishes evidence of an intention to defeat the creditors and the transaction is thus wholly void against them. I may remark that this case is not an authority upon section 53, because the learned Judges expressly state in their judgment, that the question before them was to be decided, with reference to the general principles of justice and good conscience, the property with which they were dealing not being immoveable property and section 53 not having therefore direct application. Apart altogether from this, the recent decisions of the Judicial Committee, *Mushar Suhu* v. *Hakim Lal* (4), *Mina Kumari Bibi* v. *Bijoy Singh* (5) place the matter beyond doubt. In the former, at page 525, an extract is given from the judgment of Palles, C. B., *In re Moroney*, where it is stated that although the effect of the transaction, or *even the intention of the debtor in making it* may be to defeat another creditor, it is not a fraud within the statute. Their Lordships, towards the close of their judgment, say that a preference of one creditor to another is no ground for impeaching the deed, even if the debtor was intending to defeat an anticipated execution by another creditor. In the latter case, *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (2), equally strong observations were made. Their Lordships say at page 671: "It may be that the judgment-debtor preferred the plaintiff and that he did this of set purpose; yet this would not stamp the transaction as a fraudulent transfer." On these authorities, it is perfectly clear that the transaction before us cannot be regarded as wholly void, as against the plaintiff.

I may add that in *Rajani Kumar Dasi* v. *Gaur Kishore Shaha* (2), *Palamalai Mudaliyar* v. *The South Indian Export Co.* (1) and in *Umachakutti* v. *Ummerkutti Haji* (5), the transactions were not held to be wholly invalid and effect was given to the deeds to the extent to which the consideration was applied, for the discharge of the transferor's debts. I therefore hold that the mortgage in favour of the 2nd defendant is good, to the extent of Rs. 7,037-12-10 and that the property is liable to be sold, subject to this right of the 2nd defendant. The appeal will be allowed to that extent. The parties will pay and receive proportionate costs throughout.

Phillips, J.:—I agree.

Decree modified.

(4) (1916) 43 Cal. 521 (P.C).
(5) (1917) 44 Cal. 662 (P.C.)
(6) (1915) 29 I.C. 589.

** 1924 Madras 453.

KUMARASWAMI SASTRI AND WALLER, JJ.

V. A. Subba Rao—Appellant

v.

Ponnammal Nadathi and others—Respondents.

S.A. No. 194 of 1921, decided on 13th September, 1923, from the decree of Addl. Sub-Judge, Tinnevelly.

Transfer of Property Act, S 83—Sub-mortgagee.

A sub-mortgagee is an assign and a deposit of money as payable both to the legal representative and the sub-mortgagee is a proper deposit. [P. 455, C. 1.]

S. Ramaswami Aiyar—for Appellant.

C. S. Venkatachari—for Respondents.

Judgment:—This second appeal arises out of a suit by appellant to redeem a mortgage executed by him in favour of the husband of the 1st defendant who died leaving the 1st defendant, his widow, and defendants 2 and 3, his minor daughters. The 1st defendant in 1909 and after her husband's death sub-mortgaged the property and the 4th defendant claims to be entitled to the amount due on the sub-mortgage. The contention of defendants 1 to 3 is that the sub-mortgage originally created by the 1st defendant was a nominal transaction. The District Munsif found that the sub-mortgage was a genuine transaction supported by consideration but the Subordinate Judge on appeal reversed the decree on this point. In 1917, the appellant filed O. P. No. 33 of 1917 and deposited in Court the amount due on the mortgage. It is not disputed that the amount deposited was the amount legally payable on the mortgage. He seems to have stated that there was a sub-mortgage and that the 4th defendant claimed under it. Notice was issued to defendants 1 to 3 and to the 4th defendant. Owing to the contention raised by 1st defendant that the

sub-mortgage was nominal and that the 4th defendant was not entitled to any portion of the money deposited in Court, the money was not paid to anybody but remained in Court. It was after decree in the suit (O. S. No. 515 of 1917) ordered to be paid out by the District Munsif to the 4th defendant who drew this sum.

The first question is whether the deposit made under the provisions of section 83 of the Transfer of Property Act in O. P. No. 33 of 1917 was a proper one. Section 83 of the Act enacts that a mortgagor may, at any time before a suit for redemption is barred, deposit in a Court having jurisdiction to the account of the mortgagee the amount remaining due on the mortgage. There can be little doubt that the word 'mortgagee' includes the legal representatives and assigns of the mortgagee. It is argued that a sub-mortgagee is not an assign and that a deposit of the money as payable both to the legal representative and the sub-mortgagee is not a proper deposit.

We are unable to uphold this contention. Fisher in his Law on Mortgage observes "Mortgages are frequently transferred by way of sub-mortgage. In that case the sub-mortgage is a compound mortgage consisting of a mortgage of a chose in action (*viz.*, the original mortgage debt), and of the property which is security for the original mortgage debt." In cases of suits where there is a sub-mortgage, the decree has to direct an account of what is due on the original mortgage and of what is due on the sub-mortgage and payment of what is due on the sub-mortgage not exceeding the sum due on the original mortgage and the residue, if any, to the original mortgagee. Form No. 9, Appendix D to the Code of Civil Procedure refers to suits by a sub-mortgagee against the original mortgagor and mortgagee and shows that an account has to be taken on the above footing. Ghose in his work on the Law of Mortgages in India observes "Debts secured by mortgage are also frequently assigned by way of security. Such transactions are known as sub-mortgages and may be evidenced merely by a deposit of title-deeds. The sub-mortgagee by virtue of the assignment is not only entitled to the usual remedies against his own mortgagor but also against the original mortgagor." It is clear that a claim by a sub-mortgagee against the original mortgagor cannot be met by a plea of want of privity as the sub-mortgage is only an assignment of the original mortgagee's rights. Where the sub-mortgage is for an amount equal to or in excess of the original mortgage debt it will operate as a complete assignment, and if for any lesser sum, as an assignment *pro tanto*.

We have not been referred to any case where a deposit in Court under section 83 of the Transfer of Property Act has been held to be bad owing to the assignee of the mortgage being stated as the person entitled to the money. Where a person having notice of an assignment pays the money into Court and names only the original mortgagee who has parted with his rights as the person entitled to receive the sum deposited we do not see how he can, if the money is taken away, resist a suit by the assignee of the mortgage before such deposit. [See *Narayana Mudali* v. *Raghavammal* (1)]. A sub-mortgagee will be a necessary party to a suit for redemption and we think that a deposit will not be bad merely because the petition states the persons entitled on the original and sub-mortgages and the Court issues notice to them. The case will, of course, be different if the mortgagor alleges claims of persons not the legal representatives or assigns of the mortgagee for the purpose of seeing that the money is not drawn out or of supporting the case of persons with no title.

We do not think that *Madhavi Ammal* v. *Kunhi Pathumma* (2) and *Debendra Mohan Roy* v. *Sona Kunwar* (3) referred to by the respondent apply to the case of sub-mortgages. They were cases where strangers having no right in the mortgage were mentioned as persons entitled to the money deposited.

The fact that the mortgagee and sub-mortgagee have disputes *inter se* either as to the validity of the sub-mortgage or the amount due thereunder will not affect the mortgagor. Where the fact of a sub-mortgage is not disputed it is no part of the business of the mortgagor to decide whether the sub-mortgage is real or nominal. In the case of legal representatives it has been held in *Nagathal* v. *Arumugham Pillai* (4) that any dispute that may arise between the heirs as to their shares will not affect the mortgagor making the deposit and we

(1) (1908) 18 M.L.J. 462.
(2) (1899) 23 Mad. 510.
(3) (1904) 26 All. 291.
(4) 1923 Mad. 354 (1).

can see no reason why a similar rule should not apply where disputes arise as to the right to the money between the mortgagee and the sub-mortgagee from him. A person executing a sub-mortgage and giving an apparent title should not cast on the mortgagor, a stranger, the duty of deciding who is entitled. To hold otherwise would in effect deprive the mortgagor of the rights given to him by section 83 where a mortgagee disputes the effect of his own act in executing a document which on the face of it creates rights in another to the mortgage money.

We are of opinion that a sub-mortgage is an assignment of the mortgage and that having regard to the remedies of the sub-mortgagee a deposit in Court does not contravene the provisions of section 83 of the Transfer of Property Act merely by reason of the fact that the mortgagor recites the sub mortgage in his petition and the Court directs notice to issue and the money is owing to disputes between the mortgagee and his sub-mortgagee, not paid out.

The next question is as to the liability of the defendants for mesne profits. The 2nd and 3rd defendants are minor daughters and they cannot be liable for mesne profits owing to any wrongful act of their mother. So far as the 1st and 4th defendants are concerned it is immaterial to the plaintiff whether the 1st defendant continued in possession or parted with it to somebody else. 1st defendant died pending second appeal and her legal representatives are brought on record. If she created a sub-mortgage it was her duty to get back possession and hand it over to the mortgagor. The 1st defendant is found by the Subordinate Judge to be in possession. So far as the rate of mesne profits is concerned there is no dispute. We think that defendants 2 and 3 as legal representatives of the 1st defendant and out of her assets and 4 are jointly liable to pay the amount decreed for mesne profits.

As regards the amount deposited in Court in O. P. No. 33 of 1917 which has been drawn by 4th defendant we think that on the finding of the Subordinate Judge the 4th defendant is liable to pay the sum to the 1st defendant. As we hold that the deposit was valid there is no reason why the plaintiff should pay the sum over again. There will be a decree in favour of the 1st defendant against the 4th defendant for recovery of the amount drawn by him.

The decree of the Subordinate Judge will be modified as decided above. As the appellant has succeeded in all the grounds urged, respondents 1 and 4 will pay his costs of the appeal and in the Courts below.

Decree modified.

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* * 1924 Madras 455.

SCHWABE, C J., AND WALLACE, J.

Board of Revenue, Madras—Referring Officer

v.

S. R. M. A. R. Ramanadhan Chettiar—Assessee.

Ref. No. 5 of 1922, decided on 28th September, 1923, referred by Secretary, Board of Revenue, Income Tax, Madras.

(a) *Income Tax Act (VII of 1918), S. 9, sub-S. 2, Cl. 17—Assessee is not entitled to allowance for deduction—On sale of machinery in mills not sold as obsolete.*

The words 'machinery or plant which has been sold or discarded as obsolete' in Cl. 7 of sub-S. 2 of S. 7 do not include the case of a sale of machinery which is not sold as obsolete. The words "as obsolete" govern both 'discarded' and 'sold'. [P 456, C. 2.]

(b) *Interpretation of statutes—Punctuation.*

Where the statute has been punctuated, the punctuation marks are part of the statute. [P. 456, C. 1.]

M. Subbaraya Aiyar—for Assessee.

The Govt. Pleader (C. V. Ananthakrishna Aiyar,—for Referring Officer.

Schwabe, C. J.:—The question referred for the opinion of the Court is whether the assessee is entitled to the deduction from the annual profits of what in fact is a loss made by him by the sale of certain machinery or plant. He carried on various businesses, two of which consisted of rice mills. He sold those mills and wishes to bring into account the difference between the purchase price of the machinery at those mills and the sale price, giving credit for amounts, if any, allowed to him in any previous year for depreciation. Whether he can do so or not turns on the proper interpretation of section 9 of the Income Tax Act, VII of 1918, sub-section (2), clauses 6 and 7. Certain specified allowances are thereby made, which may be taken into account in arriving at the profits of the business. While the machinery is being used, clause 6 allows a certain annual depreciation on such machinery, the practice

being, we are told, to consider that the machinery has a life of 15 years, and therefore to allow an annual depreciation as a general rule of 6¼ per cent. Clause 7 deals with cases where the machinery has been sold or discarded as obsolete and in that case, the assessee is entitled to deduct from his profits the difference between the original cost reduced by the annual allowances for depreciation added together, and the amount for which the machinery is actually sold or its scrap value. It was contended in this case that the assessee, who had got rid of these two mills by sale had sold them as obsolete. There was no finding of fact as to this in the original case referred to this Court and for that reason we sent it back to the Commissioner. Evidence has been taken before him and he has found as a fact that the machinery was sold as not obsolete. It appears that, so far as one of the mills is concerned, the machinery had been allowed to get into a very bad state of repair, and required the expenditure of a considerable sum to put it in proper working order. Evidence has also been given that it had been put in proper working order by the purchaser and is being used for its proper purposes, namely, the milling operations. On that, the Commissioner has found the fact that the machinery was not obsolete, and I cannot see how we can say that he was wrong in so finding.

It is then argued that, on the true construction of clause (7), all sales of machinery are included, irrespective of whether they are sold by reason of their being obsolete. In other words, that the words "as obsolete" govern the word 'discarded' appearing immediately before them, and not the word 'sold.' The phraseology of this clause is not very happy, because it is obvious that the words could bear either meaning; but the statute has been punctuated, and we must take the punctuation marks, as part of the statute. If it was intended to read the words 'as obsolete' as governing 'sold' one would expect to find a comma after the word 'sold.' There is none, the comma being put after the word 'obsolete'. Further it does not seem probable that the legislature meant to provide a deduction for losses, on sales of machinery by manufacturing concerns, without at the same time providing for the bringing into account as profits any profits that might be made on such sales. Sales of machinery are sales of part of the capital of a concern of this kind, and thus resulting profits or losses on such sales are dealt with quite apart from this section. Without this clause at all, the Commissioner, can and does consider, whether or not realised profit or realised loss on such a sale lie to be brought into account or not, and the answer depends on whether the sale is in fact part of the ordinary business operations of the concern.

On these grounds, I think the answer to the question referred to us is that the assessee is not entitled to the deduction claimed.

The question originally referred to us was "Is an assessee disentitled from claiming from out of his income from business an allowance under section 9 (2), clause (7), in respect of a rice mill machinery, when the assessee has ceased to derive profits from rice mill business, though he earns profits from other parts of his business?" That question does not arise, as we find that he is not entitled to an allowance under section 9 (2), clause (7), because the machinery was not sold or discarded as obsolete. We are told that the assessee came here originally, believing that the point he had to argue was whether the fact that he ceased to derive profits from his rice mill business, when he earned profits from other parts of his business, prevented section 9 (2), clause (7) applying, and he understood from the wording of the reference that the whole case was going to proceed in this Court on the basis that he would be entitled to an allowance under section 9 (2), clause (7), but for the fact that he ceased to carry on the rice mill business and that this was admitted. I think there is a good deal in what he says, and that he could not have had any idea from the terms of the reference that he was going to be called upon to argue the question, whether or not the sale of his business machinery had been because that machinery had become obsolete and that therefore he was not entitled under section 9 (2), clause (7) in any event. In these circumstances, I think there must be no costs of this reference.

Wallace, J.:—I agree. I have nothing to add.

Reference answered.

* 1924 Madras 457.

SPENCER AND DEVADOSS, JJ.

K. C. Manavikraman—Appellant

v.

N. C. Ananthanarayana Ayyan and others—Respondents.

S. A. No. 22 of 1922, decided on 28th August, 1923, from the order of District Court of South Malabar, dated 21st November 1921.

(a) *Civ. Pro. Code, Ss. 38, 39, 37 and 21—Court losing jurisdiction over property during execution can't proceed with it.*

Section 38 does not make it optional to a Court to execute its own decree, or to transmit it to the Court which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. Although the words in S. 39 are "the Court may send it for execution," in all cases the Court should send its decree to the Court which has territorial jurisdiction if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court.

(b) *Jurisdiction—Consent—Objection to jurisdiction as regards place of suing must be raised at earliest opportunity.*

There must be failure of justice owing to wrong place of suing before objection can be allowed. [P. 458, C. 2]

K. P. M. Menon—for Appellant.

C. V. Ananthakrishna Aiyar and *P. S. Narayanasawmy Aiyar*—for Respondents.

Judgment:—In O. S. No. 6 of 1919, a decree for redemption of a kanom demise was passed by the Subordinate Judge of Ottapalam on March, 5th, 1920. An execution petition was filed on August, 6th, 1920, for having a re-valuation made of the improvements and for delivery of the property. On the 1st October, 1920, the place, where the mortgaged property was situated, was transferred from the jurisdiction of the Ottapalam Subordinate Judge's Court, to that of the Palghat Subordinate Judge's Court. The Subordinate Judge of Ottapalam disposed of the execution petition and in the course of so doing, he ordered on the 16th December, 1920, that there should be a re-valuation of the property, and on the 11th April, 1921, he ordered that a warrant for delivery of the property should be issued, returnable on the 21st June, 1921, and he adjourned the further hearing of the petition for disposal of other matters referred to therein.

On appeal to the District Judge, an objection was taken for the first time to the jurisdiction of the Subordinate Judge of Ottapalam to pass an order for delivery of the property, after the executing Court had lost jurisdiction over the locality, where the property was situated. This objection was upheld by the District Judge and the lower Court's order was set aside.

It is clear from the above dates that both at the time of passing the decree and at the time when the execution petition was presented the Ottapalam Sub-Court had territorial jurisdiction over the subject-matter of the suit. It follows, therefore, that the Ottapalam Court was "the Court which passed the decree," within the definition, in section 37 (*d*), Civil Procedure Code. Section 38 provides that:

"a decree may be executed, either by the Court which passed it, or by the Court to which it is sent for execution."

Section 39 (*c*) provides that the Court, which passed the decree, may, on the decree-holder's application, send it for execution to another Court:

"if the decree directs the sale or delivery of immoveable property, situate outside the local limits of the jurisdiction of the Court which passed it."

As Mukerjee, J., has observed in *Begg Dunlop & Co.* v. *Jagannath Marwari* (1), these provisions read together plainly indicate the general principle that no Court can excute a decree, in which the subject-matter of the suit, or of the application for execution, is property situate entirely outside the local limits of its jurisdiction, and he quotes the Full Bench decision of the Calcutta High Court in *Prem Chand Dey* v. *Mokhoda Debi* (2), in support of this elementary principle. We are not inclined to accept the suggestion that section 38 makes it optional to a Court to execute its own decree, or to transmit it to the Court, which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. Although the words in section 39 are "the Court may send it for execution," we think that in all cases the Court should send its decree to the Court which has territorial jurisdiction, if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court. In this view of the case, it is unnecessary to canvass the correctness of the decision of the Full Bench of the

(1) (1911) 39 Cal. 104.
(2) (1890) 17 Cal. 699 (F.B.).

Calcutta High Court, in *Prem Chand Dey* v. *Mokhoda Debi* (1), to the effect that a Court has no jurisdiction, in execution of a decree, to sell property, over which it has no territorial jurisdiction, at the time when it passes the order of sale.

In the present case, the objection to jurisdiction was not taken in the executing Court, but was taken for the first time in the grounds of appeal to the lower appellate Court. The question, therefore, arises whether the submission by the defendant to the jurisdiction of the Ottapalam Subordinate Judge's Court cures its want of jurisdiction. There can be no doubt that under section 21 of the Civil Procedure Code, such an objection will not be admissible, if it is not raised, to the trial of a suit by a Court, which has no jurisdiction over the place of suing. This section makes it imperative that such objection should be taken in the Court of first instance at the earliest possible opportunity, in any case, before issues are settled; and there must further be a consequent failure of justice for sustaining the objection.

The respondents' pleader has conceded that he submitted to the jurisdiction of the Ottapalam Court, so far as it issued directions for re-valuing the improvements, that being a matter, which the executing Court has jurisdiction to dispose of, under section 6 of the Malabar Compensation for Tenants' Improvements Act. There is nothing in the statement put in by the first counter-petitioner at the time of execution, or in the B diary, to show that he took this objection, even at the stage when delivery was ordered.

The question whether section 21 of the Civil Procedure Code is applicable to execution proceedings was referred to a Full Bench, in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (3) but was not directly decided. From the order of reference by Seshagiri Aiyar, J., and from the opinion of Sir John Wallis, C.J., it appears that both those learned Judges were inclined to extend the same principle to execution proceedings; but they decided the case upon other considerations, which were that in execution no party had a right to question the correctness of the decree, which was being executed, or the jurisdiction of the Court which passed it. Following this Full Bench decision. in C.R.P. No. 372 of 1921, one of us applied the same principle to an objection to jurisdiction, which was taken only in the executing Court.

We are of opinion that the objection in the present case is one of form only and not of substance. The District Judge's order will only have the effect that the property will have to be re-delivered to the defendant, and then it will be open to the plaintiff to apply to the Palghat Subordinate Court, for a fresh order for delivery, and all the formalities of issuing a commission and handing over property by means of an *amin* will have to be repeated, without any advantage to any one.

In the circumstances of the case, as the defendant took no objection at the time but submitted to the jurisdiction of the executing Court and only raised this objection, after the order had been passed we think that the District Judge would have been well advised to have refused to allow such an objection to be taken in appeal and that he should have declined to interfere with the executing Court's order, upon an objection which was utterly devoid of merits.

In this view, we set aside the District Judge's order and restore the order of the Subordinate Judge, with costs here and in the District Court.

Appeal allowed.

(3) (1920) 43 Mad. 675 (F.B).

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* * 1924 Madras 458.

SCHWABE, C.J. AND WALLER, J.

Official Assignee of Madras—Appellant

v.

N. Rajabadar Pillai and others—Respondents.

F.A. No. 55 of 1922, decided on 12th October, 1923, from the decree of Krishnan, J., dated 21st March, 1922.

(a) *Hindu Law—Partition—Managing member must render account of monies specifically traced to him though he is not bound to keep accounts even if all co-parceners are minors.*

A managing member is not bound to give a general account of his dealings and in the absence of fraud or misappropriation the managing member cannot be called upon to justify his past transactions; the manager is not bound to keep general accounts and co-parceners cannot complain if the manager in his discretion favours in his expenditure one of the co-parceners at the expense of the

others. In this matter there is no difference between the position of an infant co-parcener and another. In respect of assets proved to have come into the hands of the manager, he has to account. It is not enough for him to say that he has no longer got those assets. Once it had been proved that the assets came into his hands, the co-parcener is not required to prove that they remained in his hands at the date of the partition. Capital monies proved to have come into the hands of a manager must be considered as available for partition in the absence of some evidence showing what has happened to them. (32 Mad. 271, 41 M.L.J. 503, *Foll.*) [P. 460, C. 1].

(b) *Hindu Law—Partition—Members have not absolute right to residence in a particular house or room.*

It is quite wrong to say that the member of a joint Hindu family have rights *in rem* to residence in a particular house. It is true that while the common house is being used as a family house, they have a right to reside there but whether they have a right to any particular separate room is doubtful, but on partition it is clearly a matter for the tribunal arranging the partition to say whether it is in the general interest of the co-parceners that residence should be given in a particular house or not. Some other provision can be made if there are more houses than one to choose from. It may be for the general advantage of the family that provision should be made in money instead of in kind. [P. 461, Cs. 1 and 2].

T. S. Rajagopalaier and *T. L. Venkataramaier*—for Appellant.

P. Venkataramana Rao, *N. K. Mohanarangam Pillai* and *N. Damodaram Naidu*—for Respondents.

Schwabe, J.:—This is an appeal from the judgment of Krishnan, J., in a partition suit—from so much of his decree as directed that the 1st defendant should account for a sum of Rs. 6,500 shown to have come into his hands as part of the joint family assets. The 1st defendant was the manager of a joint Hindu family governed by the Mitakshara Law, the other persons interested being a minor brother, and their mother and sister who were entitled to rights of maintenance. The 1st defendant has become an insolvent and the Official Assignee of Madras on behalf of his creditors represents his interest. The facts so far as they are relevant are that Rs. 6,500 which formed part of the ancestral property were deposited in a Bank, and, some years ago, drawn out by the 1st defendant. Of that amount Rs. 2,500 were deposited with Messrs. Beardsell & Co. as security for the honesty of the 1st defendant who was entering the service of that firm as cash-keeper. The balance has disappeared. There was a suggestion that it was used by the 1st defendant for purpose of his own marriage or other legitimate family expenses. But this was negatived by his mother who stated that she had found the necessary money for the marriage and by the fact that the sums were drawn out sometime after the marriage, and no evidence was forthcoming of any other necessary family expenditure which could not be met out of the income. The 1st defendant was not called as a witness. It was suggested that he was helping his relations as against his creditors which might account for the Official Assignee not calling him as a witness. But all his affairs were in the hands of the Official Assignee who had every opportunity of examining the insolvent and ascertaining the true facts. The money was drawn by the 1st defendant in 1914. In 1918 he was found to have committed defalcations in his office of Cash-keeper to Messrs. Beardsell & Co., amounting to Rs. 15,000. It is possible that the balance of the money so drawn out by the 1st defendant was invested in some other manner. At the time, he told his mother that he was lending a large part of it to a Muhammadan, a businessman; but there is no evidence that this loan is still outstanding, and it is much more probable that it was ultimately used to meet the defalcation in Messrs. Beardsell & Co. or to meet the 1st defendant's losses in some unfortunate speculatious which led to his making away with this large amount of Beardsell's money.

The learned Judge has held that the 1st defendant has received these moneys and has not accounted for them except as to the Rs. 2,500 mentioned. He has held further that it is a rule of Hindu Law that a co-parcener upon partition is not entitled to call upon the managing member to render an account of his past management so as to debit him with any loss caused to the joint property by his management but can only get his share in the properties available for division at the time of the partition, and for this proposition he quotes *Balakrishna Aiyar* v. *Muthuswami Aiyar* (1) and *Krishnayya* v. *Guruvayya* (2). He points out that there is an exception to this rule, when a person is able to establish misappropriation on the

(1) (1908) 32 Mad. 271.
(2) (1921) 41 M.L.J. 503.

part of the manager. He also holds that there is another exception, namely, that if a co-parcener is a minor, the manager can be made to account generally in respect of the *corpus* of the estate, at any rate where there are no adult members except the manager; and as the plaintiff in this case was at all material times a minor, he holds that the first defendant must bring into account this sum of Rs. 6,500.

I agree to the result arrived at, but I do not agree with the reasons given. That a managing member is not bound to give a general account of his dealings, that, in the absence of fraud or misappropriation, the managing member cannot be called upon to justify his past transactions, that the manager is not bound to keep general accounts and that co-parceners cannot complain if the manager in his discretion favours in his expenditure one of the co-parceners at the expense of the others are matters, I think, beyond controversy; nor do I find any authority in support of the proposition that in this matter there is any difference between the position of an infant co-parcener and another. In fact, on an examination of the cases establishing these propositions, it will be found that in most of them there were persons who were minors at the date of the partition or had been minors at the time of the expenditure by the manager. But in respect of assets proved to have come into the hands of the manager, in my judgment, he has to account. It is not enough for him to say that he has no longer got those assets; nor do I think it right to say, once it had been proved that the assets came into his hands, that the co-parcener has also to prove that they remained in his hands at the date of the partition. In my judgment, capital monies proved to have come into the hands of a manager must be considered as available for partition, in the absence of some evidence showing what has happened to them. It is not necessary in this case to discuss what would be sufficient evidence. It may be that the proof of family necessities which would involve an expenditure greater than the income would lead to the presumption that the assets have been properly expended on behalf of the family. But, in this case, there is nothing of the sort, and I think that the proper inference to be drawn is that these monies have been misappropriated by the managing member. In this connection I think that misappropriation means nothing more than the expenditure of the money on other that justifiable family expenses. Rs. 2,500 were clearly misappropriated. It was a legitimate family purpose to place that money with Messrs. Beardsell & Co. as security for the good behaviour of the managing member. But it remained joint family property and, when he caused the loss of that money to the family by his misconduct as an employee of Messrs. Beardsell & Co., in my judgment, he clearly misappropriated the money. As regards the balance of Rs. 4,000 it was traced into his hands. It was proved that it was deposited in a Bank and that he drew it out. There is no evidence that he spent it on a family necessity, or that there was any family necessity for which such a sum of money would have been required, and, in my judgment, under those circumstances, when the assets are traced into the hands of the managing member, he is bound to account for them on a partition, whether his co-parceners are minors or majors, and in this case the first defendant and the Official Assignee representing him have entirely failed to do so. If authority were required for these propositions, I think, it is to be found in the account that was ordered in *Balakrishna Aiyar* v. *Muthuswami Aiyar* (1), and in the clear judgment on the point of Phillips and Krishnan, JJ., in *Krishnayya* v. *Guruvayya* (2), particularly of Krishnan, J., at page 509 where he states the law correctly. It was suggested that *Tami Reddi* v. *Gangu Reddi* (3) was an authority to the contrary, but as I read the judgment, particularly on page 287, it supports the view expressed above.

The result is that this appeal must be dismissed with costs.

Waller, J.:—I agree that this appeal must be dismissed with costs. The rule of law, as stated by Krishnan, J., is that a co-parcener can get a share only in such properties as are actually available at the time of partition. If this means that, when a manager is asked to account for missing property, it is a sufficient answer on his part to point out that it no longer exists, I cannot accept it is an adequate statement of the law. The ruling in *Balakrishna Aiyar* v. *Muthusami Aiyar* (1)

(3) 1922 Mad. 286 (2).

shows that it is open to a co-parcener to call upon the manager to account for specific items of property which are alleged to have come into his hands. Though he is not entitled to ask for a general account of the management, he is entitled to an account of the property at the time he asks for partition. And by that is meant not the property as it actually exists, but as it ought to be. This is the view taken in *Krishnayya* v. *Guruvayya* (2) and there is nothing to the contrary in *Tami Reddi* v. *Gangu Reddi* (3).

In the present case it is clear that the manager had to account for Rs. 6,500. This sum of money he probably appropriated to his own use. In any event, it has not been proved that he spent it for any necessary or legitimate family purpose. He must, therefore, make good plaintiff's half share.

(Continuation of the Judgment pronounced in open Court this day).

Schwabe, C.J. :—Another point arises under the judgment of Krishnan, J. The second and third defendants being the mother and sister of the co-parceners, he directs that they should have a maintenance of Rs. 15 a month, and that the daughter should have a sum of Rs. 2,000 for her marriage. He also holds that they should be allotted each a room in the house item 1, that is, the family house, for their residence. Now, it is objected that the last part of the order will seriously interfere with the most advantageous partition, namely, the sale of the house which is the only valuable family property that there is, if it is to be sold subject to a right of these two ladies each to have one room in that house. It is argued on the other hand that they have an absolute right to them, it being called a *right in rem*. In my judgment, it is quite wrong to say that the members of a joint Hindu family have rights *in rem* to residence in a particular house. It is true that, while it is being used as a family house, they have a right to reside there; but I have serious doubts whether they have a right to any particular separate room; but, on partition, it is clearly a matter for the tribunal arranging the partition to say whether it is in the general interest of the co-parceners that residence should be given in a particular house or not. Some other provision can be made if there are more houses than one to choose from. It may be for the general advantage of the family that provision should be made in money instead of in kind. I think that so much of this judgment as purports to hamper the Official Referee's discretion in effecting this partition by giving these two ladies an indefeasible right to occupy a certain part of this house is wrong and that the matter must go before the Official Referee to decide what is best to be done unfettered by any such direction.

Waller, J. :—I agree.

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* * 1924 Madras 461.

KRISHNAN AND ODGERS, JJ.

K. Sankara Rao—Appellant

v.

Turlapati Ramakrishnayya—Respondent.

S. A. Nos. 56, 57 and 58 of 1922, decided on 12th October, 1923, against the orders of District Court of Kistna, in I.A. No. 191 of 1921.

(a) *Provincial Insolvency Act (V of 1920), Ss. 58 and 59—Without vesting order, Receiver can't deal with property.*

The Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order by the District Judge. Where when the insolvency petition was filed by the insolvent in the District Court, the District Judge made an endorsement on that petition that it was transferred for disposal to the Official Receiver. *Held* that the wording of the order itself does not convey the idea of any vesting at all. (41 M.L.J. 78, 43 Mad. 869, 39 M.L.J. 438, 30 M.L.J. 415, *Foll.*) [P. 462, C. 1.]

(b) *Provincial Insolvency Act (V of 1920). S. 68—Does not apply where sale is by unauthorised Official Assignee.*

Where the sales were made by a person who was not authorised to sell and were thus invalid. *Held*, that it is impossible to hold that the limitation under S. 68 will apply as S. 68 presupposes that the decision is by a receiver properly appointed. [P. 462, C. 2.]

A. Krishnasawmy Iyer—for Appellant.

V. Viswanatha Sastry and *V. Suryanarana*—for Respondent.

Krishnan, J. :—These are three appeals by two creditors of one Ramakrishnayya, an insolvent, who sought to get set aside by the lower Court two sales by the Official Receiver of Kistna, of two items of properties belonging to the

insolvent. Their applications were dismissed by the learned District Judge on the ground that it was out of time under section 68 of the Provincial Insolvency Act, the applications having been filed more than 21 days from the date of the two sales.

In appeal it is argued before us by the learned Vakil for the creditors that section 68 does not apply to this case as the sales cannot be considered to have been made by a properly authorised Receiver, but by some one who had no power to deal with the properties. The argument is that after the adjudication of the insolvent in this case, no order vesting the property of the insolvent in the Official Receiver was made, and without such an order the Official Receiver gets no right to deal with the insolvent's properties. What happened in this case was, when the insolvency petition was filed by the insolvent in the District Court, the District Judge made an endorsement on that petition that it was "transferred for disposal to the Official Receiver." It is not denied by the other side that the District Court made no further orders in the case. The Official Receiver has been authorised under section 80 to hear an insolvency petition and make the order of adjudication: but under that section the power to make the vesting order is not delegated to the Official Receiver; and it is clear from the authorities which have been cited before us, *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1), *Muthuswami Swamiar* v. *Somoo Kandiar* (2) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3), that the Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order by the District Judge. Such an order has to be made under the Act by the District Judge after the adjudication of the insolvent. It is, therefore, quite clear that the argument that the endorsement made by the Judge on the insolvency petition is tantamount to vesting the property of the insolvent in the Official Receiver cannot be accepted. I agree with my learned brother that the wording of the order itself does not convey the idea of any vesting at all. The order in the case cannot be taken to include a vesting order made in anticipation of the adjudication of the insolvent; for even if we suppose that the District Judge meant, when he transferred the insolvency application to the Official Receiver to make him the receiver of the properties it would be illegal. There is thus a difficulty in the way of the respondents. We must take it that the sales in the present case were made by a person who was not authorised to sell and are thus invalid. In a case like that, it is impossible to hold that the limitation under section 68 will apply as section 68 presupposes that the decision is by a receiver properly appointed. It follows, therefore, that the three appeals must be allowed, the two sales must be set aside, and the cases sent back to the District Judge for a proper vesting order being made and further proceedings in insolvency conducted thereafter. The petitioners-appellants are entitled to their costs in this Court and in the Courts below to be paid from the insolvent's estate.

Odgers, J.:—These are appeals against the order of the District Judge of Kistna on an application by two creditors of an insolvent called Thurlapati Ramakrishnayya praying to set aside two sales by the Official Receiver held on 27th August, 1919 and 26th February, 1920. The District Judge held the application out of time as having been made more than 21 days after the sales. The Court on the application of Thurlapati Ramakrishnayya to be adjudicated an insolvent passed the following Order:—

"Transferred to the Official Receiver, Kistna, for disposal," and it is contended by the respondent that this has the effect of transferring the whole matter to the Official Receiver and thus of incidentally appointing him Receiver of the insolvent's property. This contention is necessary in face of the following decisions *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1) which held that the property of an insolvent does not *ipso facto* vest in the Official Receiver but an order must be passed in every case appointing a Receiver and that failure to do this entails as a consequence failure of title in those purchasing from an Official Receiver not so appointed. In the present case there was no special appointment unless the order above set out can be so construed. *Vythilinga Padayachi* v. *Ponnuswami*

(1) (1921) 41 M.L.J. 78.
(2) (1920) 43 Mad. 869.
(3) (1916) 30 M.L.J. 415.

Padayachi (1), followed earlier authorities *Muthuswami Swamiar* v. *Somoo Kandiar* (2) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3). *Muthuswami Swamiar* v. *Somoo Kandiar* (2) is also an authority to the same effect. I was a party to the decision in *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1) and I adhere to my decision there. Therefore I must hold that unless the order appointed the Official Receiver, Receiver of the insolvent's property, there was no Receiver appointed in this case and the sales by a person purporting to act as such would be void. Now it is said that the Court by its order set out above practically made a vesting order under the Act. What the Court did was to transfer the petition to the Official Receiver "for disposal." I do not think that the fact that the petitioner (debtor) asked that his immoveable property should be sold and his debts settled can give any other or wider meaning to the order of transfer. The Court has certain powers of delegation —section 20 of the Act V of 1920 provides that the High Courts may delegate to Official Receivers certain specified powers, *inter alia*, the hearing of insolvency petitions, examination of debtors and the making of orders of adjudication. The Official Receiver has no delegated power to appoint a Receiver. The respondent contends that the procedure prescribed for the Court and for Official Receivers when acting under their delegated powers are different and that the latter are in fact under such circumstances Courts in themselves. *Subba Aiyar* v. *Ramaswami Aiyangar* (4) is cited as an authority for this proposition. There the order was 'The petition is transferred to the Official Receiver for adjudication and for the administration of the estate.' The learned Judges held that the combined effect of section 20 (*c*) and (*e*) and section 23 of the Act of 1907 [section 59 (*c*) and (*e*) and section 58 of the present Act] was that the order to administer enabled the Official Receiver to sell the insolvent's estate. They distinguished the case in I. L. R. 43 Mad. 869, while deploring the deficiency in the Act which does not provide that immediately on adjudication the estate shall vest in the Official Receiver. Their decision was that the Official Receiver was the agent of the Court and as under section 23 (section 58) the latter has all the powers of a Receiver, it was capable [section 20 (*e*) : section 59 (*e*)] of appointing an agent to take any proceedings sanctioned by the Court and that the Court might under section 20 (*a*) [section 59 (*a*)] sell the property of the insolvent through such agent. The difficulty as to appointment of a Receiver was thus obviated in this case. The learned Judges did not give an opinion on the other argument advanced in that case, *viz.*, that the order of transfer may be construed as an order under section 18 (section 56) vesting the property in the Receiver to take effect if and when adjudication took place. It will be observed that the order of transfer in the present case did not contain the words "for the administration of the estates" and this in my opinion is sufficient to distinguish it from the case in *Subba Aiyar* v. *Ramaswami Aiyangar* (4). The present petition was not even transferred for adjudication but merely for disposal. I am unable to agree that the transfer in the present case had any further operation than to transfer to the Official Receiver for disposal of the petition for adjudication and I think the Official Receiver under his delegated powers under section 80 was *functus officio* when he has carried out the duties delegated to him, in this case the disposal of the petition. The next contention by petitioner is that section 68 applies to this case—and that the Official Receiver was certainly a Receiver in this case though one of his acts is impugned. If he was never legally appointed a Receiver, he is a mere intermeddler with the property and if so, it is said the District Judge had no power to set saide the sales under the Act [cf. *Avanashi Chetti* v. *Muthu Karuppan Chetti* (5)] there being no 'person aggrieved by any act or decision of the Receiver.' The answer to this appears to me to be that in *Muthuswami Swamiar* v. *Somoo Kandiar* (2) the sale was either set aside or declared to be void—it is not clear which in *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1) it was held that defendant had no title to the property. Both cases were under the Insolvency Act and both were cases of sales by Official Receivers not legally appointed Receivers in the respective insolvencies. This seems to me to conclude the

(4) (1921) 44 Mad. 347.

(5) (1918) 23 M.L.T. 319.

respondent's contention on this point. As to limitation, section 68 prescribes a period of 21 days for an application by a person aggrieved by act or decision of the Receiver. It is quite clear that a Receiver means one legally appointed, *i.e.*, one appointed under the provisions of section 56 of the Act. I am, therefore, of opinion that the Official Receiver not having been appointed Receiver in this insolvency, the sales by him are void and ineffective to pass any title to the purchasers and these Civil Miscellaneous Appeals must be allowed with costs.

I agree with my learned brother in the order he proposes.

Appeal allowed.

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* * 1924 Madras 464.

KRISHNAN AND WALLER, JJ.

Messrs. Ponnuswamy Aiyar and *Narayanaswamy Aiyar and another*—Appellants

v.

Damodar Hunsraj—Respondent.

F. A. No. 75 of 1922, decided on 20th November, 1923, from the order of City Civil Court of Madras, dated 14th December, 1921.

Civ. Pro. Code, S 20 c)—*Cause of action arises at a place where payment is to be made or part of contract is to be performed*—Hundi *is made only by actual payment and not by negotiation.*

When a firm outside Madras draws *hundis* on a firm in Madras which under the contract the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the *Hundi* is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the *hundi*. Negotiation of the *hundi* is only a provisional method of realising money from persons who are willing to accept the *hundi* for a small profit and take the trouble of presenting the *hundi* to the drawee and recovering the money from him. If the *hundi* is dishonoured the endorsee will of course have recourse to the payee of the *hundi* who had endorsed it over to him. So that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the drawee, the Madras firm actually makes payment on the *hundi* and such payment is clearly a payment made in Madras. Where payment was to be made only on the delivery of the railway receipts and the railway receipts were to be attached to the *hundis* and presented in Madras along with the *hundis* when payments of the hundis were demanded from them and thus the presentation of the railway receipt in Madras was a part of the performance of the contract and was a necessary condition to be performed, before money could be demanded from the Madras firm. *Held* that part of cause of action arose in Madras. (37 M.L.J. 712, *Dist.*; 30 Bom. 167, *Expl.*) [P. 465, C. 1.]

M. A. Tirunarayanachari—for Appellants.

N. Chanderasekara Aiyar—for Respondent.

Krishnan, J.:—This is an appeal, against an order of the learned City Civil Judge, returning the plaint in O. S. No. 530 of 1920, on his file, to be presented to the proper Court. The learned Judge held that no part of the cause of action arose within his jurisdiction and therefore passed that order. The suit was brought by the Receivers on behalf of a firm in Madras called Kuppuswami Naidu and Company, against the defendants, a firm carrying on business in Calcutta, for a certain sum of money, which, they claimed, had been overpaid to the defendant's firm. Among the pleas raised by the defendant's firm, one was that the Court in Madras had no jurisdiction to try the suit and that the suit was properly triable only by the Court in Calcutta, where they carried on business and where according to them, the whole cause of action arose.

It is not denied that the defendants do not reside, or carry on business, or work for gain in Madras; but the plaintiffs rely entirely, for their contention that the suit lies here, on the ground that part of the cause of action arose within the jurisdiction of the Madras Court Under section 20, clause (*c*) of the Code of Civil Procedure, a suit can be brought where the cause of action arises, at least in part, and the question we have to decide is whether the cause of action in this suit has arisen at least in part in Madras.

Kuppuswami Naidu & Co. had dealings with the Calcutta firm and the way in which the dealings were carried on was that, on the orders of Kuppuswami Naidu & Co., the Calcutta firm was to send by rail rice to several places, all over the Presidency, named by the Madras firm (plaintiffs). The contract was made in Calcutta; but the arrangement as regards payments, as stated by the defendants' firm itself in their written statement, was that the money was to be paid either in cash in Calcutta, or by Hundis drawn by defendants in Calcutta, on the plaintiffs' firm in Madras. The learned City Civil Judge held that this arrangement about payment was an arrangement, which was tantamount to payment in Calcutta itself:

but we are unable to agree with the learned Judge on the point. When a firm outside Madras draws hundis on a firm in Madras, which, under the contract, the Madras firm has to honour and pay, when presented to them in Madras, the payment cannot be considered to be made, when the Hundi is negotiated by the firm outside Madras, but only when the payment is actually made by the firm in Madras on the hundi. Negotiation of the hundi is only a provisional method of realising money from persons, who are willing to accept the hundi for a small profit, and to take the trouble of presenting the hundi to the drawee and recovering the money from him. If the hundi is dishonoured, the endorsee will of course have recourse to the payee of the hundi, who had endorsed it over to him. So that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the buyer, in this case, the Madras firm, actually makes payment on the hundi, and such payment is clearly a payment made in Madras. It is true that, in the first three instances, the money was actually paid by the Madras firm, through an agent of theirs in Calcutta, to the defendant; but that arrangement does not seem to have been persisted in and subsequent payments were all made by the system of the Calcutta firm drawing hundis in their own favour and endorsing them to some hundi-broker and obtaining money from him, and that broker taking the trouble of presenting the hundis to the Madras firm and receiving payment. It may also be mentioned that one other arrangement about the payment was that payment was to be made, only on the delivery of the railway receipts. These railway receipts were to be attached to the hundis and presented to Kuppuswami Naidu and Co. in Madras, along with the hundis, when payments of the hundis were demanded from them; so that the presentation of the railway receipt in Madras was also a part of the performance of the contract, and was a necessary condition to be performed, before money could be demanded from the Madras firm.

In these circumstances, it seems to us clear that a part of the cause of action must be held to have arisen in Madras, both as regards the presentation of the railway receipts and as regards the payment on hundis; and it would follow that the City Civil Court had jurisdiction to try the suit, under section 20 (*c*) of the Civil Procedure Code.

The learned City Civil Court Judge has relied upon a case reported in *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirasee* (1), which he thinks is a case on all fours with the present one; but there is a fundamental difference between that case and the present one, which the learned Judge has overlooked. There, although payment was by hundis, the arrangement was that the hundi was to be drawn and presented to the National Bank of Mandalay, along with the bill of lading, taken in the name of the consignor himself; it was to be endorsed over to the branch of the National Bank at Mandalay and handed over, along with the hundi, to them, and they were to make payment of the amount claimed to the consignor at Mandalay. The learned Judges find as a fact in that case that the National Bank was merely acting as the agent of the Madras Bank, who were themselves only the agents of the consignee at Negapatam and, when the bill of lading was endorsed over to the National Bank and received by that Bank and money was paid to meet the hundi drawn on the bank, the transaction was complete, so far as the consignor was concerned, as the National Bank was found to have been acting merely as agents of the Negapatam merchant. It was on that ground that the learned Judges in that case held that the payment should be taken to be one made in Mandalay and not in Negapatam and that, so far as payment was concerned, the cause of action did not arise in Negapatam, but in Mandalay. Here, as we have already stated, all that the Calcutta firm did was to draw the hundi on the Madras firm and discount it, in the manner usual among merchants, with some exchange bank or firm, which took hundis on discount, without being freed from the liability of having to repay the money paid, in case the hundi is dishonoured. The Calcutta firm was entitled to discount the hundi with whomsoever it pleased. There is no evidence that Nantaramdas Atmaramdas, the firm which actually negotiated these hundis for the Calcutta firm, were acting as agents of the Madras merchants at all. This case

(1) (1919) 37 M.L.J. 712.

is therefore very clearly distinguishable from the case in *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirazee* (1).

The Bombay case referred to, by the learned Judge, *Motilal* v. *Surajmal* (2) is a case where the principles are no doubt stated by Tyabji, J.; but according to those principles, if the payment has to be made at a particular place, part of the cause of action will arise there.

It will be further noticed that the main claim in this suit is really for the amount that had been over-paid by Kuppuswami Naidu & Co. to the defendant company. That payment was actually made in Madras. The hundi having been drawn for a larger sum, than the Calcutta firm was entitled to draw it for, was presented in Madras; and to save it from being dishonoured, the Madras firm paid the excess amount, here in Madras, and it is mainly for that amount that the present suit is brought.

It is therefore clear to us that the cause of action did arise in Madras and that the plaint should not have been returned, for being presented to another Court, but that the learned Judge should have tried the suit himself. We therefore set aside the order of the learned Judge and direct him to take the plaint on to his file and dispose of the case according to law.

As regards costs, the respondent will pay the appellants' costs in this Court. All costs in the lower Court will be disposed of by the City Civil Judge in his final judgment.

Appeal allowed.

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* * 1924 Madras 466.

KRISHNAN AND ODGERS, JJ.

Angavalathamal—Appellant

v.

Janaki Ammal and another—Respondents.

F. A. No. 164 of 1922, decided on 8th October, 1923, from the order of Sub-Judge, Kumbakonam, in E.P. No. 69 of 1920.

Civ. Pro. Code, S. 50 (2)—To make legal representative or administrator liable—Decree-holder must prove both amount of assets and receipt of assets.

The burden is upon the person, who desires to make the legal representative or the administrator liable, to prove not only the amount of the assets left by the deceased, but also the extent of such assets which has actually passed into his hands.

Quaere:—Whether the proposition that if it were shown that a deceased person left a certain amount of assets and that the legal representative had received some portion of those assets it would be for him to explain why he did not receive the whole of the assets and if he says that he did not so receive them, it would be for him to establish what proportion of the assets, proved to have been left by the deceased really got into his hands, is not too wide. [P. 468, C. 2.]

A. Krishnaswamy Aiyar and *C. A. Seshagiri Sastriar*—*for* Appellant.

T. Rangachariar and *K. S. Jayarama Iyer*—for Respondents.

Judgment.—This is an appeal that arises in execution of the decree, in O. S. No. 36 of 1909, obtained by one Janaki Ammal against her mother-in-law, one Lakshmi Ammal. As Lakshmi Ammal is now dead, execution is applied for against one Angavalathammal, the legal representative and daughter of Lakshmi Ammal. The decree was for possession of certain immoveable properties and for a certain sum of money, over Rs. 10,000. The decree had been executed, during the life-time of Lakshmi Ammal as regards immoveable properties and possession had been taken away from Lakshmi Ammal a year before her death. Lakshmi Ammal died in April 1916. This application is put in, by the Receiver appointed in O.S. No. 40 of 1916, on the file of the Subordinate Judge's Court of Tanjore, in whom the right to execute the decree has been vested for the time being, Janaki Ammal, being a party to O. S. No. 40 of 1916. The application prayed for compelling Angavalathammal to pay the decree amount, from the assets of Lakshmi Ammal in her hands, with subsequent interest and costs. Angavalathammal's plea was that Lakshmi Ammal did not have or leave any assets and that no assets of hers came into her hands and that she was not liable to be proceeded against in execution of the decree.

The learned Subordinate Judge has passed an order, apparently under section 50, sub-clause 2 of the Civil Procedure Code, and this appeal is filed against the said order, directing Angavalathammal to pay the decree amount herself personally. To justify such an order under the Civil Procedure Code, it must be shown by the person applying that the legal representative had received sufficient property to

(2) (1906) 30 Bom. 167.

cover the decree debt and the latter must have failed to show that the amount that had come into her hands has been duly disposed of. Section 50 (2), Civil Procedure Code says :

" where any such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased, as is proved to have come into his possession, the decree may be executed against the judgment-debtor, to the extent of the property in respect of which he has failed so to satisfy the Court, in the same manner as if the decree had been against him personally."

In this case, three issues were framed by the Subordinate Judge to the following effect :

(1) Did Lakshmi have or leave any assets ?

(2) If so, did they come into the hands of the respondent ?

(3) To what extent, if at all, is the respondent liable ?

On the first point, the Subordinate Judge has gone into a calculation of what the possible income of Lakshmi might have been, for the last 9 years. He considers that the lands, which were in her possession, would have yielded 800 or 1000 kalams of paddy, that the Rs. 10,000 that was paid to her would have fetched a fair amount of interest and that on the whole Rs. 2,000 might be taken to be the probable yearly income and that she was enjoying this, for 8 or 9 years. Then taking the probable amount she might have spent out of the income, including the expenses of certain special ceremonies, which the old lady had performed and making some allowance for household expenses, he comes to the conclusion that she must have had and must have left very large assets at her death. Then he proceeds to hold that she did, in fact, leave large assets. Then he goes on to say that, as Angavalathammal is the legal representative of the deceased Lakshmi, she must have got all those assets and as she has not accounted for them, she must have them with her and she is liable to pay the present decree amount in full personally. The defect in this process of reasoning is that it is very problematical and speculative. It is not denied that there is no direct evidence of the old lady having left any assets at all, excepts perhaps a few *chembus*, in the house, which her legal representative has accounted for, by showing that they were given away in charity.

It was said, by the respondent's Vakil, that the assets of the old lady were partly in the shape of bonds and partly in the shape of cash. As regards the existence of the bonds, one would have expected some better proof as the persons, who were liable under those bonds, could have been easily called as witnesses. But no one was called. As to the existence of such bonds, as a matter of fact, there is no evidence at all, on record, not even of one. As regards the cash also there is no evidence whatsoever that the old lady left anything in the shape of cash. On the other hand, there is on the side of the appellant some evidence to show that the old lady spent large sums of money in charities and in the performance of religious festivals and solemnisations. The evidence of the appellant, if accepted, would show that the old lady could not have left much assets, even if we assume that the estimate of the income by the Subordinate Judge is right. But that estimate is also a matter of speculation. There is no proof exactly as to how much Lakshmi got from the lands, or as interest for the monies she had. The lands, which were the subject-matter of the decree, were removed from her possession a year before her death. It is shown that she had undertaken a costly litigation ; and an eminent Vakil of this Court was taken from here to the lower Court, and was engaged in the case, when it come up to this Court, and the appellant's estimate that the litigation cost, about Rs. 4,000, is not in our opinion, an excessive one. Taking all these circumstances into consideration, we cannot hold that it is proved that the old lady had left any assets at all, at the time of her death, except a few *chembus*. It was said that she had been paying income-tax, on a sum of Rs. 1,050, said to have been interest derived from Rs. 15,000. There is evidence that she had protested against levy of the tax, but that the income-tax authorities would not relieve her and consequently she had to pay. We do not think it is safe to arrive at any conclusion, from the income-tax assessment, that she had at the time of her death, any particular sum of money at her disposal.

If we are right in the conclusion that we have come to, that the old lady left no assets, the respondent's case necessarily fails. But apart from that, even if she had left any, there is no proof whatsoever that those assets got into the hands of the appellant before us. It is true that she

was the legal representative and it is also true, as pointed out by the respondent before us, that this lady was paying income-tax herself, after the death of her mother, Lakshmi. But the payment of the income-tax is easily explained and does not indicate that she received any money on her mother's death; because she had, as proved by unimpeachable evidence, dealings with her own money, before her mother's death, on which she was getting interest. Two Chetties have been called as witnesses, P. Ws. 1 and 4, to show that during the life-time of Lakshmi Ammal, the appellant before us had a sum of Rs. 8,500, transferred to her name by her husband. The evidence of these witnesses is supported by entries in their account books, and there can be no doubt there were such transfers, as is spoken to by them. Besides that, Angavalathammal explains that she had a sum of money given to her, by her father and that she got some money by the sale of her jewels. We are not in agreement with Subordinate Judge, in rejecting all this evidence. We think that this evidence is entitled to consideration. The reason given by the Subordinate Judge, for rejecting the evidence, that her husband gave her some money, is that she and her husband were not on good terms. That may be so; but it really is no reason, to discredit the evidence of the Chetties. Admittedly, her husband was a rich man and it is not unlikely that he was presuaded to settle on her, a certain sum of money after he married a second wife. As regards the jewels, she is likely to have got some from her husband and from her father and it is not pretended that the jewels are now in her hands; the fact that she is not able to state exactly to whom the various jewels were sold is no reason for discrediting her evidence that she did sell them. That is the reason given by the Subordinate Judge, for discrediting that part of the evidence, relating to the sale. The payment of income tax by her, after her mother's death, is of no importance, because she herself ought to have paid income-tax much earlier on her own dealings and when she was called upon to pay income-tax, she had practically no defence but to pay.

It was suggested by the learned Vakil for the respondent that once it is proved or admitted, that the legal representative, sought to be made liable, has come into possession of assets belonging to the estate of the deceased, however small it might be, the burden of proof is on the legal representative to prove the extent of the assets really received by him and that, if that burden is not discharged by him, he would be made liable for the whole of the debts of the deceased. Three cases have been cited to us on this point, *viz.*, *Rajah of Kalahasti* v. *Sree Muhant Prayag Dossjee Varu* (1), *Ranchhod Das Govardhan Dass* v. *Krishna Doss* (2), and *Magaluri Garudiah* v. *Narayana Rangiah* (3). These cases no doubt say that, if it is shown that some property had passed into the hands of the legal representative, the extent of the property received by him being peculiarly within his knowledge, he is bound to show that he had not received so much property, as would satisfy the debts. The real meaning seems to be that if it were shown that a deceased person left a certain amount of assets and that the legal representative had received some portion of those assets, it would be for him to explain why he did not receive the whole of the assets and if he says that he did not so receive them, it would be for him to establish what proportion of the assets, proved to have been left by the deceased, really got into his hands. Of course, the burden is upon the legal representative to show that he has utilised the assets that have come into his hands, in the proper administration of the estate; otherwise, he will make himself personally liable for the debts of the deceased to the extent of the assets shown to have been left by deceased and presumed to have passed into his hands. Whether this statement of the law, as to the burden of proof, is not too wide in itself, need not be considered in this case; for our finding is that no assets have been proved to have been left by the deceased. It would seem from the authorities, cited by Mr. Krishnaswami Aiyar, and in this matter the English Law is more restricted, the burden being upon the person who desires to make the legal representative or the administrator liable, to prove not only the amount of the assets left by the deceased, but also the extent of such assets which have actually passed into his hands. See the statement in Williams on Executors, 11th Edition, page 1564, '14 Hals-

(1) (1916) 30 M.L.J. 391.
(2) (1911) 21 M.L.J. 1096.
(3) (1881) 3 Mad. 359.

bury's Laws of England, 331, and some o the cases cited therein and Bullen and Leake, at page 561. It is not necessary to discuss this question further, in view of our finding that there is no proof in this case, to show affirmatively, that the old lady had left any assets, or that any passed into the hands of the appellant.

In these circumstances, we must set aside the order of the Subordinate Judge and dismiss the execution application with costs in both Courts. Costs to be paid out of the estate of Janaki Ammal.

Appeal allowed.

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* * 1924 Madras 469.

KRISHNAN AND WALLER, JJ.

Ramaswami Reddi—Appellant

v.

Talaivasal Marudai Reddi and others—Respondents.

S. A. No. 406 of 1922, decided on 29th November, 1923, from the order of Sub-Judge, Trichinopoly, dated 12th October, 1922.

Civ. Pro. Code, S. 11—Decided—Heard and finally decided.

Adverse finding in a decree in favour of a party is not *res judicata*. (36 M.L.J. 641, 48 Cal. 460 (P.C.), *Foll.*; 12 L.W. 277; 31 M.L.J. 311, *Diss.*) [P. 470, C. 1.]

M. S. Vaidyanatha Aiyar—for Appellant.

S. T. Sreenivasagopalachari—for Respondents.

Krishnan, J.:—This is an appeal against an order of remand by the Subordinate Judge of Trichinopoly in a suit brought by the plaintiff for ejectment of the defendants from the plaint properties. The defendants pleaded *inter alia* that they had a right of occupancy in the land and that they could not be ejected. This plea, it was urged by the plaintiff, was *res judicata* between the parties and could not in consequence be raised by the defendants. The Munsif gave effect to the plea and took no evidence on the question of occupancy right. The Subordinate Judge has reversed his judgment and has held that the plea of *res judicata* is not well founded, and, having also held on another preliminary issue on the question of limitation that that issue should be found upon only after evidence was taken in the case, has remitted the suit to be tried by the Munsif after taking such evidence.

The main question argued before us is the question of *res judicata* and that question arises in this way. The plaintiff, as the transferee from the purchaser of the land in a revenue auction-sale brought a suit, O. S. No. 883 of 1902, for the purpose of ejecting the present defendants 1 to 3 and of recovering possession of the property on the strength of his title thereby obtained. In that suit these defendants had pleaded that they had a right of occupancy and therefore they were not liable to be ejected, but they raised another plea in the alternative, namely, that, in the event of their not establishing their right of permanent occupancy, they were at least tenants and were entitled to notice to quit before they were ejected and that therefore the plaintiff's suit should fail. The other pleas raised in that suit need not be referred to at present. When the suit came on for trial the District Munsif held against the defendants and in favour of the plaintiff that the defendants had failed to establish a right of permanent occupancy. He held however at the same time that they had a right of yearly tenancy in the plaint property and that as no notice to quit was given by the plaintiff, the plaintiff should fail and he therefore dismissed the suit. The defendants, having succeeded in the suit before the District Munsif, naturally filed no appeal, but the plaintiff filed an appeal to the District Court. The District Court did not actually go into the question of the permanent occupancy, for it held that even if a permanent occupancy right was not established, the defendants should be held to be yearly tenants and that such a tenancy was not an encumbrance which could be wiped off by a revenue auction-sale and therefore the plaintiff could not succeed without giving a proper notice to quit, and, as he had not given such notice, it dismissed the appeal. There was a second appeal by the plaintiff to this Court and this Court accepting the District Judge's finding considered that, on the finding that there was at least an yearly tenancy in the matter and no notice to quit was given, Act II of 1864 did not destroy that right, and dismissed the second appeal. Now it is the finding of the District Munsif in that suit that the defendants had no right of permanent occupancy that is pleaded as *res judicata* in the present suit.

There are two authorities, which have been referred to by the Munsif and by the learned Vakil for the appellant which support the contention that when a Court comes to a definite conclusion on an issue and gives a finding on that issue that issue would be *res judicata* even if the decree in the case is not based on that issue. The cases relied on are *Muthu Pillai* v. *Veda Viyasa Chariar* (1) and *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2). There is a case however which has been referred to by the Subordinate Judge which is in conflict with this case; see *Laxmipathya* v. *Ramachandra* (3), where a question very similar to this was decided in favour of the parties pleading that there was no *res judicata*. We need not however, consider these cases for we think that the matter has been settled by the Privy Council in the decision quoted by the Subordinate Judge, *Midnapur Zamindari Company* v. *Naresh Narayan Roy* (4). In that case the defendant had pleaded a right of permanent occupancy and he also pleaded that, as he had a right of renewal, the suit was permature. The first Court had found that he had no right of occupancy but held that the suit was premature and dismissed the suit against him. The plaintiff had filed an appeal but the defendant had also filed a cross appeal contesting the finding on the question of the permanent occupancy right, and the High Court dismissed the plaintiff's appeal holding that the suit was permature, and further gave a finding also on the question of the permanent occupancy right set up by the defendant in his cross appeal that no such right was proved. In spite of a cross appeal having been filed, the Privy Council held in the subsequent suit where it was pleaded that question of the right of occupancy was *res judicata* between the same parties that it was not so. Their Lordships say at page 467 of the report "Their Lordships do not consider that this will found an actual plea of *res judicata*, for the defendant, having succeeded on the other plea, had no occasion to go further as to the finding against them." That case exactly covers the present case. Here there was no necessity really to find on the question of permanent occupancy set up by the defendant for even if the Court had assumed that he had no such occupancy right the result would have been the same; a tenancy from year to year would result and that would require a notice to quit to put an end to it.

In view of this ruling of the Privy Council need we not resolve the conflict between the different cases cited in Madras. We think that we are bound to follow the Privy Council ruling, and following that ruling we hold that the Subordinate Judge is right in deciding that the plea of *res judicata* is not well founded in this case.

As regards the question of limitation we think the Subordinate Judge is right in saying that question must be decided after taking evidence and should not be decided without any evidence at all.

In the result the C.M.A. fails and it is dismissed with costs.

Appeal dismissed.

(1) (1920) 12 L.W. 227.
(2) (1918) 36 M.L.J. 641.
(3) (1916) 31 M.L.J. 311.
(4) (1921) 48 Cal. 460 (P.C.).

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* * 1924 Madras 470.

PHILLIPS, J.

T. S. Venkatesa Aiyar—Petitioner

v.

K. S. Venkatarama Aiyar—Respondent.

Civil Rev. Nos. 522 and 523 of 1922, decided on 11th September, 1923 from the orders of Sub-Judge of West Tanjore in O.P. 43 of 1921.

Civ. Pro. Code, S. 146 — Private purchaser's rights.

Private purchaser can't continue appeal withdrawn by judgment-debtor against order under O. 21, r. 89. (44 Mad. 554 (F.B.) and 41 Mad. 510, *Expl.*) [P. 471, C. 2.]

T. R. Sreenivasa Rajagopala Aiyangar—for Petitioner.

T. M. Krishnaswamy Aiyar and *N. Sivaramakrishna Aiyar*—for Respondent.

Judgment:—The facts in this case are somewhat complicated. The petitioner in C. R. P. No. 523 purchased certain property from one Rajammal, the property having previously been sold in court-sale in execution of a decree obtained by one Venkatesa Iyer, the petitioner in C. R. P. No. 522. The respondent in both these petitions is the Court auction-purchaser. The Court auction was held on the 27th April, 1920, and on the 24th of June, 1920, Rajammal, the judgment-debtor, sold the property to the petitioner Sabesa Iyer. On the 5th of July, 1920, the day the

Court reopened, Rajammal put in an application under Order 21, rule 89 and put into Court the necessary money and asked that the sale should be set aside. On the 12th of August, 1920, she put in E. A. No. 162 of 1920 asking that Sabesa Iyer may be made a party to the first petition and on the same day Sabesa Iyer put in a petition on his own behalf asking that the sale should be set aside. The three petitions were disposed of by one order and were dismissed on the 23rd August, 1920. A joint appeal was then filed by Rajammal and Sabesa Iyer on the 27th of November, 1920, but it was held that, although there was only one judgment written, there were three orders to be appealed against; consequently, the original joint appeal was represented as three appeals, C. M. As. 17 and 21 by Rajammal and C.M.A. 22 by Sabesa Iyer. The petitions had originally been dismissed in consequence of the ruling in *Subbarayudu* v. *Lakshiminarasamma* (1) but before the appeals had been represented the Full Bench judgment in *Sundaram* v. *Mausamavuthar* (2) had been delivered and in accordance with that the petition by the judgment-debtor to set aside the sale ought to have been allowed. Notwithstanding this, the judgment-debtor withdrew both her appeals in April and June, 1921, respectively, and when Sabesa Iyer's appeal, C.M.A. No 22, came on for hearing, the appeal was dismissed because the original application had been filed out of time. The question was then raised whether, the judgment-debtor having withdrawn her appeals, the purchaser Sabesa Iyer could be allowed to prefer an appeal against the order on her application under section 146, C.P.C., but this contention was overruled. Sabesa Iyer now prefers this petition against the order in C. M. A. No. 22 of 1921; and no doubt, inasmuch as that appeal was preferred against the order on an application which had been filed out of time, it was rightly dismissed; but it is now contended that, inasmuch as Sabesa Iyer joined the judgment-debtor in the original joint appeal against the order on the three petitions, he must now be allowed to continue the appeal which had been withdrawn by the judgment-debtor under circumstances which tend to throw great suspicion on her *bona fides*, it being argued that under section 146, C. P. C., the petitioner should be allowed to take the proceeding, namely, file the appeal which could have been done by the judgment-debtor, and reliance is placed on a decision in *Sitaramaswami* v. *Lakshminarasimha* (3). If the splitting up of the original joint appeal into three separate appeals by separate appellants had been ordered by Court, I think there would be some force in this contention, but the only order of Court was that one appeal would not lie against the joint order on three petitions and there was no direction that the judgment-debtor and her vendee could not appeal jointly against the various orders. If they had represented the appeal jointly in the form of C. M. A. No. 17, then it would not have been open to Rajammal to withdraw that appeal without the concurrence of the petitioner, but the petitioner took the unfortunate course of removing his name from the appeals Nos. 17 and 21 and only appealed in respect of his own application. His own application was clearly time-barred and, therefore the appeal was rightly dismissed. Inasmuch as he was not a party to C. M. A. No. 17, it is difficult to see how he can now be allowed to continue that appeal which had been withdrawn by the appellant. Undoubtedly under the Full Bench ruling that appeal would have been successful if not withdrawn, and it is a curious fact that Rajammal filed her appeal through one Vakil at the end of February 1921 and withdrew it through another Vakil in April, 1921, and it certainly looks as if this withdrawal was in collusion with the present respondent, the auction-purchaser, for he was the only person who would benefit by such withdrawal. Even the decree-holder contends that the withdrawal was without notice to him, although he was a party to the appeal.

We have now therefore, to consider whether, the appeal having been withdrawn, the petitioner can be allowed to re-open the case. The Full Bench in 44 Mad. 554 decided that the purchaser of properties after the Court-sale cannot apply under Order 21, rule 89, and it would appear that that is sufficient to decide the

(1) (1915) 38 Mad. 775.
(2) (1921) 44 Mad. 554 (F.B.)

(3) (1918) 41 Mad. 510.

present contention against the petitioner. It is, however, significant that no reference is made in the Full Bench decision to section 146, C. P. C., nor to the ruling reported in 41 Mad. 510. In that case it was held that, although the Court had a discretion, under Order 22, rule 10 to allow a vendor to continue a pending suit, section 146 gave such a vendor the right to continue to prefer an appeal; and, consequently, although the Full Bench has decided that a purchaser cannot after a Court-sale apply under Order 21, rule 89, it is not a decision directly to the effect that an appeal preferred by such a person would not lie, although it would be extremely anomalous that a person who is not allowed to make a certain application should be allowed to appeal from the order on such an application. If, however, the decision in 41 Mad. 510 is correct, he would seem to have this power and that decision has not been overruled, but I may observe that in 41 Mad. 510 the initial words of section 146 "save as otherwise provided by this Code" do not seem to have been discussed; and, if the Code provides that a certain person shall not file a certain application and it has been held by the Full Bench that a purchaser after Court sale cannot file an application under Order 21, rule 89 it seems to me that the Code similarly restricts the right of appeal against an order on such an application, which is, in effect a continuance of the same proceeding. I do not think it is necessary to determine this question now, for the petitioner could have been a party to the appeal perferred by the judgment-debtor, but voluntarily withdrew. I think he has misconceived his procedure and, consequently, his present petition must fail.

C. R. P. No. 522 by the decree-holder has not been seriously argued, and, considering that he came into Court so late, I think his petition was rightly dismissed. Inasmuch, however, as the judgment-debtor has by her conduct seriously perjudiced the petitioner and as from the circumstances of the case it would appear that she has taken this action in collusion with the auction-purchasers, the respondent, I dismiss both these petitions, but without costs.

Petitions dismissed.

* * **1924 Madras 472.**

KRISHNAN and ODGERS, JJ.

J. Burrayya—Appellant

v.

Ramayya—Respondent.

S. A. No. 724 of 1922, decided on 26th September, 1923, from the decree of District Court of Guntur, in A. S. No. 81 of 1921.

Guardian and Wards—Guardian borrowing for purchasing lands for minor does not bind minor but decree against land purchased can be passed.

The guardian has no right whatever to involve the ward's estate in debt, for the purpose of purchasing land to be added to his estate. Where a guardian incurs debt for purchasing lands, the creditor will not be entitled to proceed against the minor's estate but can have a decree, only against the lands actually purchased with the money borrowed by him.

B. Somiah—for Appellant.

Ramadass and *V. Krishna Mohan*—for Respondent.

Judgment:—In this case, defendants 2 to 5 are the appellants. They are the heirs-at-law of one minor Thirupatayya, who died sometime ago. The plaintiff brings this suit for recovering from the 1st defendant personally and from the minor's estate, in the hands of defendants 2 to 5, the amount due under the promissory note, Ex. A, which is a renewal of Exs. A-1 and A-2. It is found by the learned District Judge that the money due under the promissory note was borrowed for the purpose of paying the purchase-money for certain lands, which the guardian of the minor purchased for him. The question we have to decide is whether the money borrowed for purchasing lands—we will assume that the purchase was for the benefit of the minor—constitutes a debt really binding on the estate of the minor. There can be no doubt that there was no necessity to borrow this money at all, nor to buy the lands. The District Judge has found that there was no necessity so to borrow; but he seems to have thought that, as it might be for the benefit of the minor, the minor's estate would be liable. We are unable to agree with this proposition. The guardian had no right whatever to involve the ward's estate in debt, for the purpose of purchasing lands to be added to his estate. It has been so decided in this

Court in several cases : *vide Subramania* v. *Ramasami* (1) and *Subramania Chetty* v. *Chidambara Mudali* (2). We must therefore hold that the debt in this case, due under the promissory note sued upon, is not binding on the minor's estate, or the heirs of the minor, and the decree passed against the minor's estate in the hands of his heirs must be set aside. All that the plaintiff is justly entitled to is to have a decree against the lands actually purchased, with the money advanced by him. There will, therefore, be a decree in favour of the plaintiff, only against the lands covered by Ex. I, the purchase deed, to pay the purchase-money for which the promissory note amount was borrowed. The lower Court has refused a personal decree against the 1st defendant. There is no appeal against that portion of the decree and therefore, we cannot pass any orders against the 1st defendant in this appeal.

As regards costs, the right order to pass in this case is to give defendants 2 to 5 their full costs throughout, the plaintiff paying such costs. As between the plaintiff and the 1st defendant, there will be no order as to costs in the second appeal.

Appeal allowed.

(1) (1913) 25 M.L.J. 563.
(2) (1921) 14 L.W. 495.

* * 1924 Madras 473.

PHILLIPS AND VENKATASUBBA RAO, JJ.

M. Ramachandra Raju and another—Petitioners

v.

M. P. Bhujanga Row—Respondent.

Civ. Rev. No. 797 of 1922, decided on 11th Oct., 1923, from the order of Addl. Sub-Judge of Cocanada, dated 13th Oct., 1922.

Civ. Pro. Code, S. 11—Dismissal for default of an application for mesne profits does not bar fresh application.

The dismissal of an application for ascertainment of mesne profits for default or as not pressed, in a suit in ejectment in which a preliminary decree for possession was passed, does not bar a fresh petition for ascertaining the mesne profits. (16 L.W. 198 ; 16 Cal. L J. 3, *Dist.*)

C. Rama Rao—for Petitioners.

A. Krishnaswamy Aiyar and *Kamanna*—for Respondent.

Judgment :—The preliminary decree which was for the possession of immoveable property awarded mesne profits subsequent to suit and the plaintiff applied under Order 20, rule 12 of the Code of Civil Procedure for ascertainment of those profits. The learned Subordinate Judge made an order in the plaintiff's favour and the defendants have filed the Civil Revision Petition assailing this order.

The defendants object that the plaintiff was precluded from making the application in question by reason of the fact that he made previous applications in order to get the same relief and those applications were rejected. The material facts with reference to which this contention is advanced are these. The plaintiff filed an execution petition and he sought to execute the decree, so far as it was capable of execution, but he in addition prayed for ascertainment of mesne profits under the erroneous impression that profits were to be ascertained in execution. As the execution petition was not accompanied by a copy of the decree, time was granted for its production and as the copy was not produced within the time granted, the petition was rejected. The plaintiff again applied in execution for ascertainment of profits and this application was not pressed and was dismissed. This was followed by another execution petition which again included a prayer for ascertainment of mesne profits. This relief was, however, not pressed, but the other prayer for attachment was granted, properties were attached and proclaimed for sale. So far the plaintiff applied in execution for ascertainment of profits and there was no judicial determination of his right in respect thereto. But plaintiff apparently realising that his previous applications were misconceived filed the petition in question under Order 20, rule 12, praying for an inquiry as to mesne profits due to him, and the question to be decided is whether by reason of the dismissal of the previous applications, the present application is barred. It is not suggested that it is barred by limitation ; but the argument appears to be that the dismissal of the previous applications is tantamount to the dismissal of the suit itself, and that therefore a fresh application which is in the nature of a fresh suit cannot be maintained, the previous dismissal operating as a bar to the maintainability of the present application. First, it is to be observed that the Court had no jurisdiction to entertain what were termed execution applications, for ascertainment of mesne profits.

Secondly, the Court did not purport to decide, nor did it decide the plaintiff's right to recover mesne profits. The rule *res judicata* cannot therefore obviously apply. On what ground then can the dismissal of an application operate as a bar to a fresh application? In *Upendra* v. *Sakhi Chand* (1), in somewhat similar circumstances, it was held that the dismissal of an application for assessment of mesne profits was equivalent to the dismissal of the suit itself and that a fresh application would not lie. This case is distinguishable on the ground that the order which was sought to have the effect of *res judicata* was that "the case be dismissed for default on behalf of the plaintiff" The order in those terms was said to have been made on account of laches of the plaintiff in that suit. We however fail to see how after the passing of a preliminary decree the dismissal of an application, not on the merits, but owing to, say, non-appearance of the plaintiff, or laches on his part, can result in the dismissal of the suit itself. The dismissal of the suit would involve the obliterating of the preliminary decree, that is, taking the present case and giving effect to the arguments strictly, the dismissal of the application for ascertainment of mesne profits would lead to the dismissal of the suit, that is, the suit which was *inter alia* for the recovery of the immoveable property, although a decree had already been passed for the possession of the property. This will indeed be a startling result. The provisions of Order 9, have no application to such cases. Take for instance, Order 9, rule 3 which runs thus:—

"When neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed."

If after passing of a preliminary decree, this rule is to be applied, the suit has to be dismissed and the decree already passed becomes vacated. The rule does not say that the decree shall become vacated and the obvious inference therefore is that Order 9 has no application in circumstances like the present. Therefore, we have to fall back upon the general principle of *res judicata* and so long as the merits of an application have not been decided, we see no ground for disallowing a subsequent application. The petitioners also relied upon *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah* (2). That was a suit upon a mortgage and no portion of a preliminary decree was executable, and on this ground it is distinguishable. But it has been argued that the principle underlying that ruling is equally applicable here. For the reasons we have given, we are not prepared, at any rate, to extend the application of the principle given effect to in that decision and, in our opinion, the Subordinate Judge has correctly decided the point, and the Civil Revision Petition is accordingly dismissed with costs.

Petition dismissed.

(1) (1912) 16 C.L.J. 8.

(2) 1922 Mad. 65.

* * 1924 Madras 474.

SCHWABE, C.J. AND WALLER, J.

The Commissioner of Income-tax, Madras —Referring Officer

v.

M. Ar. Ar. Arunachalam Chettiar—Respt.

Referred Case No. 6 of 1923, decided on 12th October, 1923.

Income Tax Act (XI of 1922), Ss. 6, 10 and 24—Taxable income.

The loss incurred by an assessee in respect of the unregistered partnership trade can be set off against the profits made by him in his individual trade.

The Govt. Pleader C. V. Ananthakrishna Aiyar—on behalf of Referring Officer.

A. Krishnaswami Aiyar for *V. Rajagopala Aiyar*—for Respondent.

Schwabe, C.J.:—The question referred is:

"Where a person carries on two different trades —one individually and the other as a member of an unregistered firm, is he entitled to set off (that is, for income-tax purposes) the loss incurred by him in respect of the partnership trade, against the profits made by him in his individual trade?"

The facts are that the assessee has an income from trade profits in two distinct and separate businesses of his own, and from other property, has made losses in other businesses of his own, and also has incurred losses in two distinct businesses, in which he is a partner and which businesses are not registered.

The question for decision is a difficult one, the difficulty arising from the wording of the Income-tax Act. If our decision is not in accordance with the real intention of the legislature, it is for the legislature to make that intention clear hereafter. The relevant sections for consideration are 6, 10 and 24, and the difficulty is to ascertain

the proper interpretation of the two latter. Section 6 is merely a division into heads of different sources of income, one being "business," concluding with the general head of "other sources." Section 10 defines and elaborates the profits and gains covered by the heading "business." The tax is payable by an assessee under the head "business," in respect of the profits or gains of any business, carried on by him. "Assessee" is defined in section 2, as 'a person by whom income-tax is payable.' No mention is made in section 10 of partnerships registered or unregistered, and, although it is the practice to assess firms as such, I can find nothing to justify the argument that each partner in a firm is not an assessee; for he is a person by whom the income-tax is payable; nor can I find anything to justify the argument that this assessee being a partner, is not a person carrying on the business in question. I am, therefore, prepared to hold that the present assessee is an assessee, in respect of the profits and gains of the business which he carries on, in partnership.

The next question that arises is, where an assessee carries on two distinct businesses, is he entitled to set off the loss on one, against the profits of the other? The Crown has argued before us to the contrary but it is to be observed that this is not the view taken by the Commissioner. Indeed, he states that such set-off has been allowed, in respect of the separate businesses of the assessee, which he carried on alone, namely, his money-lending business and his bell-metal factory; and it would, from the reference seem to be his view that, if the partnership had been registered, such set-off would be allowable, also in respect of the losses of the partnership businesses.

The Crown's argument is based on the words of section 10, which refers to "the profits of any business," and would have us construe 'any' as 'each' and not as 'each and every.' Counsel points to the English Income-tax Act, which under Sch. D makes chargeable to income-tax the profits and gains from any trade, and then by a special rule, namely, rule 15 of the rules applicable to cases I and II (case I being tax in respect of trade) provides that the losses of one business can be set off against the profits of another. This re-enacts section 101 of the Income-tax Act of 1842. It is argued that, if such a section was necessary in England it follows that its omission here shows that it was not intended to allow such set-off here. I have already pointed out that it is not the view of the Commissioner, and if it were the intention of the Statutes, it would indeed be anomalous; for by section 24 (1), set-off is allowed between the different heads of income, so that a trade loss can be set-off against a professional gain, or interest on securities, a privilege not allowed in England, while an adjustment of profit and loss between different businesses incurred by the same person would be allowable in England and not here, although the arguments in favour of such allowance are at least as strong as those in favour of those governed by section 24. What is desired to tax is a man's total net-income; and it would be most unjust to tax him on a profit on one business, when, in fact, owing to losses on the other, he has a loss, or even no income at all. I do not believe that this was the intention of the Act; and I doubt whether rule 15 in the English Act was necessary, except to make clear the intention of the legislature; and in my judgment, looking at the Indian Act alone, the words, 'any business,' being open to either construction, I must take that construction which looking at the whole Act, I think, is the more rational and must construe 'any' to mean each and every. It follows that an assessee is entitled to set off profits in one business, against losses in another. And for this purpose, I can find no distinction between what an assessee earns alone and what he earns in partnership. It is argued by the Commissioner that a partnership is, for income-tax purposes, an entity; but it is not an entity known to the law; it is not a separate entity like a company, limited by shares; its name is merely a convenient method of describing its partners, each of whom is jointly and severally liable for its debts, and, for income-tax purposes, it is a convenient body to assess, as the partners carry on the trade together and keep books in which the partnership transactions are entered, and earn together profits or make losses. It is to be observed that, for this purpose no distinction can be made between registered and unregistered firms; for whether a firm is legal entity or not does not depend on registration.

It is then argued that section 24 shows an intention that such set-off is not to be allowed, in the case of an unregistered

firm. But section 24 (1) is dealing with something quite different, namely, the allowance of a set-off between different heads, mentioned in section 6 and not the allowance of a set-off between different businesses coming under one head. Section 24 (2) again dealing with a set-off between different heads, allows the partners of a registered firm, where that firm has made a loss under one head, and has not sufficient income under another head, to avail themselves of this set-off, to use the loss to set off against their own individual incomes arising under other heads. Whether this must be taken by implication to prevent such a set-off, in the case of partners of an unregistered firm, is a difficult question which does not arise here, as the present assessee desires to set off his partnership loss, against a loss of his own under the same head, that is 'business,' and not under a different head. I do not think that we should be justified in inferring from this section the intention of the legislature to prevent any sort of set-off by a partner of an unregistered firm, against his own trade losses.

It follows that the answer to the question is in the affirmative. The assessee is entitled to his costs.

Waller, J.:—I agree and have nothing to add.

Question answered in the affirmative.

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* * 1924 Madras 476.

KRISHNAN AND WALLER, JJ.

G. Kanthamma—Appellant

v.

M. Reddipantulu—Respondent.

S. A. No. 7 of 1923, decided on 30th October, 1923, from the order of the Sub-Judge of Cocanada, dated 5th September, 1922.

(a) *Civ. Pro. Code, O. 21 r. 71—Court is one party to the auction sale—Hence in absence of acceptance by Court of auction purchaser's agent the person making the bid as the alleged agent, is personally liable for deficit on re-sale—Contract Act, S. 230 (1).*

Where in a Court-auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not the judgment-debtor or the decree-holder but the Court itself. In selling property in Court-auction, the Court acts under the statutory powers given to it by the Court and not as the agent of any party and the contract that is made when the bid is accepted and confirmed by the Court, is one between the Court on the one side and the auction-purchaser, whose bid is accepted, on the other; and therefore before Cl. 2 of S. 230 of the Contract Act can be excluded, it must be alleged and proved by the party wishing to take advantage of S. 230. Cl. (1) that when making the bid or before doing so, he had informed the Court or the Court officer, conducting the sale that he was making the bid only as the agent of some named third party. It would then be open to the Court officer, the Nazir, either to accept his bids or decline them, if he is not fully satisfied, that he had a proper power of attorney to make the bid. Where the auction-purchaser is accepted by the Court as agent he is liable personally for deficit on resale. [P. 477, Cs. 1 and 2.]

(b) *Civ. Pro Code O. 21, r. 71—Interest is allowable on deficit only from date of order to pay.*

Defaulting auction-purchaser is not liable for interest on the deficit amount, from the date of the sale to the date of the order directing him to repay, but he is liable for interest after the date of the order of payment. [P. 478, C. 1.]

P. Somasundaram—for Appellant.

B Jagannadha Doss and *O. Rama Rao*—for Respondents.

Krishnan, J.:—This is an appeal against the Appellate Order passed by the Subordinate Judge of Cocanada, in an appeal to him, from an order of the District Munsif of Cocanada in an execution proceeding. The appellant before us was the judgment-debtor, under a decree passed by the District Munsif's Court, which was under execution, and her property was advertised for sale in Court auction. The sale was actually held by the Nazir, the Court Officer, in the usual way and the 1st respondent bid for the property and offered a price of Rs. 4,600, which was accepted by the Court Officer and the bid was knocked down in his favour. Under Order 21, rule 84, Civil Procedure Code, the purchaser is bound to pay 25 per cent. of the purchase-money on the completion of the auction. The 1st respondent made default in making the payment and in consequence, under the same rule, the property was again put up for sale. This time the property was knocked down for a lower sum, namely, Rs. 3,750, thus leading to a deficit of Rs. 850. The judgment-debtor applied to the Court under Order 21, rule 71, Civil Procedure Code, that the auction-purchaser, the 1st respondent, should be made liable for this deficit and should be called upon to pay the amount of the deficit into Court, and the District Munsif passed an order in her favour. The appeal from this order was heard by the Subordinate Judge, and he was of opinion that the 1st respondent might have bid for the property, as the

agent of the 2nd respondent, and that as an agent, he would not be responsible to pay this deficit amount under clause (1) of section 230 of the Contract Act, which says, that an agent cannot personally enforce contracts, which he has entered into on behalf of his principal, nor can he be personally bound by them. No evidence had been taken on this point in the first Court and therefore the Subordinate Judge remanded the case to the first Court to take evidence, in order to ascertain whether the 1st respondent was actually the agent of the 2nd respondent, as he subsequently alleged after the sale was over; and it was pleaded that in any case, even if the 1st respondent was an agent, as he did not disclose the name of his principal at the time of the bid, clause 1 would not apply. The Subordinate Judge, thinking that if the judgment-debtor, whose property was sold in auction, did actually know that the 1st respondent, was bidding as the agent of the 2nd respondent, that would take the case out of clause 2 of section 230 of the Contract Act, directed evidence on that point also. In taking this latter view, he treated a sale in Court auction, as a contract between the owner of the property sold, namely, the judgment-debtor, and the auction-purchaser apparently considering that the Court and its Officer were merely acting as agents for the judgment-debtor, for selling the property. We are unable to accept this view which he has adopted. Where in a Court-auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not in our view the judgment-debtor or the decree-holder, but the Court itself. In selling property in Court-auction, the Court acts under the statutory powers given to it by the Code and not as the agent of any party and the contract that is made, when the bid is accepted and confirmed by the Court, is one between the Court on the one side and the auction-purchaser, whose bid is accepted, on the other; and therefore before clause 2 of section 230 of the Contract Act can be excluded, it must be alleged and proved by the party wishing to take advantage of section 230, clause(1), that when making the bid or before doing so, he had informed the Court or the Court Officer, who was acting on behalf of the Court in selling the property, that he was making the bid only as the agent of some named third party. It would then be open to the Court Officer, the Nazir, either to accept his bids or decline them, if he is not fully satisfied that he had a proper power of attorney to make the bid. In this case, it is not pretended that there was any power of attorney, which the 1st respondent had from the 2nd respondent, or that any power of attorney was shown to the Nazir; nor is it even alleged that before the sale took place the 1st respondent informed the Nazir, or the Court, that he was bidding as an agent. Therefore, even if we assume that the 1st respondent was really the agent of the 2nd respondent, we have here a case where the agent did not disclose the name of his principal, and did not even inform the other party, the Court that he was acting as the agent of a principal. The question whether the judgment-debtor knew or not, that the 1st respondent was bidding as an agent of the 2nd respondent, is therefore quite immaterial. The Court was entitled to enforce the contract against the 1st respondent personally and as the 1st respondent made himself personally liable for the deficit that has been caused by his action in not completing the sale by depositing 25 per cent. of purchase-money. Order 21, rule 71, Civil Procedure Code, gave the Court power, at the instance of the judgment-debtor, to collect the deficit that has been caused in a summary manner, by way of execution. In these circumstances, we think that the order of the District Munsif was right and that there is no object in taking evidence, which the Subordinate Judge has directed to be taken, as to whether the 1st respondent was really the agent of the 2nd respondent or not, and whether the judgment-debtor knew of it; for even assuming that he was an agent, as he never disclosed to the Court Officer that he was bidding as an agent, till a long time after the bid was offered and accepted, he is liable for the deficit personally. Whatever rights there may be between him and the 2nd respondent, he may enforce as advised, but they need not be considered now at all. The order of the Court directing him to pay the money into Court is therefore correct.

The ruling relied upon by the Subordinate Judge in *Mackinnon Mackenzie & Co.* v. *Lang Moir & Co.* (1), followed in Lahore

(1) (1881) 5 Bom. 584.

in *Lyallpur Sugar Co.* v. *Mulraj* (2), is not relevant here; for it is only in the view that the judgment-debtor is a party to the contract of the auction-sale, that they become of any importance and necessitate a finding on the question whether the judgment-debtor did actually know that the 1st respondent was acting as the agent of the 2nd respondent.

There is one other small point, which has been dealt with in the argument and that is the question, whether the defaulting auction-purchaser, the first respondent, is liable for interest on the deficit amount, from the date of the sale to the date of the order of the District Munsif directing him to repay. There is nothing in Order 21, rule 71, Civil Procedure Code, that speaks of interest and we think, therefore, that he is not liable for interest between those dates. Of course he is liable for interest after the date of the order of payment. With this variation, we must allow the appeal of the appellant, set aside the order of the Subordinate Judge and restore that of the District Munsif.

As regards costs, the 1st respondent will pay the costs of the appellant throughout. As regards the 2nd respondent's costs, the claim against him was expressly given up by the appellant in the First Court and therefore there was no necessity to make him a party in this appeal before us. As we are giving no relief against him, we think he is entitled to the costs of this appeal from the appellant.

Order modified.

(2) (1922) 65 I. C. 473.

* * **1924 Madras 478.**

KRISHNAN, J.

In re *Chinnappa Naidu*—Petitioner.

Crim. Rev. No. 129 of 1923, decided on 6th September, 1923, from the order of Stationary S. C. Magistrate, Villupuram, dated 3rd January, 1923.

Crim. Pro. Code, Ss. 403 and 235—Penal Code, Ss. 147 and 427—Trial and acquittal for mischief on certain facts precludes fresh charge for rioting on nearly the same facts.

Where an accused was alleged to have gone with a number of others to a palmyra tope and it was alleged that some of the members in that assembly climbed up the trees and cut the spathes of the palmyra trees and threw down the pots attached to the spathes in which toddy was being collected and the accused was once charged with mischief under S. 427 of the Penal Code and acquitted on the ground that he was not present at the scene of occurrence. *Held* he could not subsequently be charged with rioting under S. 147 of the Penal Code on the allegation that he along with the same body of people as on the former occasion went to the tope and that some of them destroyed the spathes in pursuance of the common object, *viz.*, of committing mischief by destroying the spathes and breaking the pots because the two transactions were so closely overlapping that it was open to the prosecution to have framed an alternative charge of mischief and rioting under S. 236. Section 403 is not a section easy of construction but the general principle underlying it is to be borne in mind namely that a man should not be put upon his trial twice over on the same facts as it is a great hardship for a man to stand more than one trial for any one offence.

S. Ramaswami Aiyar—for Petitioner.

V. L. Ethiraj for *Public Prosecutor*—for Crown.

Order :—This is an application against an order passed by the 2nd Class Magistrate of Villipuram rejecting an application by the 2nd accused that he should not be tried for the offence of rioting, under section 147, because he had been already acquitted on a former occasion in C. C. No. 237 of 1922, by the Sub-Magistrate of Tindivanam on the same facts, although on that occasion he was charged only with the offence of mischief. The two prosecutions seem to be based, to a great extent, upon the same facts. They arise from the alleged facts that the 2nd accused went with a number of others to a palmyra tope and some of the persons in that assembly climbed up the trees and cut down the spathes of trees and also threw down the pots attached to them, in which toddy was being collected. The Magistrate has held that section 403, Criminal Procedure Code is not applicable to this case, because he holds that the trial of the previous case referred to an offence under a section which has nothing in common with section 147, that being a trial under section 427, Indian Penal Code, for committing mischief.

(Section 403) Criminal Procedure Code is not a section easy of construction; but the general principle underlying it is to be borne in mind, namely, that a man should not be put upon his trial twice over, on the same facts, as it is a great hardship for a man to stand more than one trial for any one offence. Though

the first part of clause 1 of section 403 is clear enough, that a man is not to be charged for the same offence once again, after he has been convicted or acquitted of that offence, the second part of it which says :

" nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237,"

is not always easy of application.

Clause 2 says :

" A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, Sub-s. 1".

It is urged by the Public Prosecutor that it is the second clause that applies in this case ; but I am unable to accept his argument. I think that this is not a case where there are a series of acts so connected together as to form the same transaction in which more than one offence was committed. Evidently the second accused and the members of his party came to the tope and some of the party broke the pots. In the first case it was alleged that the person who did the mischief did so at the instigation of the others who were standing on the ground. The second accused was one of those charged in that case. He was acquitted on the ground that he was not present at all on the scene of occurrence. Now it is alleged that the second accused along with the same body of people as on the former occasion went to the tope and some of them destroyed the spathes, in pursuance of the common object, which the party entertained, namely, of committing mischief, by destroying the spathes and breaking the pots. Though the offences in the two cases are under two different sections and there is nothing in common between those sections 147 and 427, still the facts of the two cases here seem to overlap so considerably that I feel inclined to apply the principle underlying section 403 to this case. I think that it is possible to bring it under the words of section 236 ; though under section 403 it would have been open to the prosecution in the previous trial to have framed alternative charges under mischief and rioting, somehow or other the charge of rioting was not put forward. We have not got here series of acts and if the prosecution felt it doubtful, as to whether they would be able to prove the facts constituting the offence of mischief or the offence of rioting, they could easily have charged the accused, in the former trial in the alternative with the two offences. That being so, I am inclined to think, though with some hesitation, that section 403 will apply to this case.

Some authorities have been cited before me by the Vakil for the petitioner. The case in *In re Ganapathi Bhatta* (1), a decision of a Bench of this Court, is distinctly in his favour. It was there held that the trial of a person under section 211, Indian Penal Code, was a bar to his trial subsequently under section 182, Indian Penal Code. The learned Judges considered the scope of the language of section 403, and applied that language to it. There is also a case in *Emperor* v. *Jhabbar Mull Lakkar* (2) somewhat to the same effect, where, however, unfortunately the learned Chief Justice does not consider the language of the section in question. All the authorities that have been cited before me are in favour of a liberal view being taken of section 403.

I therefore allow this petition and direct that the trial of the second accused only under section 147, Indian Penal Code, be finally stayed.

Petition allowed.

(1) (1913) 36 Mad. 308.
(2) 1923 Cal. 179.

* 1924 Madras 479.

(FULL BENCH.)

SCHWABE, C.J., COUTTS-TROTTER AND KRISHNAN, JJ.

In the matter of *Mr. K. M., First Grade Pleader, Chalapuram, Calicut*

and

In the matter of, *Mr. U. G., First Grade Pleader, Kallai, Calicut.*

Decided on 31st July, 1923.

Legal Practitioners Act, S. 13—Failing to comply with order under S. 107, Crim. Pro. Code, and consequent committal to prison are not without definite intent—Civil Disobedience in itself is inconsistent with the practice of a lawyer.

Where a pleader was committed to prison for default in complying with an order under S. 107, Crim. Pro. Code, and the pleader later disclaimed and disavowed any intention of either disobeying the order or in any way paralysing the administration of justice : *Held* the sanads of the pleaders may

be renewed. Where the pleader before he renewed his sanad took up occupation on the press and mainly without remuneration *held* such conduct can be overlooked.

A. Krishnaswami Aiyar—for Brother pleaders.

K. Kuttikrishna Menon, V. V. Srinivasa Aiyangar and *T. R. Ramchandra Ayyar*—for the Vakils' Association.

Schwabe, C. J.:—I think these cases have been very properly brought before the Court, so that the two pleaders, Mr. K. M. and Mr. U. G. may have the opportunity of explaining to the Court the circumstances relating to their imprisonment on the charges that were made against them, and I think they have now stated very fully, and I am prepared to say very fairly, the facts of their respective cases. They both disclaim and disavow any intention at all of either disobeying the District Magistrate's orders, or of in any way paralysing the administration of justice. They express regret that in the one case the sending out of a telegram to the press; and in the other case the refusal to sign a statement before the Magistrate have been understood to show a spirit of disaffection or an intention either to disobey the orders of the duly constituted authorities or in any way to paralyse the administration of justice. I think that we can accept their statements as being accurate and accept their expressions of regret as being genuine and, under the circumstances I think that we can quite properly order the sanad to be issued to these two pleaders.

In both cases our attention was also called to a minor offence of having engaged themselves in another profession while they were still pleaders. It appears that they had not renewed their sanads when they took up their respective occupations on the press. It appears also that the work was done mainly without any sort of remuneration—a matter which can without difficulty be overlooked.

In these circumstances, the sanads will be issued.

Coutts Trotter, J.:—I am of the same opinion. All the concern that I have had in this or in any of these cases is to make it as plain as any language of mine can make it that, while this Court will not interfere with or have regard to any man's political opinions or opinions on public questions, it is impossible to allow a person, who proclaims or practices what is called the doctrine of "Civil disobedience", to ask to be part of the machinery of the courts which exist for the very purpose of the thwarting of civil disobedience and the enforcement of civil obedience. He may be a perfectly honourable man; he may act from conscientious motives; he may inconceivable circumstances be a patriot. It may be imagined that he should not be punished or even prosecuted for holding or expressing these opinions. All our business is to say that however admirable a person he may be, he cannot consistently with his professions, ask to be considered and to be adopted as part of the machinery of this Court for enforcement of law and order. But I am satisfied now, I confess I was not before from their last statements, that the intention of these gentlemen is to give an assurance to this Court, which I hold the Court is entitled to demand, that they are not and do not in the future intend to be, exponents of the doctrine of civil disobedience.

For these reasons, I agree with my Lord that sanads may be properly issued to them.

Krishnan, J.:—I also agree with the opinion of the learned Chief Justice and that of my learned brother Coutts Trotter that in these two cases we should not withhold the sanad. I do not think it necessary, after what fell from the Chief Justice with which I entirely agree, that I need say anything more.

I agree to the order proposed.

Schwabe C. J.:—I should like to add that I agree entirely with what has just fallen from my learned brother Coutts Trotter.

Sanad granted.

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* 1924 Madras 480.

KRISHNAN, J.

Ramachandra Mardaraj Deo Garu Zamindar of Kallikota—Petitioner

v.

Tumbanatha Behara and others—Respondents.

Civ. Rev. No. 672 to 749 of 1919, decided on 25th April, 1923, from the Principal District Munsif of Berhampore dated 20th December, 1918.

Landlord and Tenant—Rent—Payment of a lump sum for over 60 years jointly by the inamdars without reference to their numbers in lieu of kattubadi payable by them raises a presumption of agreement.

Where the inamdars in a Zamin village have been jointly paying for over 50 years a lump sum of Rs. 400 instead of kattubadi at a fixed rate, an implied contract to pay that sum by the inamdars may be inferred whatever might have been the right of the Zamindar originally. [P. 482, C. 1.]

The word "Kham" would seem to mean a rough account of the revenue due. [P. 482, C. 1.]

C. Madhavan Nair (*Advocate General*) and *C. Sambasiva Rao*—for Petitioners.

K. P. Padmanabha Pillai, *M. Ramchandra Rao* and *C. S. Venkatachariar*—for Respondents.

Judgment:—These are revision petitions arising from a number of small cause suits, filed by the Zamindar of Kallikotta, against various inamdars, holding lands in the Zamin Village of Mardakota, for kattubadi and land cess alleged to be due. The Zamindar's case is that the inams were granted for Paik's service, by one of his predecessors-in-title, with a condition attached, that each inamdar was to pay to the Zamindar a kattubadi equal to $\frac{1}{4}$th of the Rajabhogam, or the total income of the inamdars from the lands. The defendants in the various suits pleaded *inter alia* that they were not liable to pay kattubadi separately as claimed, but were only liable as a body to pay a lump sum of Rs. 53 for it every fasli. They also pleaded that the grant was absolute and not burdened with any service; but that question did not arise for decision in these suits. There is also no question raised before me about the liability for land cess. The District Munsif found on the evidence that the inamdars were not individually liable to pay any kattubadi but they were liable collectively to pay a fixed sum of Rs. 400 every fasli to the Zamindar and not Rs. 53 as they pleaded. As no claim was made in these suits to enforce this joint liability, he dismissed them, except as regards the claims for land-cess and interest on them which were decreed. The Zamindar has applied to this Court to revise this judgment.

One of the suits brought by the Zamindar had to be tried as an Original Suit, as the value of the claim was beyond the small cause jurisdiction of the Munsif. These Small Cause Suits and that suit were however all tried together, at the request of parties and the judgment given is a common one for all the suits. The decree in the Original Suit is now under appeal before the Subordinate Judge and it was urged by the learned Advocate General that the hearing of the revision petitions should be stayed, till the disposal of that appeal, as different findings of fact may be arrived at by that learned Judge. This suggestion was strongly opposed by the learned Vakil for the inamdars. As pointed out by him, any finding of fact that the Subordinate Judge may come to, different from the Munsif's will be of no avail in the disposal of these petitions, as the parties here are different from the parties in the appeal, the Zamindar being the only common factor. These petitions have already been on this Court's file for nearly four years. I therefore decline to grant the prayer for further adjournment.

The finding that the defendants are liable only as a body to pay a kattubadi of Rs. 400 per fasli to the Zamindar is a finding of fact from the oral and documentary evidence in the case and as such it should be accepted in revision. But it is contended by the learned Advocate General that in coming to that finding the District Munsif misconstrued Exs. A and A (1) and misunderstood their nature and thus failed to attach due weight to them. Now Exs. A and A (1) are "Kham Bhogattas" of faslies 1225 and 1226 (1816 and 1817). They refer to the Rajah being paid at 4 annas per rupee, or $\frac{1}{4}$th share of the total income "as per the yearly mamool". The District Munsif instead of ascertaining the meaning of the term "Kham Bhogatta", from some recognised glossary of such terms, entered upon a philological speculation of his own, as to what its meaning might be and came to the conclusion that it meant an account prepared for "his own information", by the Karnam. He, therefore, treated it as of little value and preferred Exs. A (2) and (4) which were returns made to the Collector. No doubt he was not strictly correct in the meaning he attached to the expression "Kham Bhogatta". Bhogatta is a Telugu word admittedly meaning "information". Now the word "Kham" which is a Persian word means, according to Wilson's Glossary "gross, immature". "Kham Chitta" which evidently corresponds to Kham Bhogatta is said to mean a rough statement or account; "Kham Wossool" is stated to mean gross receipts

of revenue and also a settlement made with the cultivators direct, without the intervention of a third person, or a farmer or Zamindar. From the various meanings given above to expressions containing the word "Kham", the phrase "Kham Bhogatta" would seem to mean a rough account of the revenue due, prepared for information.

Even though Exs. A and A (1) are only rough accounts they are entitled to considerable weight as documents of a very early date; and there is no doubt a reference in them to the Zamindar's share being a quarter. I am, however, of opinion that the weight to be given to these documents does not really affect the validity of the Munsif's finding in these cases. They only show that the Zamindar's claim was calculated at a $\frac{1}{4}$th share in the years 1816 and 1817. We find however in Ex. A (4) a return submitted by the then Zamindar in 1861 and signed by him, a statement that the Kattubadi was Rs. 400. It is manifestly not a $\frac{1}{4}$th share of the income which is stated to have been Rs. 1,517. The present Taluq Officer of the Kallikotta Estate, P. W. 1, had admitted in evidence that the same amount of Rs. 400 had been collected as Kattubadi from the defendants for all the 16 years that he had been in service and that when an attempt was made in fasli 1324 (1914) to introduce an "*asamiwar arusal*" or "individual war account", the defendants promptly objected and in spite of criminal and other coercive proceedings, it has been found impossible to enforce it.

We must therefore take it, as the District Munsif has found, that for 50 or 60 years now, the same lump sum of Rs. 400 a year has been paid by the inamdars as a body, as kattubadi to the Zamindar. Whatever therefore might have been the Zamindar's original claim, the facts here are sufficient to justify the inference that there is an implied contract between the Zamindar and the inamdars that the latter are to pay only a sum of Rs. 400 a year jointly. The Zamindar is not entitled now to go back on such an arrangement. The fact that though from time to time holdings of heirless paiks were resumed by the Zamindar, the total amount of kuttubadi was left intact at Rs. 400 and the fact that the increase in the number of inamdars on the other hand also did not affect the amount payable, strongly corroborate the inference that the liability of the inamdars was a joint one to pay a fixed sum.

In these circumstances, I do not think it necessary to call for a revised finding from the District Munsif, on the ground of his having given an inaccurate meaning to the expression "Kham Bhogatta," which is the only ground urged in support of the claim for it.

It was lastly urged that as the inamdars were all jointly liable to pay kattubadi at the rate of Rs. 400 a year, decrees should have been given against one or more of the defendants, for a sum or sums not exceeding Rs. 400 on the whole. It was urged that it was open to the Zamindar to claim the whole amount from any one of the persons jointly liable, leaving it to the latter to claim contribution from his co-obligors. Now such a claim was not made in the lower Court. In this Court, the Advocate-General asks that a decree may be given against the defendant in S. C. S. No. 846 of 1918, for the amount claimed against him in that suit, for the three faslies. As that amount is less than Rs. 400 per fasli, a decree will be so given. The decree in that suit will be modified by giving the plaintiff a decree for the full amount Rs. 190-4-9 including the land cess already decreed. In that case, the parties will bear their costs. The other Civil Revision Petitions are all dismissed with costs in cases in which the respondents are represented. Vakil's fee at Rs. 10 each but not exceeding the regulation fee in any single case.

[And this case having been posted to be spoken to and coming on for hearing again this 25th day of April, 1923, the Court made the following]

Order:—The order as to costs is revised by giving a fee of Rs. 5 in each case irrespective of the regulation fee.

Petitions dismissed.

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* 1924 Madras 482.

SPENCER AND DEVADOSS, JJ.

M. V. Kunhan Menon—Appellant

v.

M. V. Kannan Menon and others—Respondents.

S. A. No. 153 of 1922, decided on 29th August, 1923, from the order of Sub-Judge, Palghat, dated 3rd April, 1922.

Civ. Pro. Code, O. 40, r. 1—Receiver can't be appointed without substantial grounds to interfere with possesson.

There must be some substantial ground for interfering with existing rights of possession for the appointment of a Receiver in a suit. The fact that no harm would be done by such appointment is not a sufficient ground especially where there is no danger of waste.

The Advocate-General (C. Madhavan Nair) and *K. Sankunni Nair*—for Appellant.

K. P. M. Menon and *P. Govinda Menon*—for Respondents.

Judgment:—The parties are Nair subjects of the Cochin State. The suit has been brought in a British Court to obtain partition of properties in British India. The Subordinate Judge of Palghat has appointed a Receiver to manage these properties *pendente lite*.

When a member of a Mitakshara joint Hindu family sues for partition, his right to become divided is self-evident and it may be taken for granted that, unless he makes default, he will get a decree, the form that the partition will take being alone left in issue. There is no such certainty about the present case. The theory that the plaintiff can take his newly acquired right to partition under the Cochin Regulation, carry it with him as his personal law into a foreign country and impress immoveable property lying in that country, where partition among Nairs is not the law of the land, with the character of partibility is a novel one and will need to be established at the trial. Meanwhile the plaintiff has not a *prima facie* right to ask for a Receiver. Moreover the Judge has not found that there is any danger of waste. He says that "no harm will be done" by the appointment of a Receiver, and that if the plaintiff has first to prove his right to partition it will be "too late" to appoint a Receiver. This is not enough. There must be some substantial ground for interfering with existing rights of possession (vide *Sivagnathammal* v. *Arunachalam Pillai* (1)). We therefore set aside the lower Court's order with costs of this appeal.

Order set aside.

(1) (1911) 10 M L T. 490=21 M L J. 821.

* 1924 Madras 483.

SPENCER AND KUMARASWAMI SASTRI, JJ.

T. V. Kutumba Rao—Petitioner

v.

T. Venkatappa and others—Respondents.

C. R. P. No. 251 of 1922, decided on 5th September, 1923, from the order of Sub-Judge, Bezwada, in M.A. No. 4 of 1921.

Civ. Pro. Code, O. 21, r. 89.

Application for deposit by duly authorised pleader's clerk is not illegal.

B. Somayya—for Petitioner.

P. Narayanamurthi and *K. Kamanna*—for Respondents.

Judgment:—The application under Order 21, rule 89, Civ. Pro. Code, was made by the authorised Vakil of a person entitled to apply. We are not prepared to hold that the words "on his depositing in Court" make the application incompetent if the person who actually pays the money into the Treasury is not a pleader or recognised agent within the meaning of Order 3, rule 1. The decision in *Sarva Begum* v. *Haider Shah* (1) is distinguishable by the fact that there the application under the section of the Code was not a competent one. The lower Court has found that the payer in this case was the Vakil's clerk.

Rule 131 of the Civil Rules of Practice only requires that the lodgment schedule should be signed by the payer. It is not questioned that the money paid into Court was that of the respondents. The applicant is the guardian of the persons entitled to apply, the money is their money; the mere fact that the Vakil sent the money by the hand of his clerk instead of taking it to the treasury himself will not invalidate the application.

The Civil Revision Petition is dismissed with costs. The Civil Miscellaneous Second Appeal is also dismissed but without costs.

Revision dismissed.

(1) (1917) 9 A.L.J. 12.

* 1924 Madras 484.

KRISHNAN AND WALLER, JJ.

Sami Chetti and another—Appellants

v.

Adaikalam Chetty and another—Respondents.

S. A. No. 422 of 1922, decided on 29th November, 1923, from the order of District Court of West Tanjore, in O. P. No. 87 of 1920, dated 6th October, 1922.

(a) *Civ. Pro. Code, O. 22, r. 1—On death of appellant pending appeal against order appointing a guardian, appellant's legal representative can continue the appeal.*

A minor's paternal uncle who opposed the appointment in the lower Court preferred an appeal against an order of Court appointing a certain person as guardian of the minor. On the death of the appellant pending the appeal, *held* that the appeal could be prosecuted by the son of the deceased appellant. (23 Bom. 719, *Dist.*)

(b) *Arbitration—Guardianship proceeding can't be settled by arbitration.*

A guardianship application is not a suit *inter partes*. It is a proceeding designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment. The selection of the guardian is a matter which is not of private interest between the parties and cannot be settled by a reference to arbitrators. (30 All. 137, *Foll.*)

K. Bashyam Iyengar—for Appellants.

S. G. Ramanujam and *K. Sankarasastri*—for Respondents.

Waller, J.:—This is an appeal against an order of the District Judge, West Tanjore, appointing one Adaikalam Chetti as guardian of his minor nephew. Adaikalam Chetti was the applicant in the guardianship petition, which was opposed by Sami Chetti the minor's paternal uncle. The latter appealed, but died during the pendency of the appeal. His son was brought on record as his legal representative and seeks to prosecute the appeal. Objection is taken that the right to sue does not survive and that the appeal has abated.

The objection is based on the decision in *Gangabai* v. *Khashabai* (1). The facts of that case were, however, very different from those with which we are now concerned. The appellant there relied on a personal appointment as guardian under a will and her brother, after her death applied for leave to prosecute her appeal. It was held that a claim based on a personal trust did not survive. As Parsons, C. J., observed "It cannot be said that the right to sue, which in this case must be construed to mean the right to make the objection which Ganga Bai made, survived," Ranade, J., also pointed out that the brother could not succeed as he claimed no right under the will.

On the other side has been cited a decision of a single Judge of the Punjab Chief Court who allowed the son of a deceased appellant to prosecute an appeal of this kind [*Arjan Singh* v. *Gujri* (2)]. In that case the appellant had asked to be appointed guardian as a reversioner. In the present case Sami Chetti opposed the application of the minor's maternal uncle on the ground of his own superior claim as the undivided senior paternal uncle. I see no reason why in the language of Parsons, C. J., the right to make that objection, should not be held to have survived in favour of his legal representative. A guardianship application is, after all, not a suit *inter partes*. It is a proceeding designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment. The application may be made by (among others) any relative or friend of the minor and the Judge may issue notice of it not only to certain specified persons, but also to any other persons to whom, in his opinion, special notice should be given. The welfare of the minor is the paramount consideration and it would, I think, be most unfortunate to hold that an appeal against an unsuitable or illegal appointment abated on the death of one of the persons who has received special notice of the application. Here the nearest male relation had filed an appeal objecting to the appointment and I think that the right to make that objection survives to his legal representative. I therefore overrule the preliminary objection

On the merits it appears that the parties agreed that the selection of the guardian should be left to certain arbitrators who chose Adaikalam Chetty. Their choice seems to have been accepted by the Judge. In *Mahadeo Prasad* v. *Bindeshri Prasad* (3) it has been held that such a matter, which is not of private interest between parties cannot be settled by a reference to arbitrators. This ruling I respectfully follow. The

(1) (1899) 23 Bom. 719.

(2) (1917) 160 P.W.R. 1917.

(3) (1908) 30 All. 137.

law allows a reference to arbitrators where all the parties interested agree that the subject of difference between them shall be so referred. In a guardianship application the party most interested is the minor and he cannot agree to a reference. There is nothing on record to show that the Judge arrived at any independent conclusion as to Adaikalam Chetti's fitness for appointment. Under the circumstances, I think that his order must be set aside and that he must be directed to dispose of the application afresh. I do this with great reluctance. It is quite likely that Adaikalam Chetti is the proper person to be appointed and this litigation has been going on since March 1920. As appellant agreed to the reference, there will be no order as to costs.

Krishnan, J.:—I agree.

Order set aside.

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* 1924 Madras 485 (1).

SPENCER AND DEVADOSS, JJ.

Thirumurthy Chetty—Appellant

v.

Ponnan Chetty—Respondent.

S. A. No. 424 of 1922, decided on 21st August, 1923, from the order of Sub-Judge, Dindigul, dated 10th August, 1922.

Provincial Small Cause Courts Act, Art. —15 Suit for money on award is not covered by Art. 15.

A suit for enforcement of an award is in essence a suit for specific performance of a contract. But a suit for the recovery of money on an award can in no sense be treated as a suit to enforce a contract. A suit to enforce an award and a suit to enforce a contract are not the same. (33 Cal. 881 ; 25 I.C. 826, *Foll.*)

T. L. Venkataramier—for Appellant.

S. Muthia Mudaliar—for Respondent.

Judgment:—This is a suit to recover money payable under an award. It is cognizable by a Court of Small Causes [Vide *Simpson* v. *McMaster* (1) and *Mizaji Lal* v. *Partab Kunwar* (2)]. No second appeal lies and therefore this Civil Miscellaneous Appeal must be dismissed with costs.

The appellant's pleader has quoted the authority of *Kunja Behary Bardhan* v. *Gost Behary Bardhan* (3). The suit there dealt with involved the partition of immoveable property and the award could not be enforced piecemeal by giving the plaintiff a decree for a sum of money which was also due under the award.

There is a remark in that judgment that a suit for enforcement of an award is in essence, a suit for specific performance of a contract. But a suit for the recovery of money as this is can in no sense be treated as a suit to enforce a contract. Moreover, the observation that a suit to enforce an award and a suit to enforce a contract are practically the same is opposed to the view taken in earlier decisions of the same Court [Vide *Sukar Hajam* v. *Oli Mohammad* (4) and *Bhajahari Saha Banila* v. *Behary Lal Basak* (5)].]

We see no reason to interfere with the order of the lower Court in the exercise of our revisional powers under section 115 of the Code of Civil Procedure. The result will be as above stated.

Appeal dismissed.

(1) (1890) 13 Mad. 344.
(2) (1919) 42 All. 169.
(3) (1917) 22 C.W.N. 66.

(4) (1914) 25 I.C. 826.
(5) (1900) 33 Cal. 881.

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* 1924 Madras 485 (2).

SCHWABE, C.J., AND WALLER, J.

Commissioner of Income-tax, Madras—Referring Officer

v.

M. S. S. Chidambaram Chettiar and another—Assessees.

Referred Case No 4 of 1923, decided on 26th September, 1923.

Income Tax Act (XI of 1922), Ss. 68, Proviso 2 and 34—Income Tax Act (VII of 1918) Ss. 19 and 25—Person not assessed to super-tax in 1921-22 can be assessed to such tax for 1921-1922 in 1922-1923 when the income is ultimately ascertained —Adjustment abolished by the new Act is saved for the transaction year—Principle of adjustment is applicable to cases where no original assessment at all was imposed provisionally.

Under the 2nd proviso to S. 68 of the Income Tax Act, 1922, as amended by S. 3 of the Income Tax Amendment Act, 1923, assessment to super-tax for 1921-1922 on the income of 1921-1922 can be made in 1922-1923 under the heading of adjustment in cases in which during provisional assessment proceedings, it was found that the income was below the taxable amount for purposes of super-tax, but the real income is ultimately found in proceedings under S. 68 of the Income Tax Act of 1922 as amended by S. 3 of the Act of 1923 to be large enough to be assessed to super-tax.

The meaning of S. 19 of the Indian Income Tax Act, 1918, is that, if the total income actually received has been ascertained by the Collector, the

Collector is to compute the income-tax and super-tax, which would have been payable if income-tax and super-tax had been levied in the previous year with reference to the true amount of the income so ascertained and then the difference between the sum so computed and the aggregate of the sums already paid by the assessee for the previous year ought to be paid by, or refunded to the assessee as the case may be.

The section does not mean that if no super-tax or income-tax had been demanded or paid for the previous year on the provisional assessment, nothing shall be paid for the year of assessment.

S. 34 of the Income Tax Act, 1922, re-enacts S. 25 of the Act of 1918 and it applies not only to the present and future but also to the past. [P. 487, C. 1.]

The Government Pleader (C.V. Anantha-krishna Aiyar)—for Referring Officer.

M. Subbaroya Aiyar—for Assessee.

Schwabe, C. J.:—In this case the assessee made a return, for income-tax and super-tax purposes, in the beginning of the year 1921-1922. At first, he was assessed both to income-tax and super-tax but he satisfied the authorities that the figure that they had taken was too large, and they reduced the assessment down to an amount, which would involve the payment of income-tax, that is to say, below the minimum super-tax, amount. Under the scheme of income-tax and super-tax, then in force, to be found in Act VII of 1918, the Amending Acts and the Super-Tax Act of 1920, for both income-tax and super-tax, there was an adjustment at the end of the year; so that, if the anticipated income which was based on the preceding year's income and was the basis of the preliminary or original assessment was found by the result of the year's trading and so on to be wrong—either too large or too small—the matter was adjusted by returning any amount overpaid or demanding any amount underpaid. By the Income-tax Act of 1922, this system was abolished and for the future they adopted the system of making an assessment on the preceding year's actual income and treating that as the hypothetical income for the year of assessment, one which could not, as a general rule, be altered. The result of that was that, for the year 1921-1922, there would still have to be the adjustment at the end of the year, so as to arrive at the proper income-tax for that year, and that the final figure arrived at, as the final income for that year, would also afford a basis for the hypothetical income of the next year. As this principle of adjusting referred to above was to be abolished, the old Acts were repealed; but provision was made for the transition year 1921-1922, by preserving certain sections of the old Act, for that purpose and that purpose only. That provision is found in section 68 of the 1922 Act, as amended by Act XV of 1923, the amendment being made, so that it might be clear that it was intended that the provisos to section 68, keeping alive certain sections of the old Act, for the purposes of assessment for the year ending the 31st of March, 1922, should apply to super-tax, as well as income-tax.

It is argued that notwithstanding all these precautions, what has happened is that any one, who having made a return was assessed for a sum less than the minimum on which super-tax is payable and, therefore, was neither asked for, nor paid super-tax, although, in fact, it was subsequently discovered that the income for that year had been such, as to go over the minimum, can escape super-tax altogether. Looking at section 19 of the Act VII of 1918, so far from that being the case, in my judgment, it is quite plain that the contrary was intended. The section has a perfectly clear meaning and it is that, if the total income actually received has been ascertained by the Collector, the Collector is to compute the income-tax, and super-tax, which would have been payable, if income-tax and super-tax had been levied in the previous year, with reference to the true amount of the income so ascertained; and then the difference between the sum so computed and the aggregate of the sums already paid by the assessee, for the previous year, ought to be paid by or refunded to the assessee, as the case may be. That seems to give an easy sum to be worked out. The sum that should have been paid for super-tax in the preceding year, if the right figure had been before the Collector, is computed and from that is deducted any sum that has already been paid for super-tax. If no sum has been paid for super-tax, then there is no deduction to be made. That is the perfectly plain meaning of the section and I see no ground whatever for the suggestion, that we have to strain the meaning of that section and read it, as though there was a proviso to it, namely, provided always that, if no super-tax or income-tax had been demanded or paid for the previous year, on the provisional assessment,

then nothing shall be payable for the year of assessment. It was said that before the coming into operation of the Act of 1922, by reason of the suggested interpretation of section 19, the Crown had to have recourse, in cases where there has been no provision for super-tax, to section 25, under which the assessee could be made to pay. But it is said that section 25, having been repealed by the Income-tax Act of 1922, that remedy for the Crown is gone. In my judgment, that contention also is wrong, because section 25 of the Act of 1918 has now been re-enacted by section 34 of the Act of 1922, and section 34 in words applies not only to the present and future but to the past. It says if for any reason the income chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer can at any time within a year take necessary steps. It follows, in my judgment, that even if the assessee could escape under section 19, he would not escape under section 34.

The answer to the question referred to us is in the affirmative. The assessee will pay the costs of this reference.

Waller, J.:—I agree and have nothing to add.

Reference answered in the affirmative.

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* 1924 Madras 487.

ODGERS AND WALLACE, JJ.

V. Sesha Ayyar—Petitioner

v.

Venkatasubba Chetty and others—Respondents.

Cr. Rev. No. 63 of 1923, decided on 6th November, 1923, from the order of Sub-Divisional Magistrate of Trichinopoly, dated 4th January, 1923.

Madras Act (V of 1920), S. 55 (1) and S. 109—Abatement of—Election offence, though forming an offence under S. 171 (A), Indian Penal Code, can be tried without sanction under S. 196, Criminal Procedure Code being obtained.

Abetting an election offence, *viz.*, an application for a second voting paper by a person who has already voted at the same election is triable without sanction being obtained under S. 196, Criminal Procedure Code, though the facts alleged constitute an offence under S. 171-A, Indian Penal Code, for which a sanction is essential.. [P. 488, C. 1.]

S. T. Srinivasagopalachari—for Petitioner.

The Public Prosecutor—for Crown.

S. Swaminadhan—for Respondents.

Odgers, J.:—This is a revision petition against the order of the Sub-Divisional Magistrate of Trichinopoly, acquitting accused Nos. 2 to 5, who were charged before him, under section 55 (1) of Madras Act (V of 1920) and section 109, Indian Penal Code. The Magistrate was wrong in saying that he acquitted the accused under section 245, Criminal Procedure Code. What he really did was to refuse to entertain or proceed with the complaint, on a legal point raised by the defence. The Magistrate rightly held that as no sanction had been obtained under section 196, Criminal Procedure Code, as amended by section 3 of Act XXXIX of 1920, the new portion of the Penal Code, section 171-A-1, relating to election offences and inquiries, was not applicable to this case. The accused Nos. 2 to 5 were charged with the abetment of an election offence, *i.e.*, an application for a second voting paper by a person who has already voted once at the same election, punishable under section 55 (1) of the Madras Act V of 1920. This argument is that, though no doubt abetment of an election offence is punishable under the Indian Penal Code as now amended, Act V of 1920 makes no provision for abetment of election offences and it is not permissible to borrow the provisions of the Indian Penal Code, where that Code itself makes provision for the offence in question. By section 107, Indian Penal Code, a person abets the "doing of a thing" in three ways therein set out. If "the thing" in question is an offence, then the abetment of it becomes an offence (section 108) and the "offence of abetment" is constituted (section 108, explanation 2), which is thus a separate and distinct offence. "Offence" by section 40 (paragraph 1) and section 108-A means: (1) a thing made punishable by the Indian Penal Code; and (2) a thing made punishable by the Indian Penal Code though it is committed without and beyond British India. Consequently, the abetment of an offence means the abetment in British India of a thing made punishable by the Indian Penal Code. Section 40, Indian Penal Code, has, however, been extended by amendment. The limitation in paragraph I, confining an offence

to a thing punishable by the Indian Penal Code, has been relaxed and "offence" in section 109 (*inter alia*) now denotes a thing punishable under the Code, or any special or local law. There is no doubt that Madras Act V of 1920 is a local law and it, therefore, seems clear that section 109 can be applied to a thing punishable under it. As pointed out, abetment is a separate and distinct offence, provided the thing abetted is an offence; and the thing abetted here is made an offence by the second paragraph to section 40, Indian Penal Code. Section 26 of the General Clauses Act shows that an act may constitute an offence under two or more enactments. In *Probodh Chandra* v. *Corporation of Calcutta* (1), section 40, Indian Penal Code, was held applicable in order to constitute abetment of an offence under a local law—the Calcutta Municipal Act. I am of opinion that the accused Nos. 2 to 5 could legally be charged, under section 55 (1) of Madras Act V of 1920 and section 109, Indian Penal Code. This Criminal Revision Case must be allowed.

Wallace, J.:—I agree. Petitioner charged respondents in this case with abetment of an offence under section 55 (1) of Madras Act V of 1920, the substance of the charge being that they abetted a case of double voting, by one Krishnaswamy Chetty, at a Municipal election in Trichinopoly. The Sub-Divisional Magistrate has held that since section 171-D of the Indian Penal Code specifically provides for such an abetment section 109 of that Code cannot be called in aid; and that such abetment is chargeable and punishable only under section 171-D and not under section 55 (1) of Madras Act V of 1920, read with section 40, Indian Penal Code and that since petitioner has not obtained the authority of Government, requisite under section 196, Criminal Procedure Code, for a prosecution under section 171-D, Indian Penal Code, his charge cannot stand.

Petitioner rejoins that since section 40, Indian Penal Code, which makes section 109, Indian Penal Code, applicable to an offence under section 55 (1) of Madras Act V of 1920, has not been so far and to that extent repealed, there is nothing to prevent the Court taking cognizance of his complaint.

The decision of this petition turns on the meaning to be given to the words of section 109, Indian Penal Code. Section 109, Indian Penal Code, is concerned only with the punishment of abetments, and lays down nothing more, in my opinion, than that if the Indian Penal Code has not separately provided for the punishment of an abetment as such, then it is punishable with the punishment provided for the original offence. I cannot read it to mean that, where the Code has set out separately the offence of an abetment and provided for its punishment, it has thereby, without saying so, abrogated another section of the same Code, presumably of equal validity and authority. Unless respondents can go, so far as to contend that section 171-D, Indian Penal Code, has wholly abolished section 55 (1) of Madras Act V of 1920—and they do not go so far—nor does the lower Court itself, since it dealt with the principal offender himself under that very section, I do not see how the application of section 40, Indian Penal Code, to it can be affected.

I admit that the effect of the enactment of section 171-D, Indian Penal Code, creates difficulties: but, I read section 109 to mean no more than this, that if the offence charged will in the opinion of the Court come within the four corners of it, then the punishment for it is the punishment provided for by that section. I cannot, as I have held, read it to mean that the offence of abetment of double voting can be charged only under section 171-D, Indian Penal Code.

It may no doubt be argued that section 196, Criminal Procedure Code, means that no one should be punished under section 171-D, Indian Penal Code, unless the previous authority of Government has been obtained for his prosecution. On the other hand, the detailed procedure set out for putting in a charge under section 55, Madras Act V of 1920, has not been repealed and still remains in force. Hence, no Court can refuse a complaint duly put in, regarding an offence under that section and that offence being still cognisable by a Court, the Court cannot refuse to apply section 40, Indian Penal Code, to an abetment thereof.

I agree with the order proposed by my learned brother.

Petition allowed.

(1) (1920) 24 C.W.N. 196.

* 1924 Madras 489 (1).

SPENCER, J.

Arumuga Goundan and others—Petitioners

v.

Periavanjiappa Goundan and others—Respondents.

Civ. Rev. No. 385 of 1923, decided on 7th December, 1923, from the order of District Munsiff, Udumalpet, dated 2nd October 1922.

Civ. Pro. Code, O. 9, r. 13—Decree against minor, not properly represented, is a nullity and suit can't be restored to file.

If a minor is not properly represented before the Court, a decree passed against him is in effect a nullity and the Court cannot set aside the *ex parte* order and re-open the suit under O. 9, r 13. The Court possesses no inherent power to restore a suit once disposed of and to add parties to it, who were not represented at the original trial. (39 All. 8, 5 L.W. 482, *Dist.* ; 10 L.W. 471, *Foll.*)

C. S. Swaminandhan—for Petitioners.

T. G. Ramaswami Aiyar—for Respondents.

Judgment :—In O. S. No. 479 of 1921, it was decided that the decree in O. S. No. 559 of 1919, was not binding on the minors, because they were not validly represented in the earlier suit, the guardian appointed by the Court not having consented to act as guardian and not having appeared for them at the trial.

The decree in O. S. No. 479 simply declared that the decree in O. S. No. 559 was not binding on the minors, and in this respect it was in accordance with what in the view of the Privy Council [*Monohar Lal* v. *Jadunath Singh* (1)] was a proper decree, *viz.*, that it would be sufficient in such a case to remit the parties to their original rights, without declaring that the earlier suit would have to be tried afresh.

In the judgment in O. S. No. 479, there is an observation that O. S. No. 559 will have to be revived, as against these minor plaintiffs, and the District Munsif has now, in the exercise of his supposed powers under section 151, Civil Procedure Code, taken the case back on his file and proceeded to try it. I do not think that the Court possessed inherent power to restore a suit once disposed of and to add parties to it, who were not represented at the original trial. *Bhagwan Dyal* v. *Param Sukh Das* (2), is quoted as an authority for so doing; but that case has been dissented from, by a Bench of this Court, in *Eda Ponnayya* v. *Jangala Kama Kotayya* (3). As pointed out by Oldfield aad Seshagiri Aiyar, JJ., if a minor is not properly represented before the Court, a decree passed against him is in effect a nullity and the Court cannot set aside the *ex parte* order and re-open the suit under Order 9, rule 13.

If the minors were not legally made parties to the suit, the action of the Court in making them parties now is tantamount to restoring to file a suit already disposed off and adding parties who were not represented at the original trial. The case, in *Venkata Row* v. *Turjaram Row* (4) is not an authority for such a proceeding.

I set aside the order of the District Munsif, with costs in this Court and remit the parties to their rights as they stood at the disposal of O. S. No. 479 of 1921.

Petition allowed.

(1) (1906) 28 All. 585.

(2) (1917) 39 All. 8.
(3) (1919) 37 M.L.J. 399.
(4) (1917) 5 L.W. 482.

* 1924 Madras 489 (2).

SCHWABE, C.J.

In re *Assistant Commissioner of Labour* —Appellant.

Stamp Ref. No. 9324 of 1923, decided on 8th November, 1923.

(a) *Court Fees Act, S. 8—Applicability.*

Does not apply to appeal by Government against award by Judge under Land Acquisition Act. (21 Mad. 269, *Dist.*) [P. 490, C. 1].

(b) *Court Fees Act, Sch. II, Art. 17 (A) (ii)—Decision by Court on reference.*

Memo of appeal against decision by Court on reference by Collector under Land Acquisition Act requires *ad valorem* Court-fee under Sch. I Art. 1, Court Fees Act. (17 I.C. 764, *Dist.*). [P. 490, C 2.]

The Government Pleader—for Appellant.

The Advocate General (C. Madhavan Nair)—for Government.

Order:—This is a stamp reference on the following facts. An award has been made under the Land Acquisition Act, with which the party entitled to compensation was not satisfied; and under that Act, the matter was referred to the Chief Judge of the Court of Small Causes for disposal; and he increased the award by an amount

of Rs. 42,763. Being dissatisfied with that award, the department of Government interested, prefers an appeal to this Court, and the question is, what stamp that appeal has got to bear.

By section 8 of the Court Fees Act:

"the amount of the fee payable under this Act, on a Memorandum of Appeal, against an order relating to compensation, under any Act, for the time being in force for acquisition of land for public purposes, shall be computed according to the difference between the amount awarded and the amount claimed by the appellant.

Now, it is argued for the appellant, that is to say, the department interested, that that has no application, where the Crown is the appellant; because there is no difference between the amount awarded and the amount claimed by the appellant, the appellant in that case not being a claimant at all: and the learned Advocate-General, who appears to represent the Crown, as distinguished from the department interested, as the matter is of general importance, agrees with that argument. It is certainly contrary to the *dictum* on the subject in *Kusturi Chetti* v. *Deputy Collector, Bellary* (1), in which it was said that section 8 was a special provision, applicable to appeals against all orders, including awards, awards relating to compensation for lands, under the Land Acquisition Act. But I think, on the proper construction of the section, it has no application, where the Crown is the appellant; and that the *dictum* is too wide.

Then, it remains for me to consider, whether the article applicable is article (1) of Sch. (I), or article 17 (A), (ii), of Sch. II of the Court Fees Act. By the Land Acquisition Act, XIX of 1921, a decision of the Court, in a case like the present, is to be deemed to be a decree, under the Code of Civil Procedure, 1908. Sch. I, article (1) of the Court Fees Act, provides the *ad valorem* fee, payable on any memorandum of appeal, not otherwise provided for, in this Act, presented to any Civil Court . . . . . except those mentioned in section 3, which has no application here. There is no doubt that this is a memorandum of appeal and therefore unless it is provided for elsewhere, it comes under that article. Turning to article 17 (A) (ii) of Sch. II, a memorandum of appeal in suit to set aside an award is provided for and it was held by the Punjab Chief Court in *Secretary of State* v. *Baswa Singh* (2), which was tried in 1912, that article 17 (4) of the then Court Fees Act, which corresponds, except in a matter which I will refer to in a moment, with article applied to a case similar to the present. I very much doubt whether that was a correct decision, under that Act as it stood; because it involves the inclusion of a reference to a Court, under the Land Acquisition Act, in the words, 'a suit to set aside an award, which is certainly not giving the ordinary meaning to those words, because the proceedings before the Small Causes Court, or the District Court, do not seem to be a suit to set aside an award. It has been held by the Privy Council in *Secretary of State* v. *Chellikani Rama Rao* (3), that the Court is itself in those cases sitting as an arbitrator and not as an appellate tribunal, though it is true that in a sense, proceedings before the Court are to set aside the award; for, if those proceedings were not taken, there is an antecedent award of the officer, which would be binding. But it is not necessary to give any decision on that point; because, the words of the present Schedule, article 17 (A) (ii) provide a proper fee, on a memorandum of appeal, against the decree of a District Munsif's Court, or a City Civil Court, and another fee on a similar appeal from a District Court or Subordinate Judge's Court. It so happens, in this case that the Court which has made the award, the Small Causes Court, is not one of those enumerated Courts—whether it is by accident or design is immaterial—and therefore, I consider that article 17 (A) (ii) does not provide for a fee to be paid on this appeal, even if it is looked upon, as an appeal from a decree in a suit to set aside an award.

That being so, we are thrown back on article I of Sch. I, and the fee must be paid, in accordance with the provisions of that article. The costs of this reference will be paid by the department, interested as appellant in the appeal. to the Crown.

The two appeals having been consolidated must be treated as separate appeals. Three weeks for the payment of the Additional Court Fee.

Reference answered.

(1) (1898) 21 Mad. 269.

(2) (1912) 17 P.L.R. 1912.
(3) (1916) 39 Mad. 617.

1924 Madras 491.

PHILLIPS AND VENKATASUBBA RAO, JJ.

P. Pacha Saheb and another—Appellants

v.

Mohammad Ruhimuddin Saheb and others—Respondents.

F. A. No. 283 of 1920, decided on 10th October, 1923, from the decree of Additional Sub-Judge, Ellore, in O. S. No. 41 of 1919.

Evidence—Inam statement is party's statement but Inam register is evidence of decision of Inam Commissioner.

An Inam statement is only a statement made by a party at the Inam inquiry and is merely an assertion of his alleged title before a tribunal which has to decide it. The Inam register embodies the result of the finding of the Inam Commissioner, based partly on statements put in by the parties and partly on other evidence and should be looked to see what the facts were. 'Maseethu' is a Telugu form of the Hindustani word "Musjid" which means a Mosque and a 'Panja' is not called "Maseethu" in Telugu.

The word Devadayam implies a public endowment. (24 Mad. 243, *Foll.*)

V. Suryanarayana—for Appellants.

T. S. Raghunatha Rao and *T. S. Srinivasa Rao*—for Respondents.

Judgment:—The plaintiff's appeal against the decree dismissing their suit, for framing a scheme for a Mosque in Palacole and for the removal of the defendants from their trusteeship. At first a decree was given in favour of the plaintiffs, owing to the failure of the defendants to prosecute their defence; but subsequently this order was set aside, as being an *ex parte* decree and now the Subordinate Judge has dismissed the plaintiff's suit.

An objection has been taken by the appellants that the Subordinate Judge had no jurisdiction to revise his original order and that on that ground the appeal should be allowed. We have, however, heard the appeal on its merits and as we are in favour of the appellants' contention on the merits, it is unnecessary to decide the other point.

The earliest evidence in regard to the Mosque is the proceedings before the Inam Commissioner. We have the inam statement, put in by defendants' ancestor, Ex. VI, and the inam register, Ex. A. The learned Subordinate Judge appears to have considered that the statement was, if anything, of more importance than the register and, therefore, has not considered that the recitals in the register are as important as they really are, because he says that they must be explained by the entries in the inam statement. It has, however, to be remembered that an inam statement is only a statement made by a party to the enquiry and is merely an assertion of his alleged title before a tribunal which has to decide it. The inam register embodies the result of the finding of the Inam Commissioner, based partly on the statements put in by the parties and partly on other evidence and, as appears from Ex. A in this case, the other evidence consisted of documents going back to 1812. There is particularly no other document of title in this case and we must look to this inam register to see what the facts are. It is contended for the defendants that there is no Mosque at all in Palacole but only a Peerla Panja and that this Peerla Panja has been loosely called Peerla Musjid and that is the reason why we find the words Mosque used with reference to the plaint institution. This theory has been accepted by the learned Subordinate Judge and he has held that there is no Mosque but only this Peerla Panja, which apparently he considers to be a private institution. If we look at Ex. A, we find, in the first place that the inam is described as "Devadayam" and there is the authority of this Court in *Muhammad Jafar* v. *Muhammad Ibrahim* (1), that the word Devadayam implies a public endowment; and whether this is correct or not, there is no doubt that the use of the word Devadayam is very strong piece of evidence in favour of holding that the suit endowment is a public endowment. There is nothing to contradict this evidence. The defendants have not even produced the inam title-deed and in 1859, they alleged that their sanad had been lost in a cyclone. We start then with the assumption that it is an inam granted for public charity. The purpose is given as "for the support of the Mosque." There is no question here of the meaning of the word (*Maseethu*) which appears to be a Telugu form of the Hindustani Musjid, for the inam register is in Englih and it may fairly be taken that when the word "Mosque" is written, the word Mosque is intended and not the word "Panja" as is

(1) (1901) 24 Mad. 243

suggested for the defendants. Even in the defendants' inam statement there is no mention of Panja, but in the first column he uses the word (*Maseethu*); he does not even use the words which we find in latter documents Peerla Masidu, although he says that the purpose for the grant was for holding "Peerla *ustavam* and other things." This statement possibly explains the introduction of the subsequent word (Peerla *Maseethu*) which seems from the evidence to be a contradiction in terms, for it is admitted that the Peerla are never kept in a Musjid. Then we have also a report of the Tahsildar, Ex. XIII, and this is a report in reference to a claim by the defendant to a portion of the site, surrounding the plaint institution. It is a report of a Muhammadan Tahsildar and he also uses the word "Mosque" to describe the owner of the site. He does mention the words "Peerla Mollalu" in his report, but that is clearly a quotation from the house-tax register. In view of this evidence and the fact that there is no documentary evidence at all to show that the institution was a Panja, we think that it must be deemed to be a Mosque, as is distinctly recited in the inam register. The subsequent confusion in the lauguage, chiefly used by Hindus, when it was called—(Peerla *Maseethu*) may be due to the fact that not only was there a Mosque, but also that a Peerla *utsavam* was performed in the same compound and when as is alleged by the plaintiffs the Mosque became demolished the idea of the Peerla remained more strongly in the minds of the neighbours. Otherwise, it is difficult to account for this curious term. The oral evidence cannot be said to be very satisfactory on either side, but there is one point which is in favour of the plaintiffs and that is that they have examined several Muhammadan witnesses living at Palacole, who support their case that there used to be a Mosque in the suit compound, that it has been now demolished and that there is only a Panja or Muzavarkhana existing. There are three Muhammadans examined on the defendants' side but none of them resides in Palacole and it is not very easy to believe their statements, when they say that they know all the details about the Palacole village, in which they do not seem to have spent very much time. The other witnesses are Hindus, mostly of the Telugu caste, and it is suggested for the plaintiffs that they are all connected with a certain gentleman of their caste named Annamalswami, who certainly took a considerable interest in the hearing of this case. Whether that is or is not the reason for their giving evidence, it is clear from a perusal of their depositions that not very much weight can be attached to their evidence, that a Mosque never existed in Palacole. Relying on the oral evidence for the plaintiffs, in support of their case, and the inam register, we come to the conclusion that the original endowment was undoubtedly made for the Mosque. That being so, the defendants have no beneficial interest in the inam, unless they can prove the same and that they have entirely failed to do. The only document they have produced is a partition-deed, under which they divided their property, and agreed that out of the proceeds of the suit inam, Rs. 50 should be set aside for the Peerla *utsavam* and that the balance of the income should be divided annually amongst themselves. This is no doubt a claim to beneficial interest, but it is not supported by any title-deed, or any other evidence of any weight.

As the defendants have not applied the inam in the proper manner and have denied the title of the Mosque to the inam, it is impossible to allow them to continue to manage, in the same way as before, and it will be necessary to frame a scheme, for the management of the trust. Although the endowment is undoubtedly made to the Mosque, the claim put forward by the defendants' ancestor in 1859 and subsequent events show that it is quite possible that the institution also included the Peerla Panja, which admittedly has been in existence for a considerable time past and is alleged by the defendants to have been in existence even prior to the inam enquiry. Therefore, in framing the scheme, it will be necessary to provide also for the upkeep of this Panja, out of the income of the inam.

As regards the items of 25 cents of site near the Mosque if was held after an enquiry in 1905 that this piece of land belonged to the defendants and not to the Mosque. There is really no evidence for the plaintiffs to show that this decision is wrong, and as the defendants have been in possession of it for over twelve years before suit, we are not prepared to disturb that possession.

As regards the scheme, the parties will be asked to submit a scheme and one of the conditions will be that there shall be three trustees, one of whom shall be a member of the defendants' family and the other two appointed by the Subordinate Judge's Court. The case will be adjourned for a week in order to have the scheme submitted for orders.

And this appeal again came on for hearing this day and after submission of a scheme, the Court delivered the following

Judgment :—A scheme has now been submitted which, with slight modifications, we have accepted. In allowance of the appeal, there will therefore be a decree in favour of plaintiffs, for the recovery of possession of the suit lands, except the 25 cents referred to, for the removal of defendants from trusteeship and for framing of a scheme as already approved.

Plaintiffs will get their costs in both Courts out of the estate, and defendants will bear their own costs.

Appeal allowed.

1924 Madras 493.

KRISHNAN AND WALLER, JJ.

Subbayya Chakkiliyan—Appellant

v.

Manjam Muthia Goundan and another—Respondents.

S. A. No. 1587 of 1922, decided on 22nd November, 1923, from the decree of District Court, Coimbatore, in A.S. No. 89 of 1922.

Deed—Construction—Conflict between boundaries: and area—Former is to prevail over latter where former is clear.

Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements.

K. V. Sesha Iyengar and *T. Sundara Rao*—for Appellant.

S. Ranganatha Iyer—for Respondents.

Krishnan, J. :—The question that has been raised before us is what exactly is the land that was purchased in Court-auction under Ex. II, the Court sale certificate. The certificate describes the land in the following terms :—

"In Coimbatore District, Ganapathi Sub-District, Coimbatore Taluq, Annuparapalayam Village, situate to the north of the east to west main road, west of Venkataswami Gounden's House, south of the temple and east of Kaliannan's land; lying within these and belonging to the defendant measuring 12 cubits east to west, and 24 cubits north to south, together with 1 thatched shed herein." It was contended before the lower appellate Court and that Court has given effect to that contention, that what was sold was only the *extent* mentioned in the land falling within the boundaries given and not the whole of the land within those boundaries. It is not pretended that the whole of the land within the boundaries mentioned did not belong to the judgment-debtor; but, because the measurements given are smaller than the measurements as taken now it is claimed by the plaintiff's temple that all the land within the four boundaries mentioned in the above description over and above 12 cubits east to west and 24 cubits north to south still belong to them and not to the 1st defendant who claims under the auction-purchaser. We are unable to agree with the construction put upon this sale certificate by the learned District Judge.

It seems to us to be quite clear that what was actually sold was the whole of the land within the boundaries and that the measurements were not accurately given, the mistake being in the measurements alone. Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements. There is no reason to suppose that, when the judgment-debtor was putting up the property for sale in execution of his money decree, he was reserving any portion of the property to be left to his judgment-debtor and settling only a portion of the property belonging to him. The property is a single property forming one block on the Avanasi Road. We think that all the circumstances point to the whole of the property within the boundaries having been sold. We agree with the District Munsif in his construction of the sale certificate and set aside the decree of the District Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

Appeal allowed.

* **1924 Madras 494.**

(FULL BENCH.)

SCHWABE, C. J., COUTTS-TROTTER, RAMESAM, WALLACE AND WALLER, JJ.

Meyyappa Chettiar—Counter-Petitioner-Petitioner

v.

Chidambaram Chettiar—Petitioner-Respondent.

C. R. P. No. 796 of 1921, decided on 17th December, 1923.

(a) *Civ. Pro. Code, O. 21, r. 57—Scope.*

(*Held* by the majority of the Full Bench *Schwabe, C. J.* and *Wallace, J., dissenting*). The provisions of O. 21, r. 57 apply to an attachment before judgment which is converted into an attachment in execution when the decree passed in the suit is sought to be executed. (42 Mad. 1, *Overruled.*)

(b) *Civ. Pro. Code, O. 38, rr. 8 and 11—Scope.*

(*Held* by the majority of the Full Bench (*Schwabe, C. J.* and *Wallace, J, dissenting*). An attachment before judgment becomes an attachment in execution when an application for execution of the decree is admitted. (Per *Wallace, J.*—Attachment before judgment ceases only by a formal order withdrawing it.) But if the execution petition is dismissed for want of due diligence in presenting the necessary papers to the Court the attachment of the property comes to an end. (42 Mad. 1, *Overruled.*)

K. V. Krishnaswamy Aiyar and *K. Balasubramanya Aiyar*—for Petitioner.

C. S. Venkatachariar and *A. Swaminatha Aiyar*—for Respondent.

ORDER OF REFERENCE TO A DIVISIONAL BENCH.

Ramesam, J. :—The facts are not fully stated by the Subordinate Judge. They are as follows :—

The respondent in the High Court (petitioner in the Court below) filed O. S. No. 153 of 1914 in the Subordinate Judge's Court of Ramnad, and in I. A. No. 592 of 1914 obtained an order for attachment before judgment of 16 items of properties belonging to the defendant. The properties were attached on 20-11-1914. The suit was then transferred to the Additional Subordinate Judge's Court and was numbered as O. S. No. 124 of 1914. A decree was passed on 22-2-1915. By the order on E. A. No. 4 of 1916 the decree was transferred for execution to the Subordinate Judge's Court of Ramnad. The decree-holder then filed E. P. No. 183 of 1916 and notice was issued to the defendant. The petition was dismissed on 19-9-1916 as the petitioner did not file an encumbrance certificate. The filing and dismissal of E. P. No. 183 of 1916 is not mentioned by the Subordinate Judge. As, under Order 38, rule 11, Civil Procedure Code, a re-attachment is unnecessary, it must be taken that E. P. No. 183 of 1916 was filed on the basis of the attachment before judgment. If Order 21, rule 57, Civil Procedure Code, applies to such attachments, the effect of the dismissal of E. P. No. 183 of 1916 is that the attachment ceased. Then E. P. No. 129 of 1918 was filed on 19th July, 1918, and the properties were again attached, but on 29-4-1919 the petition was dismissed as batta was not paid for items 13 to 16 and as there were no bidders for items 1 to 12. E. P. No. 136 of 1919 was then filed. The properties were again attached on 19th July, 1920. As there were no bidders at the sale the petition was struck off and the attachment of 19th July, 1920 was kept alive for four months. The next petition for execution was filed on 12th October, 1920, within the four months allowed.

The petitioner in the High Court first obtained a decree against the same defendant *ex parte*. The defendant applied to set aside the *ex parte* decree and it was set aside on condition of his giving security. The sixteen items in question were given as security on 15th March, 1915. If the attachment before judgment made by the respondent is subsisting, and if the execution petition of 12th October, 1920, is filed in pursuance of that attachment, the security will be subject to that attachment and cannot prevail against the rights worked out in that execution. In this view, the lower Court's order would be right.

But it seems to me (1) that the attachment before judgment is not subsisting. The lower Court relied on *Venkatasubbiah* v. *Venkata Seshaiya* (1), where it was held that Order 21, rule 57, Civil Procedure Code, does not apply to attachments before judgments. But it seems to me that the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1) requires reconsideration after the Full Bench decision in *Arunachalam Chetty* v. *Periasami Servai* (2). According to the reasoning of the latter case, when an application for execution is filed on the

(1) (1919) 42 Mad. 1.
(2) (1921) 44 Mad. 901 (F B.).

basis of attachment before judgment, the attachment before judgment must be deemed to be an attachment in execution of a decree. If so, Order 21, rule 57, applies. This conclusion seems to be reasonable. This is the view taken by the respondent himself when he obtained re-attachments in 1918 and 1920. Secondly, it is true that the security cannot prevail against all rights pursuable under the old attachment. The last execution petition was based on the attachment of 1920. If so, the security is not subject to any rights. (See my judgment referring the case to a Full Bench in Appeal No. 36 of 1920).

I therefore refer this Revision Petition to a Division Bench for disposal.

July 12, 1923. The Court (Spencer and Devadoss, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Spencer, J.:—The question for decision is how the provisions of Order 21, rule 57, are to be reconciled with those of Order 38, rule 11, Civil Procedure Code.

One method is to understand Order 38, rule 11, as applying only to the first execution taken against property attached before judgment. Another is to treat the attachment mentioned in Order 21, rule 57, as not including attachment before judgment, which will then continue until the decree is satisfied. Consistently with my judgment in *Arunachalam Chetty* v. *Periasami Servai* (2), I prefer the former view, and this seems to be the opinion of Ramesam, J., as he observes in his reference to the Divisional Bench that the conclusion that an attachment before judgment should be deemed to be an attachment in execution of a decree is reasonable, and he further adds that the security in this case was not subject to any rights arising out of the attachment of 1920, thus implying that the attachment before judgment was not kept alive for the purpose of subsequent attachments after the first attachment after the passing of the decree had ceased owing to the dismissal of the execution petition.

I think that the words "the attachment" in Order 21, rule 57, mean the attachment in execution in which the attachment before judgment became merged by virtue of Order 38, rule 11, *i. e.*, the first attachment after the passing of the decree.

But it has been held by a Bench of this Court in *Venkatasubbiah* v. *Venkata Seshaiya* (1), that an attachment before judgment does not cease to have effect because of the dismissal of subsequent applications for execution for default of prosecution, and this decision is not consistent with the above view.

The question, however, is not an easy one for decision and it is important that it should be decided finally as it is likely to arise in other execution petitions. We refer the question whether the attachment before judgment in this case was subsisting after the dismissal of E. P. No. 183 of 1916 on 19th September, 1916, to a Full Bench.

Devadoss, J.:—I agree to the reference as the question is not one free from difficulty though I am of opinion that *Venkatasubbiah* v. *Venkata Seshaiya* (1) has been rightly decided.

Oct. 22, 24, 1923. The Court made the following

ORDER:—We propose to call on the Court of the Subordinate Judge of Ramnad at Madura to purduce to this Court the execution records in O. S. No. 124 of 1914. Further consideration of this reference will be adjourned pending receipt of those papers.

[On receipt of the Records]

This petition came for hearing on Tuesday, the 6th day of November, 1923.

Schwabe, C. J.:—The respondent obtained an order for attachment before judgment of certain immoveable property of the judgment-debtor. The petitioner having obtained a decree *ex parte* against the same judgment-debtor, it was set aside on the latter's application on security being given to the petitioner, and as security, a charge was given over the property attached by the respondent. In due course the respondent obtained a decree as also did the petitioner, and there were other decrees against the same judgment-debtor by other persons. The respondent took out an execution petition in 1916, which came before the Court on several occasions, being adjourned from time to time for the respondent to file the necessary papers, which included an encumbrance certificate. These papers not having been produced, the petition was on the 29th of August 1916 adjourned to the 19th September next for filing the papers, and on that date, the papers not having been

filed, the petition was dismissed. Subsequently, the respondent attempted again to bring the property to sale, but this was objected to by the petitioner on the ground that the dismissal of the execution petition in September 1916 put an end to the attachment before judgment and that therefore the petitioner's security over the property prevailed over the claim of the respondent and the other judgment-creditors, who would but for this security given to the petitioner be entitled to rateable distribution under the rules. The Subordinate Judge has decided against this view and has ordered rateable distribution. The petitioner has brought this Civil Revision Petition, which was ultimately referred to this Full Bench.

The question to be decided is whether the words "property attached in execution" in Order 21, rule 57, include "property attached before judgment," when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale; for so, by the words of that rule, upon the dismissal of the application for execution by reason of the decree-holder's default rendering the Court unable to proceed further with the application for execution, the attachment ceases. It was argued before us that there has been no default within the meaning of the rule. But it would seem clear that the Court required papers to enable it to proceed further with the application for execution, and the hearing was adjourned to enable the respondent to file the necessary papers, and it was dismissed because he failed to do so, and I think that that amounts to a dismissal by reason of the decree-holder's default within the meaning of the rule.

But there remains the important question whether, when the attachment is an attachment before judgment, the effect of the dismissal is to put an end to that attachment. The penalty imposed by rule 57 is very serious indeed, and, if it applies to an attachment before judgment, the effect of the dismissal of the application would be to give the petitioner, who took his security after the attachment, precedence over the respondent and all the other decree-holders who would otherwise be entitled to rateable distribution; and I cannot believe that so serious a penalty would have been imposed for what may have been the negligence of a vakil or delay caused by some difficulty in obtaining the necessary papers; and I have little doubt that the Court dismissing the petition had not the least idea that the effect of such a dismissal would be to impose such penalty. Indeed the law had by that time been declared in *Venkatasubbiah* v. *Venkata Seshaiya* (1), to be that the dismissal of an application for execution for default had no effect upon attachments before judgment. Although the obvious injustice in this particular case of holding that the attachment before judgment ceases is not a proper matter for consideration, yet the serious injustice that may follow generally on deciding in one way, and the fact that third parties' interests may be affected without their having an opportunity to intervene, are legitimate considerations in arriving at the true interpretation of the rule, if the rule is open to alternative constructions. The rule is a penal one and the principle that is applicable is that the matter in question must be brought within the operation of the rule in express terms, or at least by necessary implication. Now in terms the rule applies to property attached in execution and that expression does not include property attached before judgment. But it is argued that property which has been attached before judgment becomes property attached in execution and ceases to be property attached before judgment, once proceedings are taken to bring that property to sale in execution. But I can find nothing in the Code of justify that view. It is true that, where property has been attached before judgment under Order 38, rule 11, no fresh attachment is necessary after decree for the purpose of selling the property. But that, in my judgment does no more than provide that in such a case there need be no attachment in execution and that the Court having by reason of the attachment before judgment got control over the property can proceed with the sale. In other words what the Code permits is that the attachment before judgment can be used in order to enable the Court to hand over possession of the property to the purchaser at Court auction. Attachment before judgment and attachment in execution are essentially different.

There is nothing remarkable in their being a penalty imposed for failure to proceed expeditiously in the case of property attached since decree, without a

similar penalty being imposed when the property is attached before judgment, because the penalty would be much more serious in the latter case. It would involve the letting in of all alienations subsequent to the attachment to the exclusion of all other decree-holders, and there is nothing unusual in such alienation by way of security for some other claimant as in this case or otherwise, the alienee taking only the risk of the particular creditor who has attached before judgment, subsequently obtaining a decree which is not otherwise satisfied : whereas in the case of attachment after decree an alienation between the attachment and dismissal of the execution petition is most improbable and at the worst such dismissal enables the judgment-debtor to alienate before the decree-holder can re-attach, and, although there have been cases where that has been attempted, such as *Reddi Venkatasubbiah* v *Tangator Subbiah* (3) and *Venkiteswarayyan* v. *Aswatha Narayanan* (4), it is not unaccompanied by risk as was demonstrated in those two cases. It is clear from a comparison of Order 38 with Order 21 that the framers of the Code considered what provisions of Order 21 should be applied to attachment before judgment, and I see no reason at all to suppose that it was intended to impose this penalty in cases of attachment before judgment. If it has been intended, it could have been done quite simply by adding the words "or attachment before judgment" in Order 21, rule 57. Attachment before judgment is one of the headings of Order 38, which contains a Code dealing with that form of attachment, which differs in many features from attachment in execution dealt with under Order 21. For instance, the provisions of rules 7 and 9 of Order 38 have no application to attachments in execution; and rule 12 dealing with agricultural produce differs materially from rule 74 of Order 21 dealing with the same subject; rule 7 provides that the manner of attachment in the two cases shall be the same and rule 8 applies the rules of Order 21 relating to the investigation of claims to cases of attachment before judgment, and thereby clearly indicates that the Code looks upon the two attachments as being different things. Much reliance is placed by the petitioner on rule 11; but as I have pointed out, all that the rule says is that, where property has been attached before judgment, and it is desired to execute the decree upon it, it will not be necessary to go through the formality of re-attaching the property, and it does not say that the original attachment before judgment shall become or be deemed to be an attachment in execution, which words in my judgment, would be necessary to make it an attachment in execution within the meaning of Order, 21 rule 57, or to make one form of attachment merge inextricably in the other. Further it is worth noticing that the statutory forms in the Appendix for the two forms of attachment are quite different, for, by Form No. 7 of Appendix F, the order made for attachment before judgment is addressed to the bailiff and directs him to hold the property until the further order of the Court, while the form of the order for attachment in execution in Appendix E-24, is addressed to the party, and is in the nature of a prohibition to him from transferring or charging the property until further order of the Court.

If the matter were *res integra*, I should without hesitation be prepared to hold that the attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of Order 38, but that it cannot by implication be brought to an end by an order under Order 21, rule 57.

Turning to the authorities, the point came directly for decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1) and in *Gones Chandra* v. *Banwari Lal* (5). Both in Calcutta and Madras it has been held under precisely similar circumstances to those of this case that the attachment before judgment is not affected by the dismissal of an application under Order 21, rule 57. The Madras case purported to follow the Calcutta case and also two other decisions in *Bavuddin Sahib* v. *Arunachala Mudali* (6) and *Suraparaju* v. *Narasimhan* (7). Neither of the two latter cases are authorities directly in point although they contain weighty *dicta* in favour of the view expressed in *Venkatasubbiah* v. *Venkata Seshaiya* (1) being

(3) (1915) M.W.N. 159.
(4) 1923 Mad. 703.

(5) (1912) 16 C.L.J. 86.
(6) (1914) 26 M.L.J. 215.
(7) (1914) 1 L.W. 932.

correct. The principle has now been accepted by all the text books and I think it correct to say that, since the passing of the Code of 1908, which for the first time introduced the provisions of Order 21, rule 57, this has been the accepted view. I do not however think that the time has been long enough or the number of decisions sufficient —though probably the ruling has been followed in many unreported cases in the mufassal and here—to constitute a *curses curiae*, and so relieve us from having to decide the point, though the fact of its having been accepted as correct fortifies my conviction as to the true meaning of the rule. On the other hand there is a Full Bench decision in *Arunachalam Chetty* v. *Periasami Servai* (2) which is relied upon by the petitioner, and is no doubt responsible for this attempt to upset the existing practice. That case requires careful examination. The question actually before the Court was as to which article of the Limitation Act applied to suits by a person against whom an order had been made on a claim preferred to property attached before judgment—such claim being made after an order for sale made in execution. Article 11 of the Limitation Act imposes a limitation of one year from the date of the order for suits by a person against whom an order has been made on a claim preferred to property attached in execution. The Court held that that article applied to cases where the claim was preferred to property attached before judgment if the claim was preferred after an order for sale in execution.

Wallis, C.J., with whom Oldfield, Kumaraswamy Sastri and Ramesam, JJ., agreed, stated that the property attached before judgment does not become property attached in execution upon the passing of a decree for the plaintiff either within the meaning of article 11 or under Order 21, rule 57, and that Order 38, rule 11, merely enables the decree-holder to apply for execution without a fresh attachment. But he held that where an order for sale was obtained, that order proceeds on the footing that the property is to be considered as attached in execution by virtue of Order 38, rule 11, and that a claim put in after the order may properly be regarded as a claim to property attached in execution of the decree and therefore within article 11 of the Limitation Act. It is to be observed that this change which the Court held occurs in the nature of the attachment only comes into operation according to this judgment when an order for sale is obtained. It does not hold that this change occurs either on obtaining a decree or on making an attempt to obtain an order for sale by issuing an execution petition. The case is therefore not any authority in favour of the present contention, because in this case there has not been any order for sale. It may be if there had been such an order that the position would be different This judgment points out the anomalous result that if a claim is made to property attached before judgment up to the order of sale, a suit by the party affected is barred in six years, whereas, if it is made after the order of sale, it is barred in one year, and suggests that the anomaly should be put right by legislation. Emphasis was placed in the judgment on the fact that, before the limitation provisions in such cases were removed from the Code of Civil Procedure and put into the Limitation Act in 1908, there was express provision that the limitation period of one year should apply both in the case of claims to property attached in execution and to property attached before judgment, and it was thought that the Legislature could not have intended in the process of removing a section from the Code of Civil Procedure to the Limitation Act to extend the limitation period. The Court, however, was driven to the conclusion that it had done so, but confined the extension within the narrowest possible limits. No such consideration applies to this case, as the penal provision of Order 21, rule 57, in question was, when enacted entirely new. It is not without interest that the Court treated the meaning of Order 21, rule 57, as not germane to the matter then in issue and that I.L.R. 42 Mad. 1 and the cases there quoted were not even mentioned in argument. Spencer. J., delivered a separate judgment in which he says that, if a decree is passed and an attempt is made to execute it, what was an attachement before judgment becomes in effect an attachment in execution of a decree because Order 38, rule 11, declares that no re-attachment is necessary and, later on, he says he finds no difficulty in classing a claim put in after the properties were brought to sale in execution proceedings under the heading of "Claims preferred to property attached in execution of a decree," and he declined to express an opinion on the hypothetical case of a claim

put in to property attached before judgment before the decree and the commencement of the execution proceedings. I doubt if he meant by his judgment to go further than the rest of the Court, and to extend the principle enunciated by them to claims made where there was a decree but no execution proceedings, or to claims made after execution proceedings had been commenced. If he did so intend, his observations were *obiter* and I prefer the judgment of the rest of the Court, which in my judgment strained the language of the article in question in going even as far as it did. However this may be, I find nothing in that judgment when carefully examined which militates against the view expressed in I. L R. 42 Mad. 1 which I think was rightly decided. As there has been no order for sale in this case and nothing but an abortive attempt to obtain, and for that purpose to make use of an existing attachment, it is not necessary here to decide what the position would be after an order for sale had been obtained. I can find nothing in the rule to make the failure to proceed expeditiously with the execution petition involve the loss of all rights acquired by the attachment before judgment. I would answer the question in the affirmative.

Coutts Trotter, J:—I regret that I am unable to agree. In matters of procedure it is obviously desirable that this Court, indeed, all the Courts of the country, should, as far as possible, speak with one voice. But in this matter we start with the situation that there are conflicting decisions of the various Courts of India and, as my Lord has said, it is not possible to contend that there is such a course of decisions either of this Court or of other Courts which would justify the attitude that, for the sake of uniformity, a result should be acquiesced in even although one thought it logically unjustifiable. I conceive that our business is to say, without reference to previous decisions, what we think to be the true interpretation of the provisions of the Code relating to the subject-matter of this reference.

The point for our decision is a very short one, namely, whether a party who has obtained an attachment before judgment and has subsequently had his execution petition dismissed for want of due diligence in presenting the necessary papers to the Court loses the priority that he had enjoyed by reason of his attachment before judgment. If he has lost it, he has lost it by reason of the provisions of Order 21, rule 57, which runs as follows:

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall" (among other powers) "dismiss the application."

The Court in fact dismissed the application in this case. Then follow the words "Upon the dismissal of such application the attachment shall cease." By Order 38, rule 11, it is provided as follows:—

"Where property is under attachment by virtue of the provisions of the order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

The whole point here is whether Order 21, rule 57, operates on an attachment which had been obtained before judgment or is to be confined to an attachment first sought and obtained after decree and in execution of that decree. It is well settled that attachment creates no title in the decree-holder or the prospective decree-holder as the case may be. It is merely a process whereby the Court puts its hand on the property attached and keeps it in *custodia legis* until something else happens. It appears to me that Order 38, rule 11, provides that, when property has been attached before judgment, it remains attached when in due course after judgment, the decree-holder applies for execution of his decree. It has resolved doubts alluded to in *Ramakrishna Das Surrowji* v. *Surfunnissa Begum* (8), as to whether after decree it might not be necessary for the attaching creditor to re-attach the property and it provides in terms that the property shall remain attached upon an application for execution of the decree. I am unable to see that there is any difference *in rerum natura* between an attachment before judgment and an attachment in execution of decree except that the one is prospective and, after the condition is fulfilled which brings it into active operation, namely the obtaining of a decree, confers a priority in time. But an attachment before judgment is not a remedy of a kind higher than, or

(8) (1880) 6 Cal. 129 (P.C.).

different from, an attachment applied for and obtained for the first time in execution of a decree already passed. Language is used in some of the cases which might suggest that the mere passing of a decree converts an attachment before judgment into an attachment in execution. I do not adopt that view for the reasons pointed out by Wallis, C.J., in *Arunachalam Chetty* v. *Periyasami Servai* (2). The reasoning appears to be this—and I respectfully regard it as perfectly sound—that a decree-holder need not proceed in execution unless he chooses to do so, and it would therefore be absurd to say that an attachment is an attachment in execution when there is no execution. The turning point comes in my opinion when the decree-holder by filing an execution petition has shown that he means to execute his decree and I am myself unable to escape from what seems to me the logical conclusion that, when he has elected to proceed in execution, an attachment which he has obtained and on which he must necessarily base his petition and demand for sale, becomes automatically an attachment in execution. That seems to me to underlie the reasoning of the Judges in the Full Bench case to which I have referred, particularly of Spencer, J., with whom I find myself in complete accord. I think it is also implied in the reasoning of the judgment in *Bavuddin Sahib* v. *Arunachala Mudali* (6). I confess I am not impressed by the argument that Order 21, rule 57, is a penal enactment which takes away rights which would otherwise exist and must therefore be construed *verbatim et literatim*. No common law rights are here involved. The whole position of the decree-holder and all his rights are alike the creatures of a bundle of statute-made provisions. The statute punishes lack of diligence on the part of the decree-holder. I am unable to see any logical reason why his lack of diligence should be punished only if he has attached the property after decree but excused if he attached it before decree. Nor do I think that the grammatical construction of Order 21, rule 57, can really bear the construction sought to be put on it. The words are "where any property has been attached in execution of a decree." That I construe as meaning "where any property has been in a state of attachment in execution of a decree" and not confined to cases where the first act of attachment was made subsequently to the decree. To put it in the technical language of grammar, I regard "has been attached" as a perfect and not an aorist tense. In my opinion, when a decree-holder having obtained his decree takes out an execution petition, he has, in effect, elected to take the benefit of Order 38, rule 11, and asks the Court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute. When he has made that election it seems to me that his attachment thereupon becomes subject to those requirements of diligence laid down by Order 21, rule 57. I cannot assent to the view that attachment before judgment and attachment in execution are two such wholly different things as to make any provision applicable in express terms to the one in no event applicable to the other; because, in my view, as soon as a decree-holder applies for execution on the strength of the attachment that he has obtained before judgment and which he seeks after judgment to use as validating the sale for which he is applying, he thereby by his own act asks the Court to treat his attachment as being an attachment in execution. I would, therefore, answer the question propounded in the negative.

Ramesam, J.:—The facts of the case were stated by me in the order referring the case to a Bench of two Judges and need not be repeated.

The question referred to the Full Bench is "whether the attachment before judgment in this case was subsisting after the dismissal of E. P. No. 183 of 1916 on the 19th September, 1916."

The decision turns upon (1) whether Order 21, rule 57, ever applies to attachments before judgment and (2) if it does, under what conditions? The two questions are connected and will be discussed together.

They turn on the construction of the words "attached in execution of a decree" in Order 21, rule 57. If an attachment before judgment can ever become or be converted into an attachment in execution, the rule applies to an attachment before judgment after it is so converted into an attachment in execution. If such conversion is impossible, it does not.

In the Code of 1859 there was no provision corresponding to Order 38, rule 11, of the present Code. There was a conflict

of opinion on the necessity of a re-attachment by a decree-holder who had obtained an attachment before judgment and who desired execution of his decree.

In Calcutta, it was held that attachment before judgment and attachment in execution were so entirely different in their nature that one cannot subserve the purposes of the other and it was necessary for such a decree-holder to re-attach the property for purposes of execution—*Sreeram Manick* v. *Tincowree Roy* (9). The High Court of North West Provinces took a different view. Pearson and Turner, JJ., in *Surkies Agent of the Official Assignee of the Insolvent Court of Calcutta* v. *Mussumat Bundho Raee* (10), said "Futhermore, there is in our judgment no difference between the effect of attachment obtained before, and attachment obtained after decree. It is true that in the former case the plaintiff can only obtain an order for the attachment of specified property, whereas in the latter the decree-holder may obtain a general order for the attachment of the property of the judgment-debtor, wherever it may be found; but the reason for this difference is to be found in the grounds on which the Court is authorized to grant attachment before judgment, that is to say, the probability of the disposal of the property, or its removal out of the jurisdiction of the Court. In both processes the orders directing attachment are to be carried out under the provisions of section 233 and the following sections; in both the claims of the third parties are to be similarly investigated under sections 246 and 247; and to both apply the prohibitions contained in section 240, which prohibitions we hold to embrace all the consequences resulting from attachment whether the order be made before or after judgment. When property has been attached by actual seizure or written order, any private alienation thereof, whether by sale, gift, or otherwise, is null and void." The legislature differing from the Calcutta view, and adopting the Allahabad view, enacted a section in the Code of 1877 similar to Order 38, rule 11, making a re-attachment unnecessary and the attachment before judgment available for purposes of execution. It is true that after the Code of 1877 was passed, the Privy Council held on the Code of 1859, that the attachment before judgment continues and cannot be regarded as abandoned by the then practice of re-attachment (*Ramkrishna Das Surrowji* v. *Surfunnissa Begum* (8) but this is immaterial.

Now, Order 21, rule 11, provides that one of the modes in which assistance of the Court in execution is required is "by the attachment and sale, or by the sale without attachment, of any property." Sale without attachment is permissible only in a decree for sale. Therefore, in a decree for money, there must be an attachment in execution preceding the sale. In a case where there has been an attachment before judgment and no re-attachment (pursuant to the provision of Order 38, rule 11) where is the attachment in execution preceding the sale as required by Order 21, rule 11? The answer is that the attachment before judgment is such attachment in execution, having passed into the latter. In my opinion, the effect of Order 38, rule 11, is, though it does not say so in so many words, that the attachment before judgment becomes an attachment in execution when it is definitely sought to be made available for execution. This is the view taken in the Indian Courts and by the text-writers up to 1911. In *Pallonji Shapurji Mistry* v. *Edward Vaughan Jordan* (11), Scott, J., referring to section 490 of the Code of 1882 corresponding to Order 38, rule 11, said (at page 405): The attachment before judgment enures and *becomes* an attachment in execution. That is the effect of the section." This was followed in *Sewdut Roy* v. *Sree Canto Maity* (12) by Woodroffe, J., who said, "on such application for execution, the attachment before judgment enures and becomes, upon and by virtue of the application, an attachment in execution." In *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13) Ghose and Brett, JJ., held with reference to section 285 of the old Code (corresponding to section 63 of the present Code) which contains the words "under attachment in execution of a decree," that the section applies to attachments before judgments also. Messrs. Amir Ali and Woodroffe in

(9) (1870) 13 W.R. 9 (F.B.).
(10) (1869) 1 N.W.P.H.C.R. 81.
(11) (1888) 12 Bom. 400.
(12) (1906) 33 Cal. 699.
(13) (1902) 29 Cal. 778.

their first edition of the Civil Procedure Code at page 1156 says: "He must apply for execution just like any other creditor: (In the foot-note to this sentence, the decisions in I.L.R. 12 Bom. 400 and I.L.R. 33 Cal. 639, were cited without any disapproval.) "This is now made clear by the words 'upon an application for execution of such decree.' Where, however, an application for execution is made by the terms of this rule, no application for attachment is necessary, the attachment before judgment *enuring and becoming upon and by virtue of the application for* execution, an attachment in execution." In the foot-note they refer to *Bhagwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13), and add, "In this respect, the law is now settled, etc." In *Durpati Bibi* v. *Ramrach Pal* (14), Banerji and Tudball, JJ., say, "so that, after the passing of the decree, the attachment already made was to be deemed to *be an attachment in execution of the decree.*" In *Ramasamy Udayar* v. *Chakrapani Chettiar* (15), there were two attachments before judgment in two Courts and section 285 was applied to them as in I.L.R. 29 Cal. 773. Subrahmanya Ayyar, J., said, 'the effect of section 490, Civ. Pro. Code, is to put a person attaching before judgment *in the same position as if he had attached after decree*, if a decree is passed in his favour." In *Krishnaswamy Mudaliar* v. *Official Assignee of Madras* (16) (a decision of three Judges), the learned Judges, after stating that section 490 of the Civ. Pro. Code provides that no re-attachment is necessary add: "The case, therefore, *stands upon the same footing* as if the creditor had obtained his decree and had afterwards obtained an order of attachment." Thus, it is clear that the construction contended for by the petitioner has always been accepted up to 1911.

The first note of dissent from this view was struck in *Gones* v. *Chandra Banwari Lal* (5). The learned Judges (one of whom was Sir Cecil Brett) dissent from I.L.R. 12 Bom. 400 and I.L.R. 33 Cal. 639. The decision in I.L.R. 29 Cal. 773 (in which Brett, J., was one of the Judges) was not referred to nor is the closely connected question, the possibility of the conversion of an attachment before judgment into one in execution, discussed. This decision was referred to in *Bavuddin Sahib* v. *Arunachala Mudali* (6), where their Lordships say: "The other contention of the appellant, namely, that . . . . . the present decree-holder converted the attachment before judgment into an attachment in execution is not sustainable. *Such conversion can take place only if the decree-holder applies for sale of all the properties in execution of his own decree.* Whether such conversion will take place even in such a case may be questioned on the authority of *Gones Candra* v. *Banwari Lal* (5), but it is unnecessary to decide that question for the purposes of this case." This decision far from being an authority in favour of the respondent is, as the expression of an opinion, against him. It is true the last sentence above quoted leaves the point before us open. But the immediately preceding sentence indicates the view that the attachment before judgment will be converted into one in execution on the application of the decree-holder for sale. The next case supposed to be in favour of the respondent is *Suraparaju* v. *Narasimham* (7). It does not appear from the facts that any application for execution was dismissed for default. There was no reference either in the argument or in the judgment to Order 21, rule 57, or to the cases above discussed. The next decision relied on by the respondent is *Venkatasubbiah* v. *Venkata Seshaiya* (1). It purports to be based on 16 C. L. J. 86, 26 M. L. J. 215 and 1 L W. 932. The last two decisions are scarcely authorities for it. So that, we have, as against the decisions and opinions that prevailed from 1869 to 1911, two decisions in 1912 and 1918 in favour of the respondent. In this state of the authorities we got the decision in *Arunachalam Chetti* v. *Periasami Servai* (4); here the question arose with reference to the words "attached in execution of a decree" in article 11 of the Limitation Act. A Full Bench of five Judges held that, after an order for sale was passed after the decree, an attachment before judgment becomes an attachment in execution. Wallis, C. J., said referring to Order 38, rule 11: "This provision does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the *mere passing of a decree*

(14) (1909) 31 All. 527.
(15) (1907) 17 M.L.J. 488.
(16) (1903) 26 Mad. 673.

for plaintiff either within the meaning of article 11 of the Limitation Act or Order 21, rule 57, already mentioned, as execution may never be applied for, but merely enables the decree-holder *to apply for execution by sale of the* attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that *the property is to be considered as attached in execution by virtue of rule* 11, *etc.*" This was concurred by three other Judges (of whom I was one). Spencer, J., though he may be regarded as going further than the others, certainly agreed with them to the extent that, at least after the order for sale, the attachment before judgment becomes one in execution. The judgment is therefore an unanimous judgment of five Judges laying down an attachment before judgment may be converted into an attachment in execution of a decree and is binding on this Court ; and when we remember that the Limitation Act and Civil Procedure Code are allied General Acts (first passed together in 1859, again in 1877 and again in 1908) and ought to be construed consistently [See *Phoolbas Koonwar* v. *Lalla Jogeshar Sahoy* (17) and *Arunachalam Chetty* v. *Periasami Servai* (2)], it is seen that it will be a great anomaly without any justification if the same expression is construed in one way in section 63 of the Civil Procedure Code and article 11 of the Limitation Act and in another way for Order 21, rule 57, of the C.P. Code. If the character of an attachment before judgment is such that its conversion into an attachment in execution is impossible, such impossibility exists equally for the purpose of section 63, C.P.C., and article 11 of the Limitation Act as for Order 21, rule 57. Unless there is a clear indication to the contrary in one or more of these provisions the possibility of such conversion equally applies to all and I see no reason to depart from I.L.R. 44 Mad. 902, which definitely established the possibility of such conversion.

I do not feel it necessary to discuss the interpretation of Order 38, rule 9. I agree with the decisions in *Ram Chand* v. *Pitam Mal* (18) and *Abdul Rahman* v. *Amin Sharif* (19), that, when a suit is dismissed the attachment before judgment terminates without an order of the Court. But even if the opposite view is the correct view, I do not think this has any bearing on the construction of Order 21, rule 57. While Order 38, rule 9, provides for one mode of terminating an attachment before judgment, it is not the only mode and it does not stand in the way of construing Order 21, rule 57, as providing another.

Nor do I think any assistance can be derived from the Form 7 in Appendix F of the Code. Appendix E, Form 24, which also seems to imply that a further order of the Court is necessary to put an end to the custody of the Court in an attachment after judgment, may seem to be inconsistent with Order 21, rule 57. I think the true view is that the Forms have nothing to do with the rights of parties but only deal with the relation of the Court to its subordinate officers who carry out its orders.

It is said that, if the petitioner's contention is correct, Order 38, rule 8, would be unnecessary in the face of Order 21, rule 58, but the same may be said of Order 38, rule 11. It may be some of those rules are not absolutely necessary but have been enacted as a matter of abundant caution.

It may be that, of the various opinions in the decisions, cited by me above and with which I agree, some are *obiter dicta* while others are necessary for the decision. It may be that in some of them the exact period of time when the attachment before judgment was converted into an attachment in execution had not to be and was not considered.

In the case before us, as soon as the application (E. P. No. 183 of 1916) mentioning an attachment before judgment and praying for sale, was filed, the Court passed the following order on 6th May, 1916: "Copy of attachment warrant and the order making the said attachment absolute to be produced." These papers were produced on 11th July, 1916. The Court, being satisfied that there was such an attachment as to justify the prayer for sale (as required by Order 21, rule 11), passed the next order on the application on 11th July, 1916. In this order, the Court, apparently acting under Order 21, rule 22, directed notice to the defendant as the decree was more than one

(17) (1875) 1 Cal. 226 (P.C.).
(18) (1888) 10 All. 506.
(19) (1918) 45 Cal. 780.

year old. This is a definite acceptance by the Court of the application as a proper application for sale and a statement of its willingness to pass further orders on it unless the defendant can show cause. The defendant was served on 29th July, 1916. On the 8th August, the Court passed an order directing the sale-papers to be filed: By "sale-papers" were meant drafts of the proclamation, encumbrance certificate, etc., as required by rule 148 of the Civil Rules of Practice. If the papers were filed, the sale would have been ordered; but, as they were not filed, the application was dismissed. In my opinion, after the Court was satisfied. that there was such an attachment on the properties sought to be sold as to satisfy the requirements of Order 21, rule 11, and when it passed the next order on the footing that there was an attachment which serves all the purposes of an attachment in execution, *i.e.*, on 11th July, 1916, the attachment before judgment had become converted into one in execution.

I will now refer to certain general considerations apart from decisions, which are supposed to be against this view. First it is said that an attachment before judgment is, in its nature, so essentially different from an attachment in execution, that it can be never converted into the latter. This was the view taken in *Sri Rammanik* v. *Tincowri Rai* (9) but, in my opinion, the legislature abandoned it when the section in the Code of 1877 corresponding to Order 38, rule 11, was enacted.

It is true that there are some differences between an order for attachment before judgment and an order for attachment in execution, namely,

(1) The former is made before judgment and the latter after judgment.

(2) An order for attachment before judgment is made only after giving the defendant notice to show cause why it should not be made. No such notice is given before an order of attachment after judgment. The reason for this difference is the absence of a decree in the former case.

As a corrollary following from this, if security is given by defendant the Court does not pass an order of attachment before judgment; an attachment already effected will be withdrawn. To the extent that these are considered as very important differences, I do not agree with *Basiram Malo* v. *Kattyayani Debi* (20) which relies on the obsolete decision of 4 B.L.R. 63 (F.B.).

(3) Order 38, rule 12, is another difference due to the anticipating nature of an attachment before judgment.

But do these differences make the attachment before judgment so entirely different in character, from one after judgment that one can never pass into the other? I am of opinion they do not. In my view, the attachment before judgment and after judgment are identical in their essential features. Each is effected by a prohibitory order. The purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable in pursuance of the attachment. Neither has got the character of a charge. It is thus seen that, so far as they vacate or affect rights, they are substantially identical in character (*vide* 1 N. W. P. H. C. R. at pages 96 and 97 already quoted). Just as the effect of two attachments of the same property in execution of the same decree (the second one being effected in forgetfulness of the first) is merely that the property is under attachment, the first attachment merging in the second, similarly the effect of an attachment before judgment followed by a redundant re-attachment after judgment is merely that the property is under attachment. In such cases it is meaningless to say that the property is under two attachments. It is still more meaningless to say that one attachment is dropped but another subsists. All the earlier attachments, in all such cases, merge into the last. Where there are several attachments, it is not that every attachment has an individuality of its own but the property is under a state of attachment.

Secondly, it is said that other creditors who obtained no attachments of their own but who might share rateably in the amount that may be realized by the respondent, lose this chance if the respondent's attachment is held to have been extinguished under Order 21, rule 57 and this is a great hardship. I do not see any hardship in this. Such creditors have no rights against the property—none, certainly that ought to prevail against the appellant and if they have a chance of sharing rateably with the

(20) (1911) 38 Cal. 448.

respondent under section 73, it seems to me to be a piece of good luck which they little deserve to have, dependent on the diligence with which the respondent pursued his attachment. They are no more unlucky when the attachment terminates under Order 21, rule 57 than in the case when the decree-holder pays off the attaching creditor or gives some other property as security for the debt of the attaching creditor and the attachment is withdrawn under Order 38, rule 9. The hardship is exactly the same as when we have, instead of the first attachment before judgment an attachment after judgment. I do not think that instances of creditors sharing rateably in the fruits of the attachment before judgment are more numerous than in cases of attachment after judgment. Finally, I do not think such remote considerations of hardship on other creditors can have any place in the construction of Order 21, rule 57, especially as I am not able to conceive of any argument based on hardship which does not equally apply to attachments after judgment. I am not able to see any reason why the legislature should create a smaller standard of diligence for judgment-creditors who had obtained an attachment before judgment, than those who did not, in working out execution of the decree.

I would overrule *Venkatasubbiah* v. *Venkata Sashaiya* (1). I agree with Spencer, J., in the order of reference, and answer the question referred to us by saying that the attachment is not subsisting.

Wallace, J.:—I agree with the decision of the learned Chief Justice and will, as there is a divergence of opinion in the Full Bench, give my own reasons.

The respondent in this case obtained an attachment before judgment in O. S. No. 153 of 1914 on the file of the Court of the Subordinate Judge, Ramnad, his attachment being obtained on 20th November, 1914. He obtained a decree in the Temporary Subordinate Judge's Court, Ramnad, to which his suit had been transferred on 22nd February 1915, which decree was sent for execution to the Court of the Subordinate Judge of Ramnad. He filed an execution petition, 183 of 1916, which was dismissed on 19th September, 1916, apparently because he had committed default in failing to file an encumbrance certificate within time. The petitioner before us had in O. S. No. 108 of 1914, obtained an *ex parte* decree against the same judgment-debtor but that *ex parte* decree was set aside on the judgment-debtor giving security on 15th March, 1915, the security being given on the same property which the respondent had attached before judgment. The question for decision is whether on the dismissal of the respondent's execution petition 183 of 1916, the attachment before judgment ceased or whether that attachment enured and thus takes precedence of the security given on the same property in favour of the petitioner.

Taking Order 38, Civil Procedure Code, as it stands, it seems to me clear from the wording of rule 9 that an attachment before judgment only comes to an end by a formal order of the Court withdrawing it. This is, in my opinion, the correct way of interpreting rule 9, which applies to cases where the security demanded has been furnished, or where the suit has been dismissed. Rule 6 (2) clinches this interpretation. It requires that even in the case of a conditional attachment before judgment, a formal order of withdrawal is necessary to raise the attachment. Much more must it be necessary for raising a final attachment, into which the conditional attachment has been converted. No doubt the rulings in *Ram Chand* v. *Pitam Mal* (18) and *Abdul Rahman* v. *Amin Sharif* (19) are contrary to this view, but, for reasons given, I must disagree with them. When the suit has not been dismissed, but decreed, it goes without saying (again taking Order 38 as it stands) that the attachment continues, until it is withdrawn by the Court, so long as execution of the decree is not barred. Rule 11 makes that quite clear. See also *Ganu Singh* v. *Jangi Lal* (21).

Respondent obtained a decree in his suit. Hence, so far as Order 38 goes, his attachment before judgment has not come to an end, since there is on record no formal order of withdrawal of the attachment by the Court. It can only have come to an end if there is some other provision of the Civil Procedure Code, which has caused it to cease. Petitioner's contention is that Order 21, rule 57, is such a provision; and that is really the only argument in his case. The whole point is:—Does the phrase "property.....attached in execution", in

(21) (1899) 26 Cal. 531.

Order 21, rule 57, include "property attached before judgment," when that attachment is utilised, by force of Order 38, rule 11 for an execution.

Petitioner's contention appears to me open to several objections. In the first place, an attachment before judgment is not *ejusdem generis* with an ordinary attachment in execution. To effect the former, the Court must, besides issuing, as required by Order 38, rule 7, the usual prohibitory order to the judgment-debtor and the public generally, under Form E-24 of the first schedule, also issuea special order in Form F-7 to its Bailiff to attach the property and keep it "under safe and secure custody until the further order of the Court." This clearly implies that the order under Form F-7 remains in force until it is withdrawn by a further order. It seems to me very difficult to hold that that further order is lying *perdu* in Order 21, rule 57, and must be deemed to have been passed, when the execution application is dismissed under that rule. It is true that form E-24 also uses the same phrase and implies a further order also. On this I can only say that it is inconsistent with rule 57, the inconsistency probably being due to the omission to notice the full effect of rule 57, when it was newly introduced into the Civil Procedure Code of 1908. I find it difficult to hold that in passing this new rule the legislature intended to abolish "further order of the Court" required by Form F 7, a form not coming under Order 21 at all, or to abrogate the clear provisions of Order 38, which had been in force substantially since 1859 at least. Rule 57 of Order 21 is of a penal nature and should therefore be construed strictly. One is not entitled to conclude that rights previously enjoyed by parties have been taken away by a new provision in a Code, unless that provision in clear terms or by necessary implication involves such a conclusion.

Secondly, rule 57 appears as a rule in an Order devoted to execution of decrees and orders and in my view it should, therefore, be confined to such attachments as are dealt with in the Order itself and not applied to attachments effected outside that Order. It has been argued that the phrase "property attached in execution" should mean "property in a state of attachment in the course of the execution of the decree." I think the more natural interpretation is simply that the phrase is to apply to such attachment in execution as is described earlier in the same Order—*vide* Order 21, rule 11, etc. The following rule 58 uses exactly the same phrase. Yet that rule does not apply automatically to property the attachment of which occurred before judgment. A special rule under Order 38, *viz.*, rule 8, was enacted to make it applicable. There is nothing in rule 8 to indicate that it is confined to claims against an attachment before judgment only until the judgment has ripened though a decree into an execution. The test for the application of rule 8, as I read it, is not "Has execution been taken out," but "at what stage of the case was the property attached." Order 38, rule 8, incorporates so to speak, rule 58 of Order 21—*vide Mallikarjuna Prasada Nayudu* v. *Virayya* (22). There is no corresponding rule in Order 38, incorporating Order 21, rule 57, in it, and no rule from which one is entitled to infer that an attachment before judgment *becomes*, when execution is taken out, on the strength of that, an attachment in execution.

No doubt there is one ruling which loosely uses the word "*becomes*" and to that case our attention was directed in arguments, *viz.*, *Sewdut Roy* v. *Sree Canto Maity* (12). In *Drupati Bibi* v. *Ramrach Pal* (14), the language used is that an attachment before judgment shall after a judgment "be deemed to be an attachment in execution of the decree." The fact that the attachment before judgment is useful chiefly for the purpose of a subsequent sale in execution will not, to my mind, convert every attachment into an attachment in execution.

The petitioner relies strongly upon the ruling reported in *Arunachalam Chetty* v. *Periasami Servai* (2), which laid down that article 11 of the Indian Limitation Act which deals with the question of the limitation period for an order on a claim petition preferred to "property attached in execution of a decree," applies to an order on a claim petition preferred to property attached before judgment after an order for sale in execution had been passed. Three points have to be noted with reference to this case; first, that it was a case of a claim made *after* decree, *after* an application for execution had been put in

(22) (1918) 41 Mad. 849.

and *after* an order for sale in execution had been passed; secondly, that section 246 of the old Civil Procedure Code of 1859, which the Judges held to be the *fons et origo* of article 11 of the Indian Limitation Act, applied expressly in terms to an attachment before judgment as well as to an attachment in execution; and thirdly, that they were oppressed by the facts that, despite the provisions of the old code the legislature had provided no special period of limitation at all for claims to property attached before judgment, and that, unless "the whole object of the summary claim procedure" was to be "frustrated," a briefer period of limitation than that in article 120 had to be found somewhere. The learned Chief Justice and the other learned Judges, who adopted his judgment in that case, considered that they "should not be justified in laying down generally that property attached before judgment is attached in execution of a decree" and they distinctly held that Order 21, rule 57, threw no light on the point that had been then argued before them. I do not think this ruling goes further than to say that a claim put in after there is an order in execution for sale following upon on attachment before judgment "may properly be regarded as a claim to property attached in execution of a decree within the meaning of article 11" of the Limitation Act. It cannot, therefore, be construed to lay down that in all instances where the phrase "property attached in execution" occurs in any statute, it covers cases of property attached before judgment as soon as execution is taken out on the decree arising out of that judgment; it must, in my opinion in view of the compulsion, if it may be so called, exercised over their Lordships' minds, by the omissions of the Legislature, be strictly confined to what it lays down. I cannot, therefore, read into it a reversal of the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1). That is a direct authority in favour of the respondent in this case, to which one of the learned Judges in the I. L. R. 44 Madras case was a party, and other direct authorities quoted therein are *Gones Chandra Adak* v. *Banwari Lal Roy* (5) and *Bavuddin Sahib* v. *Arunachala Mudali* (6) and another case, which indirectly is in favour of the respondent, *Kosuri Surapa-raju* v. *Mandapaka Narasimham*, reported in 26 I. C. 81.

General considerations of equity, such as, for example, third parties relying, for purposes of rateable distruction, on an attachment before judgment by some one else are entitled to be in any better position than third parties relying on some one else's attachment after judgment, or whether a party defaulting in the prosecution of his execution application ought to be in a better position because he has attached before judgment than if he had attached after judgment, do not, I feel, assist me much in the decision of this case. I think the decision must be based on an interpretation of the express provisions of the Code and on a consideration of the rights conferred by prior Civil Procedure Codes before Order 21, rule 57, was passed at all. These last were perfectly clear and included the anomalies just mentioned, and the new Civil Procedure Code has left them as they were before.

I would, therefore, in answer to the reference, say that Order 21, rule 57, does not apply to cases where the attachment is an attachment before judgment.

Waller, J.:—I think that the question referred to us should be answered in the negative. Order 38, rule 11, provides that, where there has been an attachment before judgment a decree-holder, in order to execute the decree, must make an application for execution, but need not re-attach. This is the only privilege he is given and I do not consider that it was intended to carry with it exemption from the penalty that awaits negligence on the part of attaching decree-holders in general. After he has made his application, he becomes subject to the provisions of Order 21. I agree that Order 38 contains the whole law in regard to attachment before judgment as such, but am not prepared to concede that attachment before judgment and attachment in execution are two entirely separate and distinct processes.

There is authority on both sides. In *Venkatasubbiah* v. *Venkata Seshaiya* (1) it was held that Order 21, rule 57, had no application to attachments before judgment. The Judges followed one Calcutta and two Madras decisions on the point. The Calcutta case [*Gones Chandra Adak* v. *Banwari Lal Roy* (5)] is certainly a direct authority in support of their view. One of the Madras cases [*Bavuddin Sahib* v. *Arunachala Mudali* (6)] is—if anything—an authority for the opposite view. What

it actually decided was that an attachment before judgment did not cease to exist because an application for the arrest of the judgment-debtor had been dismissed for default. That is not in point here. Incidentally, however, the opinion was expressed that an attachment before judgment was converted into an attachment in execution where the decree-holder applied in execution for sale of the attached property. At the same time, a doubt was raised, with reference to the Calcutta decision, whether the opinion was correct, a doubt which the Judges expressly refrained from solving. The last case *Kosuri Suraparaju* v. *Mandapaka Narasimham* (7) is not very clear. Apparently an execution application had been dismissed. If it was dismissed for default, the decision is a direct authority in support of *Venkatasubbiah* v. *Venkata Seshaiya* (1). On the other side—apart from dicta in certain cases—there is *Arunachalam Chetty* v. *Periasami Servai*. In that case property had been attached before judgment, a decree had been passed and an order for sale had been granted in execution. The question the Court had to decide was whether the words "property attached in execution of a decree" in article 11 of the Limitation Act covered an attachment before judgment. The Full Bench decided that they did. The main judgment was delivered by Wallis, C.J., with whom all the other Judges concurred. Spencer, J., delivered a separate judgment which — as I understand it—went no further than that of the Chief Justice. It must be conceded that the particular instance with which the Court was concerned was one in which sale had actually been ordered; but I cannot agree that that fact affects the principle of the decision. An order for sale pre-supposes and is based on an existing attachment. It does not itself create the attachment. If therefore an attachment before judgment becomes at any stage an attachment in execution, it must, in my view, be at the stage where an application to execute has been made and admitted under Order 21, rule 17. And that I conceive to be the principle laid down by the Full Bench. I may add that, in the present case, sale papers had been called for which is usually done after attachment has been ordered. I am unable to see how a subsequent order for sale would have altered the position. Wallis, C. J., explicitly stated that he was considering both cases, that is, those "in which the claim . . is put in after decree or even, as in the present instance, after sale had been ordered in execution." Further on he observed: "This provision (Order 38, rule 11) does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree either within the meaning of article 11 of the Limitation Act or of Order 21, rule 57, *as execution may never be applied for*." This sentence seems to me to indicate (*a*) that he was considering the meaning of the phrase under discussion both in article 11 of the Limitation Act and in Order 21, rule 57, (*b*) that he was of opinion nothing more was necessary to convert an attachment before judgment into an attachment in execution than an application to execute. The order for sale he regarded as "proceeding on the footing that the property had to be considered as having been attached in execution by virtue of rule 11." The reference to rule 11 requires an application to execute (and such an application would, but for the proviso in the rule itself, be for attachment as well as sale) is to my mind conclusive proof that he considered that the attachment changed its character from the time of the application to execute. And that was the view taken by Spencer, J, Wallis, C. J., no doubt remarked that Order 21, rule 57, threw no light on the question he was considering. Nor did it. He was considering the meaning of a certain expression in article 11 of the Limitation Act which was practically identical in terms with a phrase in Order 21, rule 57, but found that the context in which the latter stood gave him no assistance in interpreting the former.

As I have already pointed out, the quotation above with its reference to "within the meaning of Order, 21, rule, 57" shows that he was considering that rule as well as article 11. I see no reason to doubt that he and the other Judges would have been prepared, had it been necessary, to answer the question referred to us in the negative. Indeed, I do not see how an answer can be avoided. When once it has been found that, for one purpose an application to execute converts an attachment before judgment into an attachment in execution, the conclusion is, to my mind, inevitable that the conversion

operates for all purposes. Following what I believe to be the principle laid down by the Full Bench, I hold that, in this case, the property had been attached in execution within the meaning of rule 57 and that the attachment ceased when the application for execution had been dismissed for default.

I may add that the same question has since been argued before me with reference to section 9 of the Presidency Towns Insolvency Act. Under that section, an act of insolvency is committed where any part of a man's property has been attached in execution of a decree for over 21 days. It would, in my opinion, be anomalous to hold that an attachment before judgment takes a judgment-debtor out of the section, even though execution has been proceeding against his property for more than the prescribed period.

The Court :—By a majority the question will be answered in the negative.

Reference answered in the negative.

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* 1924 Madras 509.

SCHWABE, C.J., AND WALLER, J.

Raghavachariar—Appellant

v.

Duvvuru Krishna Reddi—Respondent.

S. A. No. 11 of 1922, decided on 17th September, 1923, from the order of Sub-Judge, Chittoor, dated 4th August, 1921.

(a) *Civ. Pro. Code O. 34, r. 5—Court can direct order of sale if mortgagee is not prejudiced.*

In executing a mortgage decree the Court can direct, at the instance of any person interested in some of the mortgaged items, the sale of some items of the mortgaged property first, before selling the other items provided always the mortgagee is in no way prejudiced. [P. 510, C. 1.]

(b) *Civ. Pro. Code, S. 11—Incidental finding.*

The mere fact that the petition in the suit itself, to have the property sold in a particular order is disallowed is no bar to the executing Court making such an order in the course of the execution. [P. 510, C. 2.]

S. A. Seshadri Aiyangar—for Appellant.

C. V. Anantakrishna Aiyar—for Respondent.

Schwabe, C.J. :—This is an appeal from the order of the Subordinate Judge, Chittoor, confirming the order of the District Munsif, on an application in execution of a mortgage decree. The position shortly was this: that the applicant, the present appellant, had at some time purchased from the mortgagor, without notice of the mortgage, properties items 1 to 3 and had remained quietly in possession for some 20 years. The mortgage covered other items of property of considerable value, which were, after the date of the mortgage and after the date of the sale to the appellant, mortgaged usufructuarily, such usufructuary mortgagees taking with notice of the existing mortgage. The appellant applied that, in executing the mortgage decree, the other properties should be sold first and that the properties which he had bought should be brought to sale actually, only if there was a deficit on the sale of the other properties. This application was refused and it was refused solely upon the ground that a similar application had been refused in the mortgage suit itself. Now it appears that in the mortgage suit the present appellant was made a party and he did contend that he was entitled to have the properties marshalled in such a way, that the morgage amount might be realised, by the sale first of the properties other than those which he was entitled to, subject to the mortgage. That contention of his was dealt with by the Munsif, who heard the case in paragraph 22 of his judgment, to which our attention has been called, and he holds, as I understand his judgment, first of all that by the decision of the Full Bench of this Court in *Kommineri Appayya* v. *Mangala Rangayya* (1) he was precluded from going into the matter at all, and secondly he holds, by reason of that decision that the plaintiff, that is the mortgagee, would be prejudiced, if he were to receive any such application. I think *Appayya* v. *Rangayya* (1) is an authority for the first proposition, that it was not the right time for the point to be decided, and I think it is also an authority for the second proposition; but so far as I can see, though it is not necessary for us to say so, the District Munsif on that occasion was wrong in respect of his view on the second proposition, because if the properties are brought to sale and some are sold first and the balance is directed to be sold for any deficit that there may be I cannot see how the plaintiff in the suit suffers any prejudice at all. However that may be, it seems that the view of the Full Bench of this Court was that it was not the right

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(1) (1908) 31 Mad. 419 (F.B.)

time to dispose of this question. That being so, the fact that the learned District Munsif on that ground, among other grounds refused the present appellants their request for this order seems to be a wholly irrelevant consideration. In the judgment in *Appayya* v. *Rangayya* (1), it is pointed out that this point can be discussed and decided, on the execution proceedings, and it is put in this way : " Under section 88 of the Transfer of Property Act, the Court may order that a portion sufficient to discharge the plaintiff's debt be sold and if a particular parcel is sufficient and if the plaintiffs cannot possibly be prejudiced by such a sale, it may be open to the Court to direct, in the decree itself, its sale before the other property." That it is to say, that if there can be no prejudice, it is possible for the Court to direct in the decree itself this order of sale: but in the execution of the decree for the sale of the land, one item may be sold first and, if the sale proceeds thereof are sufficient, the sale of the other items may be stopped. In *Ramaswami Chetty* v. *Madura Mill Co., Ltd.* (2), a similar point came before a Bench of this Court, and Srinivasa Aiyangar, J., puts the point quite clearly, when he points out that the decision of the Full Bench in *Appayya* v. *Rangayya* (1) was that the Court has a discretion to direct the sale of any particular item, if that will be sufficient to pay off the mortgage debt, although in that case under section 81 of the Transfer of Property Act, no marshalling was allowed, as between the parties before the Court. I confess myself to have my own doubts as to how far section 81 of the Transfer of Property Act does apply ; but it is not necessary for me to express any opinion on that, on this occasion. The only question that I have to consider is whether it is right that the order of the sale of these properties should be regulated, by the order of Court and that, in my judgment, must depend on whether the appellant has got a good equitable right, as between himself and the mortgagor and as between himself and the other persons interested in the other mortgaged property; and if he has a right to preference, then it is the duty of the Court to give him preference, taking care of course that the mortgagee is not prejudiced. As I have pointed out, the mortgagee is not prejudiced by the order of selling. Therefore, I think that the right order to be made in this case and the order which must be made is that the property be put up for sale, items 4 to 16 inclusive being sold before items 1 to 3, items 1 to 3 being sold, only if there is not sufficient amount realised from the sale of the other items to pay the decree amount.

Our attention has been called to a recent decision of this Court, in Appeal against Appellate Order No. 46 of 1922, which reversed an order dismissing an application by a mortgagee to bring one item of the mortgaged property alone to sale, it being contended by the person claiming an interest in that item of property that the other items of mortgaged property ought to be brought to sale first. I understand that it was held by that judgment that the only occasion on which such a point could be taken was on the hearing of the suit itself. I desire to point out that it seems to me that that proposition is much too general and is contrary to the decision, in *Ram Dhun Dhur* v. *Mahesh Chundar Chowdhry* (3) and the decision in *Appayya* v. *Rangayya* (1). In the former case it was held that a mortgagee should not be allowed to bring to sale one item of the mortgaged property only, and in the latter case, the Full Bench Case, it was pointed out that there were cases in which it was not possible or right for the order to be made on the hearing of the suit and yet it would or might be open to take the point on the execution proceedings. From what I have already said, it follows that in any view this also is a case where, although the point had been taken and decided against in the suit, it is open to be taken again on the execution proceedings. I agree with the decision in C.M.S.A. No. 46 of 1922 that the mere fact that it was sought to bring one property only to sale is no ground for dismissing the petition so asking ; but it must not be taken that I agree, if it was the intention of that Court so to decide, that when that petition is taken on the file, it will not be open to persons intended to have the point raised, as to the proper order of sale.

In the result this appeal must be allowed with costs.

Waller, J. :—I agree and I have nothing to add.

Appeal allowed.

(2) (1916) 1 M.W.N. 265.

(3) (1883) 9 Cal. 406.

1924 Madras 511.

KRISHNAN AND ODGERS, JJ.

R. D. K. Venkatalingama Nayanim—Appellant

v.

M. A. R. N. Arunachellam Chettiar—Respondent.

F. A. No. 288 of 1922, decided on the 10th October, 1923, from the order of Sub-Judge, Chittoor, dated 10th January, 1922.

Madras Impartible Estates Act (II of 1904), S. 4—Decree against deceased proprietor of Estate for money borrowed for temple and misapplied cannot be executed against estate in the hands of son.

The section does away with the special obligation as between sons and grandsons and their father and grand-fathers based upon the theory of pious obligation in the Hindu Law. Where therefore the decree was obtained for a sum of money which the father of the Zamindar had obtained as a trustee of a temple and misapplied himself, the debt thus being practically the result of a breach of trust. *Held* such a debt as that can hardly be treated as a debt binding upon a successor-in-title to the Zamindari; for it would not be a debt which, if incurred, by the managing member of a Joint Hindu family, would be binding upon the other co-parceners. [P. 511, C. 2.]

A. Ramachandra Iyer—for Appellant.

Judgment:—This is an appeal that arises, in execution of the decree in O. S. No. 19 of 1911, on the file of the Subordinate Court of Chittoor. The appeal is by the son and legal representative of the late judgment-debtor, the Raja of Kalahasti. The respondent is the decree-holder in the suit. The Raja having died, it was contended by his son and legal representative that the group of villages, called Chembedu group, could not be attached in execution of the decree, as the assets of his father in his hands, as they were part of the impartible estate of Kalahasti, of which he was at the time the proprietor. It is not denied that this group of villages, called Chembedu group, forms part of the Kalahasti Zamindari and is governed by the Madras Impartible Estates Act II of 1904. By section 4 of that Act, it is enacted that:

"The proprietor of an impartible estate should be incapable of alienating or binding by his debts such estate or any part thereof, beyond his own lifetime, unless the alienation shall be made, or the debt incurred, under circumstances, which would entitle the managing member of joint Hindu family, not being the father or grandfather of the other co-parceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other co-parceners independently of their consent."

That section clearly governs the present case. Under that section, before any part of the impartible estate of Kalahasti can be taken in execution of a decree of a personal debt, against the predecessor-in-title of the present proprietor, it must be shown that the debt for which the decree was passed was such as would be binding upon an ordinary joint family estate, when the debt was incurred by the managing member, in other words, that there was legal necessity for creating the debt. The question whether the successor is a son of the predecessor or any other co-parcener makes no difference whatever; for the section does away with the special obligation as between sons and grandsons and their fathers and grandfathers, based upon the theory of pious obligation in the Hindu Law. It is clear, therefore, that, before the decree-holder in this case could attach the property and bring it to sale, it was incumbent on him to establish that the debt for which this decree was passed was a debt, incurred for the necessity of the impartible estate itself.

There is at present no such proof on record. In fact, it is said that the decree was obtained for a sum of money, which the father of the present Zamindar has obtained as a trustee of a temple and misapplied himself, the debt thus being practically the result of a breach of trust. Such a debt as that can hardly be treated as a debt binding upon a successor-in-title to the Zamindari; for it would not be a debt which, if incurred, by the managing member of a joint Hindu family, would be binding upon the other co-parceners.

It was very strenuously pressed on us that a fresh opportunity should be given to the decree-holder, respondent, to prove in the lower Court that this debt had the character of being one that would bind the co-parceners, if it had been incurred by the managing member; but knowing the nature of the debt, so far as it appears from the record, there is hardly any room for doubt as to its character. Furthermore, if the decree-holder had intended to put forward any case under section 4 of the Impartible Estates Act, he should have done so in the first instance in the lower Court. He should have stated that though the property attached was Zamindari property, the debt

for which the decree was obtained was binding on the Zamindari estate, because it was incurred for proper and legal necessity. He never put forward a case like that and we do not think that he should be given any fresh opportunity in the matter.

The Subordinate Judge has given a decision, in favour of the decree-holder, on grounds which we are unable to follow. He says that the income from the trust funds was blended with the income from the Zamindari and for some reason or other, the debt resulting from the management of the trust property should be held binding on the Zamindari estate. It is very difficult to follow this argument; whatever blending there might have been, between the income of the impartible estate and that of the trust funds the decree-holder will only be able to proceed against such blended income and cannot possibly get any right to proceed against the impartible estate itself.

The Subordinate Judge has also relied on certain cases, where it was held that an impartiable Zamindari, in the hands of the legal representative of the deceased former Zamindar, should be treated as his assets, for the purpose of realising the debts of that Zamindar. He has quoted *Rajah of Kalahasti* v. *Achigadu* (1), and *Depuru Kalappa* v. *Umade Rajaha* (2), as authorities in favour of his view; but he has not noticed that these authorities are no longer of any value, after the passing of the Impartible Estates Act, which is now conclusive on the question of the liability of an impartible estate, as regards debts incurred by the previous holder of the estate.

In these circumstances, we must set aside the order of the Subordinate Judge and declare that the A schedule properties are not liable to be attached and that the attachment levied on A schedule properties should be set aside. The appellant will have his costs of this appeal and, as regards costs in the lower Court, each party will bear his own costs, as directed by the Subordinate Judge.

Appeal allowed.

(1) (1907) 30 Mad. 454.
(2) (1911) 1 M.W.N. 75.

1924 Madras 512.

SCHWABE, C.J., AND WALLER, J.

Agajan Saheb—Appellant

v.

Abdul Majid Khan Saheb—Respondent.

F. A. No. 16 of 1923, decided on 5th October, 1923, from the order of Kumaraswami Sastri, Judge, dated 22nd December, 1922.

Execution—Executing Court has no power to stay execution against the person of judgment-debtor until judgment-creditor sells mortgaged property.

It is for the judgment-creditor to elect his remedies in execution, subject to such rules as governed the case and the Court cannot stay execution of money decree against the person of the judgment-debtor on condition of the latter paying some amount and the judgment-creditor proceeding against the judgment-debtor's immoveable property.

N. Rama Aiyar—for Appellant

C. Venkatasubbaramiah—for Respondent.

Schwabe, C.J.:—This is an appeal from an order of Kumarasawmi Sastri, J., who has stayed execution of a decree for Rs. 4,000, against the person of the judgment-debtor, on terms of his paying Rs. 200 within 14 days, until the judgment-creditor proceeds in execution and sells the judgment-debtor's immoveable property. The judgment-creditor says that the immoveable property is worth nothing, it being mortgaged for more than its full value. The judgment-debtor says that he cannot find a purchaser for it, but that he does not want to risk himself going to prison.

I can find no power in the Judge to make such an order. It is for the judgment-creditor to elect his remedies in execution, subject, of course, to such rules as there may be, governing a particular case; but our attention has been called to no rule at all, which would justify such an order as this. In my view, the order was wrong, and the appeal must be allowed with costs and the petition dismissed with cost.

Waller, J.:—I agree.

Appeal allowed.

1924 MADRAS 513

ODGERS AND HUGHES, JJ.

Rangaswami Ayyangar-Defendant—Appellant.

v.

Veeraraghvacharry — Plaintiff — Respondent.

S. A. No. 286 of 1921, Decided on 31st July 1923, against the decree of the S. J, of Kumbakonam.

(a) *Practice—New plea—Want of valid attestation cannot be pleaded in appeal for first time.*

The objection that a mortgage bond is not duly attested cannot be allowed to be taken for the first time in the Appellate Court, as it raises a mixed question of law and fact. 51 I. C. 378 Foll. [P. 513 C. 2]

(b) *Mortgage—Personal Covenant to pay is presumed where mortgagor fixes date for payment which being made, land is to be returned.*

Where a mortgage deed fixed a date for payment and recited that the mortgagor, having paid the money by the date, will take back the land mortgaged :

Held: there was a personal covenant to pay. 39 M. 1010, (1918) M.W.N, 672 & 13 L.W 434 Dist. 17 M. 131, & 437 M. 526 Foll. [P. 514 C. 2]

K. S. Krishnaswami Aiyangar and *P. S. Ramaswami Aiyar*—for Appellant.

T. M. Krishnaswami Aiyar— for Respondent.

Hughes, J.— The first question argued in this appeal relates to the alleged invalidity of the mortgage, on the ground that it was not properly attested. This question, in my opinion, has not really been considered by the District Munsif, in his judgment and he has given no decision about it. He says no doubt in paragraph 10

"P. Ws. 1 and 2 have both attested Ex. A. Their evidence shows that they attested Ex. A, at the request of defendant and that they were not present at the time of execution of Ex. A by the defendant. In his written statement, defendant did not put plaintiff to proof of the suit mortgage deed, Ex. A. Plaintiff appears to have put these two witnesses into the box only to prove the consideration for Ex. A. The fact that P. Ws. 1 and 2 did not see the defendant execute Ex. A, by itself does not count much for defendant. Taking the evidence and the probabilities into consideration, I come to the conclusion that defendant has miserably failed to prove his case. I therefore find the first issue against the defendant."

The first issue deals only with the question of consideration. Now the District Munsif was quite right in giving no decision as to the question of validity. The defendant did not raise this point in his written statement in the suit ; in paragraph 6 of that statement, he treated the mortgage as valid; he said nothing about its invalidity in his own evidence ; the trial proceeded on the footing that the deed was a valid mortgage and on that basis the whole trial was closed. If, as is stated, the matter was referred to in the arguments before the District Munsif, no request was made that an issue should be framed. If an issue had been framed, the witnesses, P. Ws. 1 and 2 and the defendant might have been properly questioned about it. The evidence of P. W. 2 on the point is ambiguous and certainly requires amplification. There was another attestor, who was not examined as a witness in the case and the plaintiff might certainly have been able to prove that there was proper attestation. In the case reported in *Sricharan* v. *Makhan Lal* (1), it was held that the objection that a mortgage bond is not duly attested cannot be allowed to be taken for the first time in the Appellate Court, as it raises a mixed question of law and fact. In the present case, the objection was not raised properly before the District Munsif and the Subordinate Judge was right in disallowing it. We have been referred by the appellant to some cases. *Shamu Pattar* v. *Abdul Kadir Ravuthan* (2), *Vadla Nagiah* v. *Valunu Divakara Mudaliar* (3), and *Muniappa Chettiar*

(1) [1919] 51 I C. 378.
(2) [1912] 35 Mad. 607-39 I.A. 218-16 C.W.N. 1009—23 M.L.J. 321—12 M.L.T. 338—(1912) M.W.N. 935-10 A.L.J. 259-14 Bom. L.R. 1034-16 C.L.J. 596—16 I.C. 250 (P. C.)
(3) [1917] 6 L.W. 147—(1917) M.W.N. 583—41 I.C. 585.

v. *Vallachamy Hannadi* (4); but in these cases an issue had been framed in the trying Court, with reference to the question of validity and that distinguishes those cases from the present case. The respondent has referred us to *Satish Chandra Mitra* v. *Jogendranath Mahalanabis* (5). That was a case which dealt with the question of proof of execution and not with the question of validity; but it is there pointed out that the admission of the party to the document of its execution would dispense with the necessity of all further proof as against him. This is of some importance as indicating that in such a case it is only where the question of invalidity is raised that it would be necessary to go into evidence with respect to the attestation. The question was not properly raised before the District Munsif; the evidence on that point before him was incomplete and even as it stood did not establish the fact that Ex. A was not duly attested; and on the record, the District Munsif was not bound to frame an issue and he was not asked to do so. The Subordinate Judge rightly disallowed the question and it cannot be allowed to be raised here. The second point argued in this appeal is that in Ex. A., the mortgage deed, there is no personal covenant on the part of defendant to pay. Several cases have been referred to, but where it is a question of construction of a document. cases are not very helpful, for each document has to be considered on its own merits. Ex. A recites: "I have this day usufructuarily mortgaged to you Survey No. 500 A, 1 acre and 5 cents of land, which my wife Ranganayaki Ammal was enjoying and which I have got by exchange and am enjoying in the village of Poundareekapuram attached to Thiruvadamaruthur Maganam, Thiruvadamaruthur Sub District, in Kumbakonam Taluk, and the amount which I got thereon as a loan is Rs. 1000..... You shall yourself enjoy the said land from this date. in lieu of interest and having paid the amount of the principal by the 7th July 1917, having endorsed on this deed I shall enjoy the said land, If the amount be repaid at the cultivation season of any Ani month after the due date on which it falls due, the same must be received in full and the land restored to my possession."

The case in *Hakeem Patte Muhammad* v. *Shaik Davood* (6) has been referred to; but in that case, it seems to have been taken for granted that there was no covenant to pay. In the case in *Rangayya Pillai* v. *Narasimha Aiyangar* (7), the report does not contain the full terms of the document and the judgment only construes the proviso, which is similar to the last sentence in Ex. A and states that there are no other recitals in the deed, to suggest that there was any personal covenant. I do not think that the case in *Kunhimai kutty Beari* v. *Halekote Aisabi* (8) helps us. But the case in *Sivakami Ammal* v. *Gopala Savundram Ayyan* (9) is useful, as it shows that the proviso, at the end of Ex. A is simply to limit the discretion of the mortgagor to repay the money, at a season when the land could not be bringing the mortgagee any profit. The case in *Kangaya Gurukkal* v. *Kalimuthu Annavi* (10) seems to me very much in point. It deals with a document drawn up, in terms very similar to the deed under consideration and decides there was a personal covenant to pay. Ex. A fixes a date for payment and recites that the mortgagor, having paid the money by the date, will take back the land. I am satisfied there is a personal covenant to pay.

(4) [1918] 9 L.W. 5—(1918) M.W.N. 853—25 M.L.T. 19—9 L W. 5—49 I.C. 278.
(5) [1917] 44 Cal. 345—20 C.W.N. 1044—24 C.L.J. 175—34 I.C. 862.
(6) [1915] 39 Mad. 1010—29 M.L.J. 525—18 M.L.T. 209—(1915) M W. N. 852—30 I.C. 569.
(7) [1918] M.W.N. 672—47 I.C. 852.
(8) [1921] 13 L.W. 434—62 I.C. 723.
(9) [1894] 17 Mad. 131—4 M. L. J. 50.
(10) [1904] 27 Mad. 526 (F. B.)

The appeal must therefore be dismissed with costs.

Odgers, J.—With regard to the first point, I would content myself with saying that it is not proved on the evidence that the mortgage deed (Ex. A) was not duly attested according to law. The plaintiff's witnesses were called to prove a totally different point—now given up by the appellant—and the evidence of one of them may not be inconsistent with due attestation.

There was also admittedly a third attestor who was not called. The question of validity of the mortgage was never put in issue—was in fact admitted by the defendant in his written statement. It is obvious that it would be dangerous to remit the case for a finding on this question now, even supposing it were open to us to do so. The point fails. As to covenant in Ex. A, we have had the material parts of Ex. A retranslated by the Chief Interpreter. They now appear as hereunder set forth. The mortgage is either a pure usufructuary mortgage, or a combination of simple and usufructuary, as recognised in S. 98, Transfer of Property Act. The appellant contends it is the former and that the clauses "Having paid the principal amount before the 7th of July 1917, and having credited (endorsed) in this deed, I shall enjoy the said land" and "if even after the fixed time money is paid at the cultivation season of any Ani month, (you shall) receive in full and deliver the land to my possession" (the Chief Interpreter's translation) are undoubted proof for the benefit of the mortgagee, namely that he may have (1) the benefit of a fixed term and (2) may not be called upon to deliver up possession in the middle of a cultivation season. I cannot agree. The document Ex. A is executed by the mortgagor Rangaswami Aiyangar (the appellant) alone, and the reasonable construction is, in my opinion, that he took upon himself the obligation by these clauses. The words used are very similar to those considered in *Kangaya Gurukkal* v. *Kalimuthu Annavi* (10), where it was held they constituted a promise to pay. cf., also *Sivakami Ammal* v. *Gopala Savundram Ayyan* (9), also a F. B. ruling. The case in *Hakeem Patte Muhammad* v. *Sheik Davood* (6) was an instance of anamolous mortgage, under S. 98 Transfer of Property Act, and the Court held that the words of the document must prevail and that S. 60, Transfer of Property Act, had no application. In *Rangayya Pillai* v. *Narasimha Aiyangar* (7), there was no definite date fixed for repayment as here and it was held that the word as to repayment was entirely for the benefit of the mortgagor, who could pay when he liked. In *Luchmeshar Singh* v. *Dookh Mochan Jha* (11), the stipulation was in a different form and the learned judges held that the words used only preserved a right of redemption to the mortgagor. If this case conflicts with the Madras Full Bench decisions, we are of course bound by the latter. As my learned brother has pointed out, a document of this sort must be construed with reference to its own terms and circumstances. I think here there is a distinct promise in Ex. A to pay by the 7th July, 1917, and that the second clause is not inconsistent with this view, as held by the Full Bench in *Sivakami Ammal* v. *Gopala Savundram Ayyan* (9).

I therefore agree that the second appeal fails and must be dismissed with costs.

Appeal dismissed.

(11) [1897] 24 Cal. 677.

1924 MADRAS 515

SPENCER AND DEVADOSS, JJ.

V. E. Rajahbhaday Mudaliar—Petitioner.

v.

A. M. Visvanatha Reddi and another—Respondents.

Civ. R. P. No. 5 of 1923, Decided on the 12th July 1923, to revise the order of Sub-Judge Vellore.

Madras District Municipalities and Local Boards Amendment Act, (Act II of 1922)—Election of President by members who had not taken oath is invalid.

Election of a President by persons who had not taken the oath is invalid. [P 516 C 1]

K. Rajah Aiyar and *V. Ramaswami Aiyar*—for Petitioner.

P. Venkatramana Rao—for Respondents.

Judgment.—Madras Act II of 1922 declares that no person elected as a member of a local board shall take his seat till he has made an oath of allegiance. Until each member takes his seat no business can be transacted. The election of a President is the first business to be transacted at the first meeting of the Board. (*vide* Rule 15 of Schedule X of Madras Act XIV of 1920). It follows that the election of a President by persons who had not taken the oath was invalid. The lower Court was right. The Civil Revision Petition is dismissed with costs.

Petition dismissed.

✱ 1924 MADRAS 516

KRISHNAN, J.

P. S. Velayutham Chetty In re.

Cr. Rev. Case 330 of 1922, Cr. Rev. Pet. No. 287 of 1922, Decided on 15th November 1922, from the Judgment of Second Presidency Magistrate, G T. Madras.

✱ *(a) Penal Code, Ss. 403 & 406—Goods delivered in pursuance of contract—Denial of their receipt constitutes no offence.*

If goods are delivered to the purchaser in pursuance of a contract for purchase, there is no entrustment so as to give rise to a trust and the mere fact that the person denies receipt of goods delivered, does not render him guilty either under S. 403 or S. 406, the matter being one purely in the nature of a civil dispute. [P. 517 C. 1.]

✱ *(b) Evidence Act, S. 43—Judgment of Civil Court is relevant in criminal proceedings on the same question.*

A decision of a Civil Court is admissible to disprove an allegation, the truth of which is the basis of conviction of a person in a criminal case. 41 B. 1 Relied on. [P. 517 C. 1.]

Nugent Grant—for Petitioner.

K. V. Madhavan Nair — for the Crown.

Order.—This is an application to revise the conviction and sentence passed upon the accused by the Second Presidency Magistrate, George Town, in Calendar Case No. 7381 of 1921 on his file. The accused has been convicted of criminal breach of trust under S. 406, Indian Penal Code, and sentenced to four months' rigorous imprisonment by the Magistrate.

It is contended by the learned Counsel for the accused that his client is not guilty of any offence on the facts found by the Magistrate.

The facts of the case as found by the Magistrate are as follows:—The accused entered into two contracts with the firm, of which complainant is a clerk, for the delivery to him of 400 bags of castor seeds of a particular kind at Rs. 16 per bag, each bag weighing 165 lbs. and again for the delivery of 300 bags of another kind of castor seeds at the rate of Rs. 15 per bag, here also each bag was to weigh 165 lbs. The delivery in each case was to be at Royapuram. With reference to these two contracts, all but 200 bags under the first contract was delivered. The only dispute in this case is about these 200 bags. The complainant asserted that those bags had been delivered at the accused's godown. The accused denied receipt of those bags. The Magistrate held on the evidence in the case that the 200 bags were actually delivered as the complainant asserted; and as the accused denied delivery of those bags, he came to the conclusion that the accused has committed the offence of criminal breach of trust, and has convicted him of that offence.

In the first place, it may be mentioned that about the same time when the criminal case was going on, there was a civil suit filed in the High Court by the complainant firm for the value of these 200 bags alleged to have been delivered, or, for the return of the bags. That case was decreed by the learned Judge on the Original Side, and the decree has been filed in this case as Ex. XVI. That decree is for the payment of the price of the bags. On appeal, it is stated before me, and it is not contradicted by the other side, that a Bench of this Court came to the conclusion that the alleged delivery of the 200 bags to the accused was not true. If I were to accept this as the basis of my judgment now, there can be no doubt that

the conviction is clearly wrong, as the very foundation of it, namely, the alleged delivery of the 200 bags, is gone; and there is authority in favour of admitting such judgment in evidence in *Markur, In re* (1). But I do not propose to rest my judgment on that authority. Taking for the purposes of this case that the finding of the Magistrate that the 200 bags were delivered is correct, even then it is clear that no kind of criminal offence has been committed, the matter being one purely in the nature of a civil dispute. The 200 bags were delivered in pursuance of a contract for their purchase. No doubt, there was an undertaking between the parties that the bags were to be weighed to ascertain whether they contained 165 lbs., but this was entirely for the purpose of ascertaining the actual price to be paid for the quantity of goods delivered. It did not in any way affect the delivery that was made in pursuance of the contract, and, on delivery of the goods, it was entirely open to the accused to insist upon weighment, or, to waive it, if he thought fit to do so, and to accept the bags as containing 165 lbs., as the complainant firm sent them. I do not think the Magistrate was right in thinking that the weighment had anything to do with the passing of the property. When the goods were delivered, they were appropriated for the contract, and all that remained to be done was to ascertain the actual amount of money to be paid, the rate being already fixed by contract. The Magistrate says that the mere delivery of possession was an entrustment which would give rise to a trust. That cannot be so in a case where the delivery is made in pursuance of a contract to deliver at a fixed price, and his view that there was a breach of trust is entirely unsupportable. It is not possible even to hold that any criminal misappropriation, which is a lesser offence than breach of trust, was committed in this case, for, if the goods become the goods of the accused, when they were delivered to him, there can be no misappropriation at all of those goods. In this view, the conviction even on the finding of the Magistrate is untenable. It follows, therefore, that the accused should have been acquitted. It seems to me that this case was merely an attempt on the part of the complainant to convert a civil dispute into a criminal case and to try to bring pressure on the accused to pay up the value of the 200 bags.

The conviction of the accused is set aside, and his bail-bond is cancelled.

Conviction set aside.

(1) [1917] 41 Bom. 1—18 Bom. L.R. 185—17 Cr.L.J. 153—33 I.C. 633.

✱ 1924 MADRAS 517

PHILLIPS, J.

The M. S. M. Ry. Co., Ltd.—Petitioners.

v.

K. Rangaswamy Chetty and another—Respondents.

Civ. Rev. P. No. 301 of 1922, Decided on 16th March 1923, from the decree of Sub.-J. Salem in S. No. 331 of 1921.

✱ *Railways Act, S. 72—Consignee alone can sue for loss due to non-delivery—Right to sue.*

Consignee alone can sue for loss caused by the non delivery of the goods after goods have been delivered to Railway Company for consignment. (1799) 8 T. R. 330; 3 Esp. 12; 101 E. R. 1417 Foll. [P. 517 C. 1.]

Brightwell and *Morseby*—for Petitioners.

C. Rajagopalachari and *V. N. Sama Rao*—for Respondents.

Judgment.—So far as the goods bought from Kaveri Chetty are concerned, it is obvious that plaintiffs can claim no damages and this is practically conceded in argument. Under S. 91 of the Indian Contract Act the other goods had been delivered to Munisami Chetty and properties in them had passed to him. Plaintiffs in consigning the goods, some of which had never been their property, only acted as Munisami's agents. If the property had passed from plaintiffs they have sustained no loss by the non-delivery of the goods and consequently no damages.

Dawes v. *Peck* (1) is authority for holding that consignee alone can sue in such a case and it does not seem to me that S. 72 (3) of the Indian Railways Act has any application here for the responsibility of the Railway Company is not affected, but that responsibility is to the consignee and not to his agent, the consignor.

The petition is allowed and plaintiff's suit is dismissed with costs throughout.

Petition allowed.

(1) [1799] 8 T. R. 330—3 Esp. 12—4 R. R. 675.

✱ 1924 MADRAS 518

SPENCER AND ODGERS, JJ.

B. Hanumantha Raw and others—Appellants.

v

A. Krishnamma and others — Respondents.

A. A. O. Nos. 142 and 143 of 1920, Decided on 19th April 1922, from the order of District Court of Guntur, D/-26th January 1920.

(a) *Civil P. C., S. 11—Failure to object at one stage of execution proceedings does not bar objection at later stage.*

A joint decree was transferred by one of the decree holders after adjustment of the decree by the other decree holders. The notice served on the latter of the application for execution filed by the transferee did not contain any indication that the Court was going to decide any question regarding settlement of the amount for which the decrees were executable and the properties liable to be sold in execution. The case proceeded exparte as against them.

Held: that they were not estopped in the subsequent proceedings from disputing their co-decree-holders' claims to execute the whole of the decrees against any of the judgment debtor's properties. 28 M. 355 Relied on. [P 520 C 2]

✱ (b) *Civil P. C., S. 47—Questions between decree-holders inter se do not fall under S. 47.*

Disputes between co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other are not questions arising between the parties to a suit. [P 519 C 1]

✱ (c) *Civil P.C., O. 21 Rr. 15, 16—Appeal from order under, lies only if case comes under S. 47 C.P.C.*

No appeal is provided against an order under O. 21 R. 15 or R. 16. It is only when such orders determine questions arising between parties to the suit or their representatives that they become appealable as decrees passed, under S. 47 C. P. C. [P 519 C 1]

✱ (d) *Civil P. C., S. 47—Appeal lies if Court purports to pass order under S. 47.*

Even if a case does not strictly fall under S. 47, the order of the Court would be appealable if it purported to act under that section. [P 519 C 2]

V. Ramadoss with *P. Markandeyulu*—for Appellants.

T. V. Venkatarama Ayyar, P. Narayanamurthi, Ch. Raghava Rao and *T. V. Ramanatha Ayyar*—for Respondents.

Spencer, J.—In O. S No. 16 of 1905 on the file of the District Court of Guntur a joint mortgage decree for Rs. 12,000 was passed in favour of two co-plaintiffs. The 2nd decree-holder (4th respondent) transferred his interest in the decree to respondents 1 and 3 who applied to the Court for recognition of the transfer which, in the absence of opposition, was ordered. An application for execution of a joint decree by a transferee of the interest of one decree-holder has to be made under O. 21, R. 16 (S. 232 of the Code of 1882), and the Court ordinarily imposes conditions for the protection of the interests of the judgment-debtors and the other decree-holders.

In this case before the transfer was effected there was a settlement alleged to have taken place out of Court by means of a sale of the equity of redemption to a brother of the 2nd decree-holder and a mortgage for Rs. 9,000 in favour of the 1st decree-holder.

The respondents were permitted to execute the decree as if there had been no adjustment, and the legal representatives of the 1st decree-holder, who are appellants in the appeals, before us, objected to execution but the District Judge overruled their objections, and they now appeal.

A preliminary objection has been taken that no appeal lies on the ground that the matter in dispute not being a question arising between the parties to the suit in which the decree was passed, does not come within the scope of S. 47 C.P.C.

It was laid down so long ago as 1871 in GOOROO DOSS ROY v. RAM RUNGINEE DOSSIA (1) and ODHOYA PERSHAD v. MAHADEO DUTT BHANDAREE (2) respectively that disputes between co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other were not questions arising between the parties to a suit. Disputes between judgment-debtors *inter se* as to possession of property after satisfaction of a decree similarly would not satisfy the conditions of this section [See ANAVARDA KHAN PANI SAHIB v. MISIRI KHAN PANI SAHIB (3)]. To come within the category of S. 47 they must be questions arising between persons opposed in interest in the suit and not between a party to the suit and his own representative, vide YAGNASAMI AYYAR v. CHIDAMBARNATH MUDALIAR (4) and MAGAN LAL v. DOSHI MULJI (5). Persons may be parties opposed to each other without necessarily being arrayed as plaintiff and defendant respectively in the suit [vide MANGAYYA v. SRIRAMULU (6)]. Even a defendant who has been exonerated from a suit, would on a liberal construction be treated as one of the "parties to the suit" within the meaning of S. 47, [vide RAMASWAMI SASTRULU v. KAMESWARAMMA (7)].

No appeal is provided against an order under O. 21, R. 15 or R. 16 Compare RATANLAL v. BAI GULAB (8).

It is only when such orders determine questions arising between parties to the suit or their representatives that they become appealable as decrees passed under S. 47, C. P. C. [vide LAKSHMI AMMAH v. PONNASSA MENON (9) and MAGANLAL v. DOSHI MULJI (5)]. A question whether a decree has been discharged is a question relating to the execution, discharge or satisfaction of the decree, and as observed by NAPIER, J. in THIMMA REDDY v. SUBBA REDDYAR (10) to allow one of several joint decree-holders who have already recieved payment to come in and apply for execution after the other decree-holders have certified discharge of the debt would open the door to fraud and defeat the object of Order 21 Rule 15.

In the present case the applications were made to the District Court quoting Ss. 47 and 151 as the provisions under which the Court had authority to act. They were not, as now suggested, applications under O. 21 R. 2 to record satisfaction of the decree. The appellants before us were interested not merely as being legal representatives of one of the decree-holders, but also as being holders of mortgages over portions of the judgment-debtors' properties, they had acquired in some degree the interest of defendants. The District Judge's order does not disclose under what provision of law he purported to be disposing of these applications, but apparently it was S. 47, as the section was entered at the head of the applications and no objection was then taken to his porcedure. Even if the case did not strictly fall under that section the Judge's order would be appealable if he purported to act under that section [See ABDUL RAHIMAN SAHIB v. GANAPATHI BHATTA (11) and LATCHMANAN CHETTY v. RAMANATHAN CHETTY (12)].

The preliminary objection therefore fails and we must proceed to dispose of the appeals on their merits.

Odgers, J.—I agree.

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(1) [1871] 17 W.R. 136.
(2) [1871] 17 W.R. 415.
(3) [1916] 31 M. L. J. 44—(1916) 1 M.W.N. 468—35 I. C. 179.
(4) [1920] 13 L.W. 15—61 I.C. 961.
(5) [1901] 25 Bom. 631—3 Bom. L. R. 255.
(6) [1913] 13 M.L.T. 347—24 M.L.J. 477—(1913) M. W. N. 382—19 I. C. 448.
(7) [1900] 23 Mad. 361—10 M. L. J. 126 (F.B.)
(8) [1899] 23 Bom. 623—1 Bom. L. R. 87.
(9) [1893] 17 Mad. 394.
(10) [1918] M.W.N. 507—49 I.C. 141.
(11) [1900] 23 Mad. 517—10 M. L. J. 305.
(12) [1904] 28 Mad. 127—14 M. L. J. 436.

The District Judge has dismissed these applications on the sole ground that the applicants were barred by *res judicata* from raising a question as to the complete satisfaction of the decree in O. S. No. 17 of 1905 and the partial satisfaction of the decree in O. S. No. 16 of 1905 by reason of the prior proceedings of the District Judge, of August 20th 1918 passed in E. P. Nos. 12 and 13 of 1917 and E. A. Nos. 175 and 176 of 1918, recognising the transfer of the 2nd decree-holder's interest and permitting execution by the transfere decree-holders to proceed.

The appellants were not present at those earlier proceedings. The notice which was sent to them put them on notice of two things: (1) that the transferee decree-holders had purchased the rights and liabilities of the 2nd plaintiff and (2) of their intention to apply for permission to execute the decree in O. S. No. 17 of 1905. The two decrees were being executed together. It is not denied that a balance was outstanding on one. The transferee decree-holder's application was for permission to execute the decrees for the benefit of all the decree-holders. They may not have wished to oppose execution proceedings being taken out partly for their own benefit or to resist the transfer of their co-decree-holder's interest to a third party.

No doubt, they were interested in any settlement of the amount for which the decrees were executable and the properties liable to be sold in execution and if they had then had notice that these matters were about to be determined, they might have come to Court and insisted on their objections being heard under the proviso to Rule 16 of Order 21 and might have applied to the Court for an order under R. 15 (2) for the protection of their interests. But the notice, dated November 3rd, which was sent to them did not contain any indication that the Court was going to decide any questions as to the satisfaction of the decrees or as to priority of the decree-holder's claims. This being so, they are not estopped in these subsequent proceedings from disputing their co-decree-holders claims to execute the whole of the decrees against any of the judgment-debtor's properties. See NARAYANA PATTAR v. GOPALAKRISHNA PATTAR (13). We are unable to support the learned District Judge's opinion that they are barred by *res judicata* from reopening what was decided in his predecessor's orders of August 20th. We have read the District Judge's two orders of that date. We do not find that they contain any final determination of any matter which was directly and substantially in issue between the respondents and these appellants in those proceedings: Compare A. A. A. O. No. 24 of 1921 on the file of the High Court.

We must therefore set aside the rejection of these applications on the bar of *res judicata* and remand them to the lower Court for determination on the merits after finding to what extent the decrees now sought to be executed have been already satisfied and for passing such orders as may be necessary under O. 21, Rr. 15 and 16, for the protection of their interests. Costs to abide and to be provided in the final order.

Case remanded

(13) [1904] 28 Mad. 355—15 M. L. J. 247.

1924 MADRAS 520

KRISHNAN, J.

G. A. Sundara Iyar—Petitioner.

v.

Arumugam Pillai and others—Respondents.

Civ. R. P. No. 17 of 1922, Decided on 21st December 1922, from the Court of District Munsif, Tinnevelly, D/-13th October 1921.

C. P. Code, O. 2 R. 2—Claim under pronote and claim under original consideration may be combined.

There is no reason why a claim for money due based on the original loan or dealings should not be combined with a claim for the same money as due under a pronote; in case there is any difficulty in enforcing the note the party should be allowed to fall back on the original consideration. 12 L. W. 147 Foll. The two causes of action in such a case are not so

distinct as the claim which their Lordships of the Privy Council were dealing with in 48 C. 832. [P 521 C 1]

N. A. Krishna Ayyar—for Petitioner.

C. Narasimhachari—for Respondent

Judgment.—I think the amendment was properly allowed in this case. There is nothing to show that the claim based on the original debt is barred by limitation. That is a matter to be decided in the suit. If it is barred the suit will no doubt be dismissed. There is no reason why a claim for money due based on the original loan or dealings should not be combined with a claim for the same money as due under a pronote; in case there is any difficulty in enforcing the note, the party is entitled to fall back on the original consideration. See DUGGENPEDU NAGAMMA v. PADA VENKATAREDDI (1). The two causes of action in such a case are not so distinct as the claim which their Lordships of the Privy Council were dealing with in MA SHWE MYA v. MAUNGA MOO HNAUNG (2). Their Lordships' language has to be taken with the facts of the case they were dealing with. The Civil Revision Petition fails and is dismissed with costs.

Petition dismissed.

(1) [1920] 12 L. W. 147—59 I. C. 363.
(2) [1921] 48 Cal. 832—48 I. A. 214—(1921) M. W. N. 396—63 I. C. 914. (P. C.)

✱ 1924 MADRAS 521

SCHWABE, C. J. AND WALLER, J.

Secretary of State for India and another—Appellants.

v.

Kuppuswami Chetti—Respondent.

A. A. O. Nos. 200 and 254 of 1922, and C. R. P. No. 422 of 1922, Decided on 21st September 1923, from the Sub. J. Salem, D/- 20th September 1921.

(a) Land Acquisition Act, S. 18—Mortgagee can't sue Crown for mortgage balance, after compensation is paid to mortgagor—Land Acquisition Act S. 31.

A mortgagee cannot sue the Crown where Collector has paid compensation money to the mortgagor though with notice of the mortgage, in a land acquisition case. He should apply under the Land Acquisition Act for reference to the Court under S. 18 or he may sue the mortgagor for the costs and other amount due to him under the mortgage under S. 31. [P 523 C 1]

✱ *(b) Interpretation of Statutes—Remedy of Special Act is exclusive of ordinary remedies.*

Where a new right is brought into existence and a remedy in respect of that right is given at the same time by the same Statute that remedy is exclusive of any ordinary rights. [P 522 C 1]

The Government Pleader—for Appellants.

K. Shankara Sastri—for Respondent.

Schwabe, C. J.—In this case certain land was taken many years ago under the Land Acquisition Act and ultimately the value was fixed and compensation allowed at Rs. 270. In the course of the proceedings under the Land Acquisition Act, a mortgage by the owner of the land in favour of the present respondent came to light. The Revenue authorities who were enquiring into the matter came to the conclusion that the mortgage was a sham and not an effective transaction. When the award was made the mortgagee, who had not come in and claimed and had not taken any part in the proceedings was disregarded and a part of the money was paid over to the mortgagor, the owner of the land. Before the whole of the money had been paid over, or rather while the Crown was in a position to get back some of the money that had been paid over, the mortgagee made his claim and ultimately, when his claim was found to be a good one, he received the balance of the compensation money which had not been irrevocably paid over to the mortgagor. He then proceeded to sue on his mortgage and after many vicissitudes he ultimately got a decree, having established his mortgage to be a good one against the mortgagor. Apparently he has been unable to execute that decree, although he had got the whole of the principal sum and interest except Rs. 8 from the balance of compensation money referred to above, and he has been out of pocket in respect of his costs in the mortgage suit, which costs no doubt he would be able as between himself and the mortgagor

to add to his security. He now sues the Secretary of State and the present Land Acquisition Collector of Salem, treating the present Collector apparently as responsible for the acts of his predecessors, and he frames his plaint in general terms by stating the facts, namely, that he was a mortgagee, that the then Collector had notice of his mortgage and that notwithstanding that he had notice of his mortgage he paid the money over to the mortgagor. The Crown (in which expression include the Secretary of State and the Collector) replies, " you have no cause of action against the Crown at all and, secondly, if you had a cause of action it has long since been barred by limitation." In my judgment, the Crown is right on its first contention, and it is therefore, unnecessary to consider the second contention, though, as at present advised, I think that the Crown is also right on that.

The compensation money payable under the Land Acquisition Act is payable under that Act and that Act only. Any rights in respect of it are creatures of the Statute and nothing else. The Statute in creating the rights has given the remedies to be exercised in respect of those rights and the law is quite clear that, where a new right is brought into existence and a remedy in respect of that right is given at the same time by the same Statute that remedy is exclusive of any ordinary rights. The leading authority on that point is the decision of *Willes*, J., in THE WOLVERHAMPTON WATER-WORKS CO., v. HAWKESFORD, (1). The principles of the Land Acquisition Act seem to be that the Crown should, in the first instance, be allowed to recognise the person in possession as ostensible owner. There is nothing in the Act to show that it is to recongnise the mortgagees as such at all. It can make its award giving its award to the mortgagor, the ostensible owner of the property. The mortgagee can come in and, within a certain time and within certain limits, can apply to have the matter referred for the decision of the District Court. The Collector himself, if he has any doubt as to who is entitled to the money, can also refer it. Within a certain time, up to six months the time varying according as the claimant has, or has not, had notice under the Land Acquisition Act; but with the outside limit of six months, the claimant may himself institute proceedings under the Act so that the real owner of the property which has been acquired in this way is not left without a remedy. After the expiration of six months, it is provided by S. 31 of the Act, that he can take proceedings against the person who has received the money. So that the whole scheme of the Act is that down to a certain date before the money is paid over, if persons intervene and make a claim, their rights shall be enquired into and their rights established ; but that, after the money is paid over by the Crown to somebody else, they must take proceedings against that somebody else, Those being the only remedies given by the Act, I can find no sort of cause of action against either of the present defendants.

It was suggested that some cause of action might be framed in part for a wrong, breach of duty, or something of that sort against the Collector, but that view was not pressed possibly in view of the fact that we have not the right Collector before the Court; and admittedly any action for tort would have long since been barred by limitation. Under these circumstances, in my judgment, the Crown is right and this appeal must be allowed, and allowed with costs throughout.

I ought to add that a great deal of this claim, in fact all except Rs. 8 being in respect of costs incurred as between the mortgagor and the mortgagee, I cannot ascertain any principle of law under which either of the defendants, even if otherwise liable, could be made liable for that.

In the result, C. M. A. No. 200 of 1923 is allowed with costs thoughout,

C. M. A. No. 254 of 1922 and C. R. P. No. 422 of 1922 are dismissed, but without costs.

Waller, J.—I agree to the order proposed.

(1) [1859] 6 C. B. N. S. 336—28 L. J. N. S. C. P. 242.

It seems to me obvious that the plaintiff, was aware of the award. He should, therefore, have applied under S. 18 of the Land Acquisition Act for a reference to the Civil Court. This course he did not adopt. Failing that he was entitled, under S. 31 of the Act, to sue the persons to whom the compensation money had been paid wrongly. This course he did adopt and obtained a decree. He now sues the Secretary of State and the present Land Acquisition Collector for the balance due on the decree *plus* the costs incurred in getting the decree. I am of the opinion that he has not been able to show that he has any cause of action against the defendants. The compensation money was properly paid to the ostensible owner of the property, as plaintiff did not appear and claim a reference to the Civil Court. After that, he was limited by the Act to a suit under S. 31 and that against the persons to whom the money was wrongly paid. He had no other remedy at all.

I agree that the appeal should be allowed with costs throughout.

C. M .A. No. 254 of 1922 and C. R. P. No. 422 of 1922:

I also agree to the order proposed in respect of these.

Appeal allowed.

1924 MADRAS 523

KUMARASWAMI SASTRI AND WALLER, JJ.

Thimma Reddi—Plaintiff—Appellant.

v

Secretary of State—Defendant—Respondent.

S. A. No. 361 of 1921, Decided on 27th September 1923, from the decree of District Court of Anantapur in A. S. No. 63 of 1920.

(a) *Madras Local Boards Act, S. 144 R. 35—Objection under R. 33 (e) does not require notice to affected party or any enquiry.*

The objection that the person elected is likely to bring the local fund administration into contempt requires no notice to the person affected and no enquiry is contemplated by the lucrs, the reason very probably being that an enquiry into the nature of the ground referred to in Cl. (e) is not desirable in public interests. [P 525 C 1]

(b) *Madras Local Boards Act, S. 144—By rules special forum could be created—Rules not repugnant to Act could be framed and are not* ultra vires *though framed under one section rather than another.*

The Local Boards being creations of statute and that statute having given power to the Government to frame rules for the purpose of working the Act, it is perfectly open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the provisions of the Act. Where the Government in passing the Local Boards Act has not taken away any rights which had previously vested in the public, restrictions could be imposed by the Government acting on the rule-making power conferred by an anactment which creates new rights so long as the rules are not repugnant to any of the provisions of the Act. If power is given to make rules by the Act the fact that the Government purports to make rules under one section rather than another would not be a ground for holding that the rules are *ultra vires*. 13 L. W. 202 Sadashiv Iyer J's opinion Disapp. If the rule is valid the Govt. has power to declare what shall be the nature and scope of the enquiry. 45 M. L. J. 156 foll. 30 Mad. 113 dist. [P 525 C 2]

T. Richmond—for Appellant,

C. V. Ananthakrishna Aiyar—for Respondent.

Judgment.—This appeal arises out of a suit filed by the plaintiff against the Secretary of State for India in Council for a declaration that the Government Order cancelling his election to the Gooty Taluq Board is *ultra vires* and illegal and does not affect the validity of his election, for a mandatary injunction directing his name to be published in the Fort St. George Gazette as duly elected, for an injunction prohibiting the Government from publishing the name of his rival candidate Subba Rao and for the recovery of Rs. 100 as damages. No evidence has been adduced in the suit. The election in question was held on the 13th of November 1915. It is not disputed that the plaintiff obtained the majority of votes, that the defeated candidate Subba Rao put in an objection petition and that the Government set aside the election of the plaintiff and ordered a fresh election on the ground that the plaintiff's presence in the Taluq Board as a member would bring the Local Fun

Administration into contempt. This order of the Government is questioned by the plaintiff on two grounds. The first is that the rules under which the Government purported to act are *ultra vires* and that consequently he is not affected by the order and secondly that even, if the rules are not *ultra vires*, there was no enquiry by the Government into the matter, that he was not given an opportunity of showing cause against the allegations made by the rival candidate and that on the merits it could not be said that his presence in the Taluq Board would have the undesirable consequences referred to by the Government as a ground for invalidating his election. He sets out his qualifications in the plaint.

The defence by the Secretary of State for India in Council was that the rules framed by Government are valid, that under the rules the Goverment was not bound to give any notice to the plaintiff that the discretion vested in the Government is absolute and unquestionable by a Civil Court and that the Government having made such enquiry as it thought fit and having come to the conclusion that it came, it was not open to the plaintiff to question the validity of its Act. The Government denies that the plaintiff is entitled to any damages.

Two points were argued by Mr. T. Richmond before us in Second Appeal. The first was that the rules were *ultra vires* and the second was that the whole proceedings were vitiated by the fact that no notice was given to the plaintiff, who consequently had no opportunity to show cause against the objections raised by his rival candidate a violation of the elementary principles of natural justice which, without more, would invalidate the proceedings,

As regards the first point, S. 16 of the Local Boards Act runs as follows :—

"The other members of the Taluq Board may be, (*a*) either wholly appointed by the Governor in Council, or (*b*) partly so appointed and partly ppointed by election by the members f the Panchayats in the Taluq, from among their own number, or by the tax-payers and inhabitants of the Taluq, subject to such rules and conditions as may from time to time be prescribed by the Governor in Council."

S. 144 of the Act provides that :—

"The Governor in Council may, from time to time, frame forms for any proceedings for which he considers that a form should be provided, and make rules consistent with the Act (1 A.,) as to the qualifications of electors and of candidates for appointment, as members of a Panchayat by election and the method and time of appointment of members of a Panchayat by election, in regard to the following matters."

Then follow a number of matters specified in Sub-cls. (a) to (f), Sub-cl. (f) being "any other matters regarding the system of representation and of election." The Government have framed rules, which purport to have been made, under Sub-S. (1) of S. 144 of the Local Boards Act and directed that the rules should come into operation on the 1st of January 1916. R. 33 provides that the validity of any election may be questioned by a petition put in before the Collector of the District or Divisional Officer, within 15 days after the result of the election has been declared, by any candidate who has not withdrawn, or by not less than ten persons, who have voted at the election, on any of the grounds mentioned therein. Ground (*e*) which is the only matetial ground necessary to be considered for purposes of this appeal runs as follows :—

"That the person whose election is questioned is likely to bring the local fund administration into contempt or that his being a member of the Taluq Board is dangerous to the public peace or order."

It provides that the Governor in Council or the Collector may act *suo motu* and take action on any facts affecting the validity of an election, which may be brought to his notice, whether by a petition by a rival candidate, or otherwise. R. 35 which is material for the consideration of the objection raised by Mr. Richmond runs as follows :—

"Objections to the validity of an election on the ground specified in Rule 33 (*e*), *i. e.*, that the person whose election is questioned is likely to bring the Local Fund administration into contempt or that his being a member of the Taluk Board is dangerous to the public peace or order and objections on the ground of disqualification under R. 9 (*d*) and all cases which involve an interpretation of the Rules shall be referred by the Collector for the decision of the Government. In all other cases of objection under R. 33 an enquiry shall be held by the Collector, or at his discretion by the Divisional Officer, at which the contending parties shall have an opportunity of appearing in person or by representative, and orders shall be passed on the result of the enquiry by the Collector who may at his discretion, dismiss the petition, or, if he finds the election invalid, either order a new election or declare that the candidate who obtained the next highest number of votes to the candidate or candidates disqualified or found not to have been validly elected, has been duly elected. Provided that before declaring such next candidate to have been duly elected, the Collector shall notify his intention to do so to the other candidates and the petitioners who have impugned the election and shall consider an objection which may be lodged by them in writing within 10 days from the date of such notice. No appeal shall lie against the orders of the Collector passed under this rule."

It is therefore clear from the rules that so far as the objection that the person elected is likely to bring the local fund administration into contempt, is concerned, no notice to the person affected and no enquiry are contemplated by the rules, the reason very probably being that an enquiry into the nature of the ground referred to in Cl. (*e*) is not desirable in public interests. It is contended by Mr. Richmond that the right of a person who is duly elected to a public office is a right which he is entitled to vindicate in a Civil Court and that it is not open to the Government by rules framed under the Act to create a forum and thus deprive the person elected of his ordinary legal remedies. It is also contended that as the rules purport to be framed under Sub-sec. (1) of S. 144 of the Local Boards Act, they could only embrace the subjects specified in that clause, as the matters to be dealt with by the rules and as none of those matters relates to enquiries into disputed elections, they cannot be relied on by the Government for the purpose now in question. We are unable to agree with either of these contentions. The Local Boards being creations of statute and that statute having given power to the Government to frame rules for the purpose of working the Act, we think it is perfectly open to the Government to create a forum, for the purpose of deciding disputes as to elections, directed to be carried out under the provisions of the Act. The Government in passing the Local Boards Act has not taken away any rights, which had previously vested in the public, and it is difficult to see how it can be said that restrictions could not be imposed by the Government acting on the rule-making power conferred by an enactment, which creates new rights, so long as the rules are not repugnant to any of the provisions of the Act. Nor do we think that, if power is given to make rules by the Act, the fact that the Government purports to make rules under one section rather than another would be a ground for holding hat the rules are *ultra vires*.

In *Lakshminarasimha Somayagiyar* v. *Ranalingam Pillai* (1), the question arose as to whether under the Local Boards Act the Governor in Council has power to make rules ousting the jurisdiction of Civil Courts, as to objections to the validity of elections. Sadasiva Ayyar, J., was inclined to the view that the Governor-in-Council has no power to make rules and that the rules framed by the Government are invalid. The learned Judge was of opinion that Sect. 16 was too vague and that, as the rules were not made under S. 16, but only under S . 144 (1), which merely deals with the power to make rules as to the qualifications of the electors

(1) [1920] 12 L. W. 202.

and of candidates for appointments by election and as to the method and time of election of Presidents, Vice-Presidents and members of Local Boards, the power constituting a special tribunal to enquire into the validity of elections was not conferred by S. 144 (1) under which the present rules purport to be framed. Spencer, J., was of opinion that the rules are valid and that Ss. 16 and 144 gave the Government power to frame rules relating to the adjudication of disputes as regards the validity of elections. After referring to Ss. 16 and 144 the learned Judge observes as follows :

" But in any case I think that the words 'any other matters regarding the system of representation and of election, illustrate what is meant in Cl. (1) by the words method of election ' of members of Loal Boards. I think these words are wide enough to cover the power of making rules to provide for the whole scheme of election and for the conduct of enquiries into complaints and objections to elections held or about to be held as well as to objections to the list of voters. "

We agree with the view taken by Spencer, J.

The question as to the validity of the rules framed under the District Municipalities Act arose for determination in more than one case. The District Municipalities Act contains provisions analogous to those in the Local Boards Act, with regard to the matter in question. Sub-cls. 1 to 6 of Sect. 250 (1) (*a*) of the District Municipalities Act correspond to Sub-cls. (*a*) and (*b*) of Sect. 144 (1) (*a*) of the Local Boards Act and give power to the Government to make rules with reference to the matters specified in that section. Sect. 10 of the District Municipalities Act also contemplates the power of the Government to make rules. Rules were framed under the powers conferred by the District Municipalities Act. Rr. 34 and 35 provide for cases of disputes, as regards the validity of elections, and R. 35 (*d*) which is one of the grounds for setting aside an election is that the person is likely to bring the Municipal administration into contempt, or that his being a Municipal Councillor is dangerous to the public peace or order. R. 36 provides that in cases falling under R. 35 (d), order should be passed by the Government and not by the Collector. In *Secretary of State* v. *Appa Rao* (2), the question arose as to the power of Government to frame rules under the District Municipalities Act. Krishnan, J., was of opinion that the fact that the Government purported to frame rules under one Sub-clause which did not refer to the matter rather than another, which did so refer, would not make rules *ultra vires* and observed as follows :—

" Before a rule framed by a rule-making authority is declared *ultra vires*, the Court must be satisfied not only that it had no power to Act, under the power under which it purported to act, but also that it had no power at all under any law to so act, If power can be found elsewhere from the section quoted, the rules will be refeered to that power and held not to be *ultra vires*. "

The learned Judge referred to *Rajam Chetti* v. *Seshayya* (3), *Queen Empress* v. *Ganga Ram* (4) and Halsbury, Vol. 27, page 146. In *Secretary of State* v. *Venkatesalu Naidu* (5), the question arose as to the validity of the rules framed under Sect. 250 (1) of the District Municipalities Act, IV of 1884, as amended by Act III of 1897. Rules were framed under Sect. 250, as regards the power of the Government to veto election of a person if, before his election, he is convicted of an offence which, in the opinion of the Governor in Council, disqualifies him from being a Councillor. The plaintiff who was the respondent in the Appeal was elected as a Municipal Councillor, but the Government set aside the election, on the ground that he was guilty of such an offence as unfits him to be a Municipal Councillor. The District Judge found that some of the rules framed under the Act were

(2) [1924] Mad. 92.
(3) [1895] 18 Mad. 236.
(4) [1894] 16 All. 136 (F. B.)
(5) [1907] 30 Mad. 113.

ultra vires. Referring to the contention that Sect. 250 (1) (a) does not provide for a rule of the nature of R. 35 (1) (b) framed under it, Miller, J., observed as follows :—

" I am not prepared to decide that that is so, for it is not clear to me that Sect. 250, Cl. (1) (a) (1), (VI) or (VII) would not cover the case. But even if it be so, the rule may be attributed to the power given by Sect. 10 to prescribe conditions; and if the power is there, the rule is good, though it purports to have been made under a different section. "

The learned Judge held that the rule was not *ultra vires* and illegal. Wallis, J. was also of the same opinion. We think that Sects. 16 and 144 read together give power to the Government to make rules, when an election is contested and also to frame rules declaring the qualifications required of a person, before he is validly elected and that the rules framed by the Government are not *ultra vires.*

Turning to the next question that the appellant was not given an opportunity to be heard before the Government passed orders, it is clear from the rules we have already referred to that no enquiry is contemplated. R. 35 states that objections to the validity of an election on the ground specified in R. 33 (e) and objections on the ground of disqualification under R. 9 (d) and all cases which involve an interpretation of the rules shall be referred by the Collector for the decision of the Government which shall be final and that *in all other cases* of objection under R. 33, an enquiry shall be held by the Collector etc. It is clear therefore that no enquiry is necessary. If the rule is valid, it seems to us that the Government has power to declare what shall be the nature and scope of the enquiry. Reference was made to the *Secrtary of State* v. *Venkatesalu Naidu* (5), already referred to, where it was held that an enquiry was necessary before an election can be invalidated under Rr. 35 and 36 framed under the District Municipalities Act. But R. 35 requires an enquiry and the decision therefore cannot have any application to cases where no enquiry is required. We may point out that the Local Boards Act provides for enquiries, whenever the Government thinks it necessary that the person affected ought to have notice; for example, Sect. 24, Cl. iii provides for the removal of a President, Vice President, or member of a Taluk Board, whose continuance in office is, in the opinion of the Govenment, dangerous to public peace or order, or likely to bring the administration of the Local Board into contempt. But Cl. (ii) states that, when action is proposed to be taken in that matter, no order shall be passed without giving an opportunity of explanation to the President, Vice President, or member concerned.

We are, therefore, of opinion that both the objections taken fail. It is not necessary to consider the further question, whether an action for damages would lie against the Secretary of State for India, assuming that the Rules framed by the Government were *ultra vires.* In the result the second appeal fails and is dismissed with costs.

Appeal dismissed.

✱ ✱ 1924 MADRAS 527

KRISHNAN AND WALLER, JJ.

L. Rama Naidu—Judgment-debtor—Appellant.

v.

L. Ramakrishna Naidu — Decree-holder—Respondent.

A. A. O. No. 59 of 1923, Decided on 13th November 1923, from the order of District Court, Krishna at Masulipatam, D/- 23rd January 1923.

✱ ✱ *Civil P. C., Ss. 47 and 96—Order directing properties to be sold in a particular order is not appealable.*

An order directing that properties proceeded against in execution are to be sold in a particular order is not appealable as it is an administrative and not a judicial order. I. L. R. 27 Mad. 259 (F. B.) Foll. 18 L. W. 311 dist.

G. Lakshmanna and V. Viyanna—for Appellant.

P. Somasundaram—for Respondent.

Judgment.—This is an appeal under Ss. 47 and 96 of the Code of Civil

Procedure, against an order made by the District Judge, directing the sale of two items of properties, items 1 and 2 according to the order in which they were advertised for sale in the sale proclamation, that is, directing item 1 to be sold first and then item 2. The Judgment-debtor, the appellant before us, had, without notice to the decree-holder, got an order from the District Judge that item 2 should be sold first and not item 1. This was an *ex parte* order, which, on the decree-holder coming to know of it, was sought by him to be altered, so that the sale might take place, according to the order in the sale proclamation itself. No doubt, the decree-holder stated as his reason in his application, that item 2 was his own property and was wrongly included in the decree, as chargeable with the decree amount. The District Judge has not gone into that question at all, or given any finding about it. He set aside his original *ex parte* order and directed that the property be sold according to the sale proclamation, that is item 1 first.

The judgment-debtor appeals against that order and a preliminary objection has been taken by the learned vakil for the decree-holder that no appeal lies and reliance has been placed by him on *Sivagami Achi* v. *Subrahmania Ayyar* (1). The case before us certainly seems to be covered by that ruling, as the order of the District Judge was merely one settling one of the terms of the sale proclamation, namely the order in which the properties were to be sold. It was held in the Full Bench that the District Judge acted not judicially but only administratively, when he settled the sale proclamation, and therefore, the order in that case was not one which came within S. 244 of the old Code, corresponding to S. 47 of the present Code. We are bound by that ruling, unless we can agree with the argument of the appellant that the alteration of the wording of O. 21, R. 66 of the new Code, which corresponds to S. 287 of the old Code, has altered the position altogether. The only additions in the new Code, which have been pointed out, are that power is now given: (1) to give notice to the judgment-debtor and the decree-holder to be present when the terms of the sale proclamation are settled; and (2) to insist upon every application for an order for sale under the rule, to be accompanied by a statement signed and verified in the manner prescribed for the signing and verification of pleading and containing, so far as they are known to, or can be ascertained by, the person making the verification, the matters required by Sub-rule (2) to be specified in the proclamation; namely, as to the revenue assessed upon the property, as to the encumbrance to which the property is liable, as to the amount for the recovery of which the sale is ordered and other things which the Court considers material. It is argued that these provisions show that the Court is acting judicially and it is also urged that the omission of S. 288 supports that argument. It seems to us that these two additions do not alter the position at all. They simply give the power to the Court to have the parties before it, in settling the sale proclamation and their affidavits, so that it may get the consent of the parties in settling it. The Full Bench in *Sivagami Achi* v. *Subrahmania Ayyar* (1) adduced, as the most important reason for holding that a judge acting under S. 287 was acting administratively and not judicially, that special power was given to him under that section, to summon a person, when the judge thought it necessary to do so, and examine him, in respect of matters, on which information was wanted by the Court and to require him to produce documents. The argument of the Full Bench was that, if the Court was acting judicially in the matter, such power need not have been expressly given; but the Court would have the power to do so under its general powers, without an express section provided for the purpose. That provision is left intact in the new Code and is not altered and the argument therefore applies

(1) [1904] 27 Mad. 259 (F. B.)

to the new Code. No doubt, the referring judges in the Full Bench case did alude to the fact that S. 288 also corroborated their opinion ; for it was argued that a special protection for a judge need not have been given by a special provision of the Code, if that officer was acting as a judge, as he would be protected under the Act, for the protection of judicial officers. That argument, no doubt, will not now apply, because the provision has been omitted ; but we think that the omission of the provision does not lead to any conclusion that the Court now acts in a judicial capacity, rather than in an administrative capacity, in settling the terms of the sale proclamation. S. 288 was really put in, by way of abundant caution and as it was found to be unnecessary, it has been deleted and not because of any change in the law. We think that the ruling in *Sivagami Achi* v. *Subrahmania Ayyar* (1) still governs the case and that no appeal can be allowed, in a matter like the one before us where the Court merely settles the order, in which the properties are to be sold. Our attention was drawn to a decision in *Vedaviasa Aiyar* v. *Madura Hindu Labha Nidhi Co., Ltd.*, (2), but that case is distinguishable from the present case for, there their Lordships were able to come to the conclusion on the facts of that case, that what was decided in that case by the Lower Court was not the order in which the properties were to be sold, but whether the properties of one mortgagee or of another mortgagee should be sold first. On that view, they held that the order was one affecting the rights of two defendants *inter se* and, therefore, it was a matter which could come under S. 47 of the Code. Whether this is a right view or not, we are not called upon to say, for here no such question arises. This is purely a matter of settling the order in which the sale is to take place. *Sivagami Achi* v. *Subrahmania Ayyar* (1) has been followed and applied even to cases from the Original Side by the learned Chief Justice and one of us, in *Tawker & Sons* v. *Harsookdass Choughmull* (3). In these circumstances, we hold that no appeal lies in the present case and dismiss it.

Under the circumstances, we do not allow any costs to either side in this appeal.

Appeal dismissed.

(2) 1924 Mad. 365.

(3) 1924 Mad. 386—45 M.L.J. 611.

✱ 1924 MADRAS 529

KRISHNAN AND WALLER, JJ.

S. V. A. R. Vellayappa Chettiar — Appellant.

v.

M. L. M. Ramanathan Chettiar — Respondent.

A. A. O. No. 261 of 1922, Decided on 15th October 1923, from the order of Dt. Ct. of Ramnad, D/- 28th November 1921.

✱ *Provincial Insolvency Act, Ss. 80 & 4—On sale of properties by official receiver, objection by claimant can be decided only by D. J.*

Where in the course of an insolvency proceeding the Official Receiver either at his own instance or at the instance of a creditor, proposes to sell properties claimed by a third person, the claimant may apply to the District Judge under S. 4 for an order to prevent the sale of the properties. The claimant cannot apply to the Official Receiver nor can the Official Receiver adjudicate on the claim, [P. 530 C. 1]

B. Sitarama Rao and S. R. Muthuswami Aiyar —for Appellant.

M. Patanjali Sastri and C. S. Rama-Rao—for Respondent.

Judgment.—This appeal is from an insolvency proceeding before the District Judge of Madura. The Official Receiver seems to have made an attempt to sell certain properties, on which the appellant before us put forward a claim that such properties belonged to him and not to the insolvent and should not be sold. These properties were included in a mortgage decree obtained by the respondents against the insolvent. Strangely enough, the Official Receiver thought that he had power to disposed of a petition like this and

thinking that a *prima facie* title had been made out by the claimant, he passed an order releasing the property from sale, holding that the properties belonged to the claimant. On this the mortgage decree-holder conceiving that he was somehow or other aggrieved by the order put in an appeal to the District Judge. The District Judge thereupon came to the conclusion and rightly, in our opinion, that the secured creditor the mortgage decree holder, was not in any way bound by any procceedings taken by the Official Receiver in this matter. But he though t at the same time that the effect of the order, if allowed to stand, would be deprive the secured creditor of his right of sale which conclusion we are unable to follow. The secured creditor undoubtedly was not at all affected by the order of the Official Receiver. On that the District Judge proceeded to allow the appeal petition before him and set aside the order of the Official Receiver without deciding whether the property actually belonged to the claimant or to the insolvent. the form of the order which was drawn up proceeded further and it declared that the claim petition put in by the claimant do stand dismissed. The effect of that order if left standing must necessarily be that the property should be treated as the insolvent's and not as the claimant's, a position which the District Judge did not arrive at in his judgment.

We think that the whole of the proceeding are misconceived. In the first place, the Official Receiver had no power to make any order in a claim petition. It is not a power which has been delegated to him under S. 80 of the Provincial Insolvency Act, V of 1920. If the claimant wanted to prevent the sale of the properties as belonging to the insolvent, hd should have applied to the District Judge direct, to take action under S. 4 of the Act He did not do so. That being so, we must set aside all the proceeeings in the lower Courts and leave the parties in *statu quo ante*. The claimant if he finds that the Official Receiver either at his own instance or at the intance of any creditor proposes to sell the properties which he claims to be his, may, if so advised, apply to the District Judge urder S. 4 of the Act for a proper order to be passed.

We therefore allow the appeal and set aside all the proceedings in the Court and direct each party to bear his own costs.

Appeal alloxed.

✱ ✱ 1924 MADRAS 530

Full Bench

SCHWABE, C. J., COUTTS TROTTER AND RAMESAM, JJ.

Tirumalai Gandama Kondala Nagayya Ramakrishna Kadirvelusami Nayakar —Petitioner-6th Defendant—Appellant.

v

The Eastern Development Corporation, Limited, London—Assignee- Decree-holder—Respondents.

C. M. A. Nos. 85 and 86 of 1921, Decided on 24th October 1923, from the order of District Court of Madura.

✱ ✱ (a) *Civil P. C. S. 52—Income accrued since death of deceased zamindar and come into hands of representative is included in property*

Under S. 52 the income of landed property, which has passed from one Zamindar to the next the property being an impartible Raj is liable to execution for the debts of the deceased Zamindar, [P. 537, C. 2]

Income accrued since the late Zamindar's death which has come into the hands of the new Zamindar can be attached. It is unnecessary to sell it if it is actual money. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. [P. 537, C. 2.]

✱ ✱ (b) *Practice—Reference to Full Bench.*

Where a case was referred to a Full Bench on the ground that " It is advisable that the rights of decree holders against the property of a deceased person in the hands of his legal representatives should be clearly defined "

Held: that the reference was one which ought not to have been made. [P. 537 C. 2,

K. V. Sesha Aiyangar—for Appellant.

A. Krishnaswami Ayyar and C. A. Seshagiri Sastri—for Respondents.

Oldfield, J.—The essential facts in these appeals lie in a small compass. The decree in O. S. No. 65 of 1897 on the file of the Subordinate Court, Tinnevelly, was for the recovery of the amount due on a simple mortgage by sale, of the impartible zamindari of Gantamanayakkanur. The Zamindar, against whom the decree was passed, died and was succeeded by his son 6th defendant, the present appellant, in 1908, before any of the proceedings to be referred to. They began with an abortive attempt to recover by sale and the appointment of a Receiver to collect the profits and credit them against the decree. The respondent Company then became solely entitled to execute it and at a sale, confirmed on 8th September 1914, purchased the zamindari. taking delivery in January 1915, and the Receiver was then discharged. On 26th March 1915, a personal decree for 'the balance still due was passed by the lower Court against 6th defendant. That decree was set aside, as passed without jurisdiction. But previously on 24th April, 1915 another Receiver had been appointed to collect certain rents and profits outstanding for the years 1910—1913, after appellant became Zamindar, but before the sale, and it is the right to the amount collected by him, which is now in dispute. After the personal decree was set aside by this Court, another personal decree was obtained in the Subordinate Court, Tinnevelly, and was transferred to the lower Court for execution by recovery of the balance due from this fund. Appellant in E. A. No. 619 of 1917 asks for restitution of a portion of it, which was paid out to respondent, under the first personal decree, since set aside, and in E. A. No. 274 of 1919, he claims the balance still with the Receiver against the respondent's attachment. The lower Court in the orders under appeal dismissed these applications.

In the lower Court the claim was also to certain properties said to have been bought in by the Receiver at Court-sales in the course of his recovery of the rents. But here it is not disputed that these purchases were made by him, not as Receiver, but in the capacity, which he also held, of Manager of the zamindari under the respondent Company; and therefore nothing more need be said of that part of the claim. The claim to the fund is the sole matter now in dispute; and it has been argued, it is material, only with reference to the question whether the fund should be regarded as liable in the hands of respondent for the deceased Zamindar's judgment-debt and the personal decree obtained against respondent as his legal representative, no objection having been made to the assumption that the realizations by the Receiver were made on 6th defendant's behalf, as though he had received them directly.

The provisions of law in question are Ss. 52 and 53 of the Civil Procedure Code, the former being relevant in case appellant claims the zamindari and therefore the fund, which accrued from it, by survivorship and it is to be deemed to be property liable in his hands under Hindu Law for the payment of the debt of his deceased father; the latter in case he claims it by heirship. The point is that, if respondent can proceed in execution against the fund at all. a question to which I return, different objections to his doing so are relied on according to the nature of appellant's right to the estate. For it is urged that, if he took the estate by survivorship, the fund, its income, nevertheless reached his hands as his absolute property and was not subsequently merged by him in it by any course of dealing; and it therefore is not liable as part of his share of joint property for his father's debt. If, on the other hand, the estate was his inheritance and was liable for the last owner's debt in his hands, the question raised is whether its subsequent income would not also be so, as an accretion to it. Before dealing with these questions I observe that no issue was joined and no evidence was given in the lower Court as to the nature of his succession; and no suggestion was made and no finding was recorded as to any conduct by him indicative of an intention to merge these profits, which in the first instance were certainly separate property, in the zamindari and, if the zamindari

was family property, to impress them with that character. On the latter point the only possible conclusion is no doubt in the negative. For he never obtained the profits, which were with the Receiver from their realization, and had no opportunity of treating them as possessing one character rather than the other. The former also is not material. For, if the zamindari is ancestral or family property, I still hold that the fact is relevant only for the purpose of determining the person entitled to succeed to it, not the nature of his rights in it on succession, which will in any case be a right to it as separate property with the full power of enjoyment and alienation, which has been recognized fully by authority. It will serve no useful purpose to state my reasons for this conclusion at any length, since I can add nothing to the enumeration of authorities at the date of decision of the Privy Council in *Baijnath Prasad Singh* v. *Tej Bali Singh* (1), in Mayne's Hindu Law and Usage, 9th Edition 796, except that this decision seems to me in no degree to entail the conclusion reached in *Shri Shiva Prasad* v. *Banmohan* (2), or to displace that reached by this High Court in *Rajah of Kalahasti* v. *Achigadu* (3), *Zamindar of Karvetnagar* v. *Trustee of Tirumalai*, (4) *Maharaja of Bobbili* v. *Zamindar of Chundi* (5) and *Somasundara* v. *Murugappa Chettiar* (6).

On the basis, however, that the zamindari is separate property inherited by Appellant and that therefore only S. 52 need be considered, two questions of some difficulty and importance have been raised, which should, we think, be laid before a Full Bench. The first is whether in such a case not only the inherited property is liable for the debts of its deceased owner but also the profits, such as the fund at present in dispute, which have accrued from it after his death ; and the second, whether clause 1 of S. 52 authorizes execution against a deceased's property in the hands of his legal representative in this extended sense and by any method other than that actually specified in it, attachment and sale. The first question is one of substantive right, the second one of procedure and construction, its importance being that, if it must be answered in the negative and if respondent's attachment cannot, in consequence of the nature of the property be followed by a sale, that attachment was not authorized by the section and can be no obstacle to Appellant's claim.

On the first of these questions there is no doubt the clear principle that the deceased's assets are liable for his debts. But it is argued on behalf of Appellant that the assets include only what is available during deceased's life-time and can be described as accruing to him, not what may become realizable only after his death. On the other hand, the contrary is argued in accordance with general principle as supported by English authority and with the Statute Law of India, regulating the distribution of estates by executors or administrators. As regards the former, it seems clear that in England goods which have accrued by increase since the death of a testator are assets, this having been so always in respect of personal property, *vide* Williams on Executors, 11th Edition, 1872 ; and, although real property became assets only in consequence of a course of legislation ending with the Land Transfer Act (60 and 61 Victoria, Ch. 65), there has never been any doubt that so far as it is assets, its profits also are liable as assets, because they are accretions to it. *In re Hyatt* (7) explained in *In re Moore* (8). In India the Succession Act (X of 1865) and the Probate and Administration Act (V of 1881) no doubt contain no general provision as to accretions, but they are dealt with in connection with specific legacies and in connection with the residue in sections 309 and 310 of the former, and 128 and 129 of the latter and under other sections, of both Acts they are liable

(1) [1921] 43 All. 228 (P. C.)
(2) 1922 Patna 529.
(3) [1907] 30 Mad. 454.
(4) [1909] 32 Mad. 429.
(5) [1911] 35 Mad. 108.
(6) [1912] 36 Mad. 325.

(7) 38 Ch. D. 609.
(8) [1907] 2 Ch. 304.

subject to the other rules laid down for the distribution of the estate equally with property, with which they are connected. It is true that there is nothing in the latter Act regarding accretions to the estate of an intestate and their liability in the hands of an administrator for his debts. But it may fairly be contended that their liability will be the same, whether there is or is not a will and further whether or no the estate is distributed by an administrator appointed by the Court. This reference to the Statute Law, which is not directly applicable to the fund in dispute, is of course relevant only as indicating that the English Law as to accretions has been adopted in India; but even such an indication is important, when very little authority regarding them and their liability for debts has been adduced. For only two decisions, which are really in point have been cited, and in (1) *Azeemunnisa* v. *Ameer Unnisa Khatoon* (9) the liability is maintained but without any discussion. So also it was negatived in *Rani Kanno Dai* v. *B. J. Lacy* (10), the portion of the judgment at present material being, however, *obiter*, since the right to execute against accretions was then negatived also by an agreement with the heir. In *Rajah of Kalahasti* v. *Prayag Dossjee Varu* (11), however the creditor's right to proceed against accretions was recognised on full consideration, the case last mentioned being distinguished and *In re Hyatt* (7) being referred to. There is certainly very little authority on a question, which, it might be supposed, would have been raised and decided in all the Presidencies. But we have been shown no reason for refusing to follow the decision of this Court just cited, and I should have been prepared to decide in accordance with English Law and the rule to be deduced from Indian Statutes that accretions are liable, if it were not advisable to leave the matter open for determination in connection with the further question now to be stated.

(9) 15 W. R. 285.
(10) [1897] 19 All. 235.
(11) [1916] 30 M.L.J. 391.

On the assumption that the conclusion just suggested is correct, we have next the facts that S. 51 of the Civil Procedure Code in terms authorises execution only by attachment and sale and that this method of execution is not applicable to a fund, such as that now in dispute, Execution by attachment and sale is applicable only to the descriptions of property, to which that method of execution is applied in O. 21 and this fund is not one of them since other methods of realization are provided. When money in the hands of a third person is concerned. No doubt a debt due to the judgment-debtor may be attached and sold under O. 21, Rr. 46 (1) (*a*) and 79 (3). But, although the fund in the hands of the Receiver may be payable to the appellant or to respondent. if he can claim it in any other way, for instance, in administration proceedings it is not a debt due to the former for money had, and received, or otherwise, when it reached and is being retained by the Receiver (in spite of the invalidity of his appointment) in consequence of and subject to the orders of the Court and on its behalf. The case in fact is covered, as regards attachment by S. 52 and as regards further proceedings by the reference to the further orders of the executing Court therein; and if the reference to attachment and sale in S. 52 is to be read literally, the respondent's claim based on the application of that section must be rejected. This, it may be observed, refers directly to the portion of the fund, which is still with the Receiver. As regards the portion already paid to respondent, restitution of which is asked for in E. A. No. 619 of 1917, it may be pointed out that it was in fact paid out on the order of the Court and without execution by sale.

The question is then whether the limitation to attachment and sale of the methods of execution open to decree-holders, such as respondents, which a strict contruction of S. 52 entails, should be sustained. It is true that a reason for such limitation is difficult to conjecture, particularly in view of the general reference to execution without specification of any method

in S. 50 dealing with decrees obtained against the deceased himself and only to be enforced against his representatives. Against this, however, it may be suggested that the intention of the legislature was to restrict execution against the deceased's property to cases in which liability is clear and identifiable, moveable or immoveable items of it are available for sale, insisting in accordance with some principle corresponding with that of the Administration of Estates Act (3 and 4, William IV, Ch. 104) on the creditor obtaining an administration judgment in others. *Vide In re Moore* (8) already referred to. That Act, it may be pointed out, did not deal with claims such as those covered by S. 50, which had not become merged in a judgment before the testator's death and which were left to be recovered in India, as they were recoverable in England, by ordinary execution, *vide* Williams on Executors, 11th Edition I, 778. And the use in the Code of the expression "property" instead of "assets of the deceased" may be consistent with this view; for the latter term has been in use in India since the Succession Act of 1865 and it is possible that the former replacing the term "estate" in the Code of 1882, may have been deliberately preferred in order to avoid the implications, which a reference to "assets" would have entailed.

All this however, is conjectural; and the actual wording of the section is the firmer ground for a conclusion. Respondent contends that a free construction is made necessary by the inconvenience, if not the absurdity, of the result of adherence to the wording as it stands and that for "attachment and sale" we should read "attachment or attachment and sale" or else that the sentence should run simply 'it may be executed against any such property," the words "attachment and sale" being merely a generic reference to execution procedure other than that relating to arrest. But it may be doubted whether the incovenience or absurdity involved by a literal construction is great enough to justify these violent suggestions. As regards the first, more would still be required in the present and other cases, since attachment alone would not be sufficient to give the decree-holder his remedy and a reference to his obtaining the further orders of the Court would be required, *vide* O. 20, Rr. 52 and 53; and provision for equitable execution by the appointment of a Receiver under O. 40, R. 1, would still be wanting. As regards the second, it is true that the enumeration in S. 51 of methods of execution specifies, apart from the residuary item (*e*) and the appointment of a Receiver as item (*d*), only attachment and sale, item (*b*) as an avaiable method of recovering under a money-decree from the property of the judgment-debtor. But, if S. 51 is read in the light of O. 21, it cannot be regarded as exhaustive and, as it was first enacted in any form in the present Code, it cannot control the intepretation of S. 52, which is almost identical with S. 252 of the Code previously in force. Neither suggestion is in any degree probabilized by the context and the improbability that the legislature through oversight excluded the remedy appropriate, in certain cases is really all that Respondent can rely on.

As observed already in connection with another portion of the case, there is very little authority regarding the liability of a fund such as that now in dispute and there is not likely to be more regarding the way, in which that liability can be enforced. In *Rajah of Kalahasti* v. *Sree Mahant Prayag Dassjee Varu* (11) already referred to, the latter question did not arise, as execution was being taken against the legal representative's own property under S. 52 (2); and no decision dealing with that question in connection with other descriptions of property for which sale is not the appropriate method of execution, has been shown us. My learned brother is, I understand, more inclined than I am, to a construction of S. 52, such as respondent contends for; and it is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined. We therefore refer for the decision of a Full Bench the questions above stated.

Venkatasubba Rao, J. —As my learned brother has very fully dealt with the questions raised, I shall in a few words state what my own view on the point is. Subsequent to the passing of the decree against the Zamindar he died and was succeeded by his son, the appellant before us. The respondent Co., assignee-decree holder, executed the decree and purchased the zamindari at a sale confirmed on 8-9-1914 and took delivery thereof in January 1915. On 23-3-1915 a personal decree for the balance due was passed against the appellant, and on 24-4-1915 a Receiver was appointed to collect rents and profits outstanding for the faslis 1321 to 1323 (1911 to 1913), that is, for the period between the death of the previous Zamindar and the sale referred to above. The personal decree was however, set aside on 5-3-1917 as passed without jurisdiction and another personal decree was obtained on 24-9-1917. The following items of property were attached on [illegible]-3-1918 :—" (1) Amounts due under decrees in rent-suits obtained by the Receiver, (2) arrears of rent due to the judgment-debtor for faslis 1321 to 1323." The learned District Judge observes: "The real dispute relates to the outstandings of the estate in the shape of rents and mesne profits for faslis 1321 and 1323, whether decreed or not, and whether realized or not." The Lower Court upheld the right of the respondent to the items attached.

Two questions were argued before us, one relating to mere procedure and the other to substantive rights of the parties.

Dealing first with the question of procedure raised, I find it difficult to understand how on the facts stated by the District Judge the points urged by the learned vakil for the appellant arise at all. His contention is this: under S. 52 of the Civil Procedure Code when a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, the decree may be executed by the attachment and sale of any such property. The personal decree in execution of which the Receiver was appointed having been subsequently set aside, the appointment of the Receiver was void and any amounts realized by him, or decrees obtained by him, should be regarded as moneys in his hands or decrees obtained by him not in his character of Receiver, but as an utter stranger. But I do not find it stated that the Receiver was in possession of any moneys at all. But whatever the true facts may be, the assumption underlying the argument is that under S. 52, there cannot be an attachment of property unless the property can be sold in execution. Turning to the words of the section the argument is put in this way: "The decree may be executed by the attachment and sale of the property." If the property against which execution is taken out happens to be property which cannot under the Code be sold subsequent to the attachment, the attachment cannot be effcted at all. I assume that there is such property in the hands of the Receiver. For instance, if he had cash or currency notes, the property may be attached but it cannot be sold. In that event, is there immunity in the case of cash or currency notes on the mere ground that when attached there cannot be a sale under the provisions of the Code? O. 21, R. 56 provides that when the property attached is coin or currency-notes the Court may direct that such coin or notes be paid over to the decree-holder. Thus the plaintiff obtains satisfaction of the decree without having to sell the property attached. To take another similar instance, under O. 21, R. 53 when the property attached in a decree the creditor who has attached the decree may proceed to execute the attached decree and the net-proceeds may be applied in satisfaction of the decree sought to be executed. If the argument of the appellant is correct, if a debtor dies leaving assets in the shape of decrees obtained by him or ready cash, they will not be available to his creditors for the mere reason that the assets left, happen to be in that shape. One would expect that if a debtor died leaving cash, and there was no question of the cash having been secreted

or otherwise disposed of, the creditor would be most easily enabled to obtain satisfaction of his debt. There would be no need to go through the lengthy execution-proceedings which should be had if the assets left happened to consist, say, of immoveable property. But the contention curicusly is that in that very event the creditor is without a remedy. What are the further implications of this position? If a decree is passed against a legal representative of a deceased person the decree-holder can never ask for appointment of a Receiver in execution. S. 51 clearly lays down that one of the methods of executing a decree is by appointing a Receiver. O. 40, R. 1 enacts that the Court may appoint a Receiver of any property whether before or after decree. If a decree is obtained against a debtor in his lifetime, a Receiver may be appointed in execution to realize the debts due to the debtor; but if a decree is obtained after his death against his legal representative, such a course is not open to the decree-holder; and that is the argument, and I need hardly say that this leads to an absurdity. O. 21, R. 46 provides that in case of a debt not secured by a negotiable instrument, the attachment shall be made by a written order prohibiting the creditor from recovering the debt and the debtor from making payments thereof and that a debtor so prohibited may pay the amount of his debt into Court and that such payment shall discharge him effectually. If the contention of the appellant is correct, the debt attached must be sold and the debtor cannot pay the amount into Court, it is beyond the power of the Court to receive it, but the debt must be sold. I cannot believe that the legislature intended that such absurd consequences should ensue.

In my opinion the words "attachment and sale," in S. 52 must not be literally construed, as a too literal interpretation leads to inconvenience and absurdity. S. 50 refers to execution of the decree where judgment-debtor dies after the decree but before the decree is satisfied. S. 52 contemplates proceedings in execution when the decree is passed against the legal representative himself. The object of the two sections seems to be to enact that the property of the deceased debtor shall alone be liable. S. 51 provides various methods of execution and when any of those methods is appropriate, it is not the scope of S. 52 to exclude that particular method. The words used are inapt but the construction which I am inclined to adopt seems to be the only reasonable construction.

Next dealing with the construction of substantive rights raised, my learned brother has dealt with it, at considerable length and it will serve no useful purpose to once again discuss the various English authorities that were cited before us. The result of the authorities appears to be that in England the income is treated as assets for the purpose of payment of debts Is there any reason for refusing to give effect to this rule in India? I see none. I shall first take the case of a man dying leaving property which his successor inherits. Why should the successor in such a case be treated differently in India and be held not to be under an obligation to pay the deceased's debts out of the income of the property in his hands? The heir or successor may, if he chooses, sell the property immediately after the debtor's death. In that event he gets no income whatsoever from the property. Or the heir may derive income from the property and pay debts from, and out of the income. If the income so derived is sufficient for the payment in full of the debts, the corpus remains in the hands of the heir and it will remain at his absolute disposal. But if the heir chooses to derive an income and the corpus itself is not sufficient to pay the debts, I fail to see why the income should not be available to the creditors. That is to say, there is no reason why a succesor who postpones the sale of the corpus or defers the payment of the debts should be in a better position than one who the moment after the deceased's death disposes of the property or discharges the debts. In the case of a son liable to pay out of joint family property his father's debts, there is even greater reason to apply the rule. The son is

liable under the Hindu Law to pay the debts not only out of his father's share of the property but also out of his own share. How then can he be heard to say that the income from the property is not liable ?

Turning to the case of an impartible estate, I find that it is difficult to distinguish it for this purpose from the case of an ordinary partible estate. Whether in the hands of the father it was self-acquired property or joint family property and whatever the rule of succession applicable may be, I cannot imagine how the case of an impartible estate can be put on a different footing for this purpose from any other kind of property. The argument that accretions are the absolute property of the successor does not in the least touch the question. They may be the son's absolute property in one sense. But they are not necessarily his absolute property in the sense that they are not available to the father's creditors to the extent they are required for the discharge of his father's debts.

In the result, I agree in the Order of Reference proposed by my learned brother.

Opinion of the Full Bench

Schwabe, C. J.—This reference ought not to have been made to this Bench. The two Judges who heard the matter were agreed, and I see no reason for adding anything to their statements on the points on which they were agreed.

The first point is quite a simple one, whether, under S. 52 of the Civil Procedure Code, the income of landed-property which has passed from one Zamindar to the next, the property being an impartibie Raj, is liable to execution for the debts of the deceased Zamindar, that is to say, in this case, the father of the appellant. *Oolagappa Chetti* v. *Arbuthnot* (12) is a direct authority for the proposition that the income of such property is liable. The English law is perfectly plain, and to the same effect, as laid down in a long series of cases relating to the income from realty which has descended to the heir-at-law. *Stratford* v. *Ritson* (13) is a good instance, in which it was held that the income of such real property is liable for the debts of the deceased as his assets in the hands of his heir, though it is not to be taken until the *corpus* is exhausted.

There is a further point raised by the reference as to whether the money, income accrued since the late Zamindar's death, which has come into the hands of the new Zamindar can be attached and sold. It can be attached, and it is unnecessary to sell it. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. There was no necessity to refer that point, nor do I think it necessary to say anything about it.

The appeals are dismissed with costs.

Coutts Trotter, J.—I think that this case is covered by the decision in 1 I. A. 268 and I venture to put in my respectful protest against the reasoning on which this case was referred to this Bench. My brother Oldfield says :—"It is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined." Personally I protest against a Bench being called upon to define generally the rights of decree-holders and I entirely decline to do so. It is enough to say that this case is covered by 1 I. A. 268, and this appeal should be dismissed with costs.

Ramesam, J.—I agree.

Appeals dismissed.

(12) [1875] 1 I. A. 268.

(13) 10 Beav. 25.

✱ 1924 MADRAS 537

PHILLIPS AND VENKATASUBBA RAO, JJ.

B. Bhavamma and others—Defendants—Appellants.

v.

B. Ramamma and others—Plaintiffs—Respondents.

F. A. No. 81 of 1922, Decided on 5th November 1923, from the decree of Addl. Sub. J. Kistna in O. S. No. 14 of 1920.

✱ (*a*) *Evidence Act, S. 33—Strict requirements can be dispensed with by consent of parties.*

The person against whom the evidence is sought to be used may waive the benefit of the provisions, which are intended for his security and the strict requirements of the section may be departed from by consent of the parties. 43 Mad. 609 foll. [P. 538, C. 1]

✱ (*b*) *Evidence Act, S. 145—Third party's statement can not be used to contradict.*

To hold that a witness may be contradicted by previous inconsistent statements, not of himself but of a third party, would be against principle and opposed to this section. [P. 538, C. 2]

A. Krishnaswami Aiyar and P. Bapiraju—for Appellants.

C. V. Ananthakrishna Aiyar and C. Rama Rao—Respondents.

Judgment.—The plaintiff and the 1st defendant are the widows of one Janakiramiah, who died on the 6th of October 1919, at his village Pandithavalloor, leaving property of considerable value. The plaintiff claims a partition of the property and delivery to her of a moiety thereof. The 1st defendant resists the suit, on the ground that the late Janakiramiah left a will, and the question to be decided in this suit is whether the document put forward was the last will of the deceased. The learned Subordinate Judge has come to the conclusion that it was not executed by Janakiramiah and that it was brought into existence by the 1st defendant and others, some time subsequent to his death. We have carefully gone into evidence, and we are satisfied that Janakiramiah did not make the will in question and that the 1st defendant is bound to fail.

The learned Vakil for the appellant commented on the judgment and suggested that it did not show that the Subordinate Judge applied his mind to the evidence, before recording his finding. The judgment no doubt, is far from satisfactory, but on the evidence and on the probabilities, we are clearly of opinion that the 1st defendant has signally failed to make out her case.

[The judgment then dealt with evidence and proceeded as follows.]

No doubt the alleged Will has been attested by several persons in the village, including the Karnum and the Village Munsif; but we are satisfied that the 4th defendant has made use of his influence and wealth, in order to bring into existence this will, with a view to defeat the plaintiff's claim.

There is one further matter which requires notice. Ex. VI is the deposition of the plaintiff's father, in the enquiry held by the Sub-Registrar, in connection with the registering of the Will in question. That deposition was filed in the Lower Court, on behalf of the defendants and apparently without objection on the part of the plaintiff. Mr. A. Krishnaswamy Iyer, the learned Vakil for the appellants, urged that he could rely upon this deposition and cited *Jainab Bibi Saheba* v. *Hyderally Sahib* (1), in support of his contention. The argument is utterly untenable. Under S. 33 of the Indian Evidence Act, the evidence, given by a witness in a former proceeding, is admissible in a later proceeding, if certain conditions prescribed by it are found to exist; and it was held in *Jainab Bibi Saheba* v. *Hyderally Sahib* (1), that the person against whom the evidence is sought to be used may waive the benefit of the provisions, which are intended for his security and that the strict requirements of the section may be departed from, by consent of the parties. We fail to see how this case can be of any use to the appellants. They do not seek to make the evidence, given by the plaintiff's father in the previous proceeding, substantive evidence in the case; indeed they do not desire to rely upon that deposition at all, as, on very essential points it is bound to be against them. But it is relied upon for the purpose of contradicting the plaintiff's statements in her deposition in the present case. By S. 45 of the Indian Evidence Act, the credit of a witness may be impeached by proof of his former inconsistent statements; and before a witness can be impeached he must be given an opportunity of making any explanation which is open to him. To hold that a witness may be contradicted by previous inconsistent statements, not of himself but of a third party, would be against

(1) [1920] 43 Mad. 609 (F. B.)

principle and opposed to this section.

Next, Mr. Krishnaswami Iyer argued that Ex. VI would be admissible under S. 11 of the Evidence Act. This section, in our opinion, is clearly inapplicable and the cases cited by him, namely. *Gyannessa* v. *Mobarakannessa* (2) and *Naro Vinayak Patvardhan* v. *Narhari Bin Raghunath* (3), do not seem to be any authority on the point.

It would appear that item 9 of Sch. A, was alienated in the life-time of Janakiramiah and it is excluded from partition by consent.

The extent of item 1 of Sch. B, is not admitted by the appellant. But as the identity of the property is not disputed, it is unnecessary to decide the extent of the land. We accept the Subordinate Judge's finding as to the rate of the mesne profits.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

(2) [1901] 25 Bom. 210.
(3) [1892] 16 Bom. 125.

1924 MADRAS 539

SPENCER, J.

Kandaswami Goundan, In re.

Cr. Rev. No. 306 of 1923, and Cr. R. P. No. 229 of 1923, Decided on 10th October 1923, from the judgment of Joint Magistrate of Dindigul in Cr. App. No. 9 of 1923.

* *Penal Code, S. 353—Resistance to Revenue Inspector in execution of distraint for arrears of revenue is an offence though warrant of distraint is addressed only to village headman, his subordinate.*

Where the warrant of distraint was addressed to the village headman and not to the Revenue Inspector who was supervising the work of the village headman, as it was his duty to do, and who had been specially enjoined by his superior the Tahsildar to attend to the work of distraint.

Held: that resistance to the Revenue Inspector constituted an offence under S. 353.

[P. 539, C. 2]

K. S. Jayarama Aiyar — for petitioner.

V. L. Ethiraj for *Public Prosecutor*— for the Crown.

Order.—I am unable to accept the suggestion that the offence committed by the accused in resisting the Revenue Inspector, who distrained property of the accused for arrears of revenue, fell short of an offence under S. 353, I. P. C. for the sole reason that the warrant of distraint was addressed to the village headman and not to the Revenue Inspector. The latter was supervising the work of the headman, as it was his duty to do, and he had been specially enjoined by his superior, the Tahsildar, to attend to the work of distraint. The cases of *Queen Empress* v. *Dalip* (1) and *Rex.* v. *Roxburgh* (2) are distinguishable. In the former there was a failure to comply with the strict requirements of S. 56 of the Code of Criminal Procedure which failure made the act of the constables unauthorised, and in the latter, the constable acted lawfully though not in the exercise of his duty as a police officer.

The conviction, therefore is legal under S. 353, I. P. C. and in respect of the charge of insult (S. 504. I. P. C.) which was added at the trial, there is evidence to support it, and no rebutting evidence.

P. W. 4 does not speak to the insult and P. W. 5 does not say what words were used, though he says that the accused uttered defamatory language. Ex. A, a statement taken at the time, also corroborates it. I consider it unnecessary to call upon the joint Magistrate to find distinctly whether this charge was proved.

As regards sentence, the accused was awarded two sentences, one of three months' and one of two months' rigorous imprisonment to run concurrently.

He has already undergone 28 days, imprisonment and I consider that he has had a sufficient lesson for losing his self-control and daringly resisting the officers of Government. After all, the bull was attached, and the Government demand was satisfied. No one was physically injured. The affair assumed a serious importance because the Revenue Inspector was flouted and the authority of the Reve-

(1) [1896] 18 All. 246.
(2) 12 Cox. Cr. cases 8.

nue Authorities to collect the arrears of revenue was set at naught.

I reduce the sentence to the amount of imprisonment already undergone and direct that the accused be released from his bond.

Sentence reduced.

✱ 1924 MADRAS 540

SCHWABE, C. J. AND WALLER, J.

S. Tirumala Reddi, In Re.

Cr. R. C. No. 355 of 1923, Decided on 4th October 1923, for the orders of H. C. under S. 438 of C. P. C. by D. M. North Arcot, D/-14th May 1923.

✱ *Penal Code, S. 179—Conduct of accused.*

S. 179 has nothing whatever to do with the conduct of accused persons in Court.

[P. 540, C. 2]

V. L. Ethiraj for *Public Prosecutor*—for the Crown.

Schwabe, C. J.—This is a reference by the District Magistrate of North Arcot, under S. 438 of the Code of Criminal Procedure, in relation to a conviction by the Sub-Magistrats of Gudiyatham of one Tirumala Reddi under S. 179 of the Indian Penal Code, he being fined Rs. 10, in default, seven days' simple imprisonment.

The facts appear to be that the accused had been summoned for some offence before the village Panchayat Court at Kandiapedu, he being charged with instigation to beat. On being charged before that Court he said he would not make any reply and remained silent. The Panchayat Court thereupon sanctioned the prosecution of the accused under S. 179 of the Indian Penal Code. S. 179 runs, "Whoever, being legally bound to state the truth or any subject to any public servant refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished." The procedure before the Punchayat Court is governed by the Madras Act II of 1920 and the rules made in pursuance of S 78 of that Act. The rules have been published and are to be found Government Order No. 572 of 1922 dated the 2nd March, 1922 published in the Fort St, George Gazette. By Rule 36, "If the accused pleads not guilty or declines to plead, the Court shall proceed to examine the complainant, if any, the witnesses for the prosecution and the witnesses of the accused." Those rules made the procedure of this Bench Court precisely the same in respect of the pleading of the accused as the provisions of the Criminal Procedure Code, which apply to other Courts in this country. As far as this matter is concerned, they come to this, that an accused is not bound to answer any question put to him at all, and can, if he likes, decline to plead, and, if he declines to plead, the case goes on, just the same. In my judgment, S. 179 of the Indian Penal Code has nothing whatever to do with conduct of accused persons in Court. What they have to do and what they have not to do is provided by the Code of Criminal Procedure where it applies, and by the rules governing a Panchayat Court where they apply. This conviction of the accused under S. 179 of the Indian Penal Code was entirely wrong. No offence under that section had been committed. The order of conviction must therefore, be set aside, and the fine, if paid, must be refunded.

Panchayat Courts have got ample powers to deal with such cases. They can simply go on with the case. Having heard the evidence, if they choose to convict, their conviction will be perfectly in order, although the accused has failed to plead, and although the accused by his demeanour has been contemptuous of the Court which has been trying him.

Waller, J.—I agree to the order proposed. It is quite clear that S. 179 of the Indian Penal Code has no application to a refusal to plead to a charge.

Order set aside.

✱✱ 1924 MADRAS 541

KRISHNAN, J.

A. R. P. R. Viswanathan Chetty Defendant—Petitioner.

v.

M. N. M. Somasundaram Chetty Plaintiff—Respondent.

C. R. P. No. 582 of 1923, Decided on 5th November 1923, from the order of Dist. Munsif, Devakottah, D/- 16th March 1923.

✱ *Civil Pro. Code., O. 16 Rr. 19 and 21—Applicability.*

Rules 19 and 21 of O. 16 do not apply where party of his own accord desires to examine himself on commission. Further, defendant's application is less strictly dealt with than plaintiffs'. [P. 541 C. 1]

✱ *Civil Pro. Code., O. 16 R. 4 and S. 115—Revision—Refusing to allow defendant to examine himself on commission when plaintiff was so examined, though bothlived outside jurisdiction was held revisable.—C. P. Code, S. 115.*

Where the defendant had been a resident of Rangoon with his family for many years and he was served with summons there, and the plaintiff himself was a resident of Rangoon and was examined on commission himself there.

Held: in these circumstances the defendant should have been allowed to be examined on commission. The watching of his demeanour was not a sufficiently strong ground to justify the dragging of the defendant all the way from Rangoon to India. 40 M. 793 Exp.

Held: further that the ommission to examine defendant on commission amounted to material irregudarity [P. 541, C. 2]

G. Krishnaswami Aiyar and *R. Swaminatha Iyer*—for Petitioner.

E. Doraiswami Aiyar—for Respondent.

Judgment.—In this case the district Munsif has refused to issue a commission to examine the 2nd defendant as his own wituess, and the revision is against that order. The learned Munsif dismissed the petition rather summarily without noticing the importance of the fact that the defendant was the person applying and without his attention having been drawn to the cases which show in what manner a Court should deal with an application of a defendant to examine himself as a witness on commission as distinguished from an application by a plaintiff. A reference to the case of *Rose* v. *Woodford* (1) and to the case *Sara Kumar* v. *Ram Chandra* (2) will show how a defendant's application should be dealt with. In this case a defendant has been a resident of Rangoon with his family for many years. He was served with summons there. The plaintiff himself was a resident of Rangoon and was examined on commission himself there. In these circumstances the defendant should have been allowed to be examined on commission. The watching of his demeanour which the lower Court referrs to, in support of its order is not a sufficiently strong ground to justify the dragging of the defendant all the way from Rangoon to Ramnad. I would therefore set aside the order of the Munsif and direct him to issue a commission to examine the defendant in Rangoon as prayed by him.

It was argued that this was not a proper case for intervention in revision and reliance was placed on the observations of their Lordships in page 799 of the case in *Balakrishna Udayar* v. *Vasudeva Aiyar* (3).

Their Lordships recognise irregular exercise of jurisdiction as a ground for interference as the section also says. I think this is a case of such irregular exercise of the lower Court's powers in examining witnesses. In refusing to examine defendant on commission in the circumstances of this case the Court is acting with material irregularity as it might lead to his evidence being lost to the defendant altogether. The objection that it is not open to this Court to act in revision is therefore overruled.

The Respondent will pay the costs of the petitioner in this Civil Revision Petition but I do not interfere with the order as to costs in the lower Court.

Petition allowed.

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(1) [1894] 1 Ch. 38.

(2) 1922 Cal. 42.

(3) [1917] 40 Mad. 793—44 I.C. 261.—33 M.L.T. 69—15 A.L.J. 645—2 Pat. L.W. 101—26 C.L.J. 143—19 Bom.L.R. 715 — (1917) M.W.N. 628—6 L.W. 501—22 C.W.N. 50—11 Bur.L.J. 480—40 I.C. 650 (P. C.)

✱ ✱ 1924 MADRAS 542

ODGERS AND HUGHES, JJ.

Gnanamuthu Nadan—Plaintiff—Appellant.

v.

Veilukanda Nadathi and others—Defendant—Respondents.

S. A. No. 141 of 1921, Decided on 23rd July 1923, against the Decree of Addl. Sub. J. Tinnevelly in A. S. No. 9 of 1920.

(a) ✱ *Evidence Act, S. 32—Attestation.*

Attesting with knowledge a document showing that the attestors have no interest in the land passed by the documents amounts to a statement against interest and is admissible under S. 32. [P. 544 C. 1]

(b) *Registration Act, S. 17—Othi deed.*

If an Othi deed of Palmyrah trees does not place any restriction on the right of the owner's enjoyment of the land on which the trees are standing, it does not need registration though the value is Rs. 100, 6 M. H. C. R. 71, 20 Mad. 51 Dist. [P. 543 C. 2]

(c) ✱ ✱ *Evidence Act, S. 17—Partition lists* Partition lists indicating properties which fell to the share of each party though signed by all the co sharers and attested require no registration provided they do not contain words that can be construed as creating a partition of the status of the parties. 1923 Mad. 160, Foll. [P. 543 C. 1]

K. V. Sesha Aiyangar—for Appellant.

S. Anantarama Aiyar—for Respondents.

Judgment.—This is a suit for a declaration that certain lands in Schedules A and B, belong to plaintiff and for an injunction against defendants' enjoyment of the same. Over 20 years before suit, plaintiff's younger brother, Guruswamy Nadan, died leaving a widow and daughter, defendants 1 and 2. The A and C schedule properties belonged to the family of the plaintiff and his brother, and the B schedule properties (except item 5) were brought to sale under a decree and bought by one Israel Nadan, who conveyed to his brother in 1883 under Ex. B. The plaintiff and his cousins were undoubtedly divided; but plaintiff alleges that the properties in question are his right of survivorship, as his deceased brother and himself were never divided. C schedule properties are admittedly in the possession of defendant No. 1. This, the plaintiff accounts for, by saying that it was in pursuance of an arrangement for the maintenance of 1st defendant. Both Courts have found that the plaintiff's case is false and that the brothers were divided. Mr. Sesha Aiyangar for the plaintiff-appellant in second Appeal takes three points.

(i) That Ex. XXI is the primary and only possible evidence of partition and being unregistered it is inadmissible. Under S. 91 of the Evidence Act, no other evidence of partition is admissible and there is therefore no legal evidence upon which, the Courts below, could have come to a finding that plaintiff and his brother were divided.

(ii) Exs. XVI, II and III are inadmissible.

(iii) Ex. J. has been attested by plaintiff and a divided cousin, but that is no evidence of knowledge of its contents.

To take these points in order—Ex. XXI is a cadjan document much torn and largely indecipherable. It is undoubtedly a list of properties. The question is "Is it anything more." It is headed "Nayinar—share." He is D. W. It is signed by the plaintiff, his divided brother and his two cousins. The document is dated 1880. The facts of its containing Nayinar's name and its being signed and attested are said by Mr. Sesha Aiyangar to show that it is a formal partition-deed. The circumstances under which these lists came to be drawn up are detailed by D. W. 5 himself. The lands were divided by ridges and the chits prepared. Four lists were drawn uy and a boy took the chits and placed them on the lines. A person (apparently unconnected with the family) called Aiyamperumal-wrote the chits and left spaces for names and attestations. This man also wrote in the names, as the chits were taken up. The witness adds 'We had no idea of writing a partition deed. The chits were regarded as the partition.' Ex. XXI is a mere list of properties and there are no operative words of division at all. It may be a division of properties, sub-

sequent to an oral division of status. That such a written deed can be treated as minutes of agreement and not as a completed partition and that though unregistered it can be admitted in evidence is clear from *Gundapaneni Gopayya* v. *Gundapaneni Kristnayya* (1). Of course, if Ex. XXI is the partition, it will be inadmissible. In *Shrinivasacharlu* v. *Perindevamma* (2), the deed after detailing the distribution of property among the sharers concluded: "In the presence of the witnesses named hereunder we divided." This we take to mean "divided by this instrument." The Full Bench held that this required registration but merely directed it and the evidence relating thereto be expunged from the record. As laid down by the Privy Council in *Girja Bai* v. *Sadashiv Dundiraj* (3), "severance of status is quite distinct from the *de facto* division into specific shares of the property" hitherto held jointly, and a deed of partition though inadmissible to prove partition, for want of registration, is still admissible to prove an intention among all members to become divided in status *Saraswatamma* v. *Paddayya* (4) And in *Chotalal Aditram* v. *Bai Mabakore* (5), it was held that the fact of partition may be proved by oral evidence, though the partition-deen may be inadmissible. The terms of S. 91 of the Evidence Act are not transgressed by this course of action, as all, the Courts had been concerned with, was to find out whether particular properties claimed by plaintiff to be joint family, were at the date of the suit, joint or separate. That is precisely the case here. In our opinion, the question under S. 91 of the Evidence Act does not really arise, as we hold confirming the view of the Munsif (the lower appellate Court does not base its decision on Ex. XXI, that Ex. XXI, can only be regarded as a list of properties, handed to each sharer by an independent person, either by lot, or in order of seniority and that as it contains no words from which we can construe, that it was intended to effect a partition of status, we come to the conclusion that it was a *de facto* division into specific shares, following a prior division of status. No question of its inadmissibility accordingly arises.

The next point is the objection to Ex. XVIII.

Ex. XVIII is an othi deed for Rs. 152 of 100 palmyrah trees by Guruswamy Nadan on 10th February, 1884. It is witnessed by the plaintiff and his son and one of the cousins. It is said this ought to be registered under S. 17 of the Registration Acts (either of 1871 or of 1908), as creating an interest in immoveable property of the value of Rs. 100. Reliance for appellants is placed on *Sukry Kurdeppa* v. *Goondakull Nagireddi* (6), where a lease of palm and date trees for 5 years was held to require registration. Holloway, A. C. J., observed that a document with respect to trees may or may not require registration, according to the character of the transaction. This may contemplate the trees, as in a state of attachment to or detachment from the soil and the interest passed will be respectively moveable or immoveable. The case was decided under the terms of the Registration Act, 1864, S. 13. There was, in that Act, no definition of immoveable property, exempting standing timber, growing crops or grass, as is the case in the Acts of 1871, S. 3, 1908 S. 2 (6). In *Seeni Chettiar* v. *Santhanathan Chettiar* (7), it was held to be more than a sale of standing timber, as "it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land." Sir Edward Vaughan Williams, J., quoted with approval in *Marshall* v. *Green* (8). As pointed out in *Natesa* v. *Thangavelu* (9), which concerned a

(1) 1923 Mad. 160 (1).
(2) [1916] 30 M.L.J. 402.
(3) [1916] 43 Cal. 1031 (P. C.)
(4) 1923 Mad. 297.
(5) [1917] 41 Bom. 466.
(6) 6 M.H.C. 71.
(7) [1897] 20 Mad. 58 (F. B.)
(8) [1875] 1 C.P.D. 35.
(9) [1915] 38 Mad. 883.

lease for two years of palmyrah trees, there was in the case in *Seeni Chettiar* v. *Santhanathan Chettiar* (7), a limitation on the transferor's enjoyment of the land as such ; there was none in that case, *Natesa* v. *Thangavelu* (9) and there is none as far as we are able to see here. In the later Madras case, both the cases in *Sukry Kurdeppa* v. *Goondakull Nagireddi* (6) and *Seeni Chettiar* v. *Santhanathan Chettiar* (7) are distinguished and in our opinion Ex. XVIII fall distinctly under the law as laid down in *Natesa* v. *Thangavelu* (9), and that the latter ought to be followed. It follows that this objection fails.

As to Ex. III, this is a similar *othi* deed of the same days and the same reasoning applies. It is executed by Nayinar Nadar one of the divided cousins and attested by the plaintiff and his cousins. It is objected, that as Ex. III contains a recital between third parties, it is not admissible to prove title. But in our opinion there is no ground for this objection, as the question really is whether the brothers were divided and whether the attesting brother must be taken to know the document.

As to Ex. J : This is an *othi* deed executed on 10th July 1891, by Guruswamy Nadan of land "remaining under my enjoyment as ancestal property" and is witnessed by plaintiff and D. W. 5 (a divided cousin). This is utilised to prove an individual dealing with land which had formerly formed part of the family property. It will be observed that Exs. XVIII, and III (and it is said also Ex. C) in the case are othi deeds of even date, each mortgaging trees on the shares of three out of four of the sharers. In so far as the deeds are attested by the other sharers, it appears to us that this shows, that they assented to the alienations and acknowledged that they have no interest in the subject-matter of the document each attests, though they before partition would have had an interest in such subject-matter. This appears to us to be a statement against interest in the case of each such attestor, and to be therefore admissible under S. 32 of the Evidence Act. It is clear we think, that the attestors in the circumstances of the case must have known the contents of these documents : they were all made on the same day and each of the divided attestors, was certainly as to three and most probably as to all, the executant of a similar document himself. It is suggested that they executed these deeds for the purpose of liquidating each his share of the family debt. It may be so. The plaintiff's evidence was entirely discredited in both the lower Courts and in our opinion the evidence objected to, was rightly admitted. His evidence as to the properties acquired under Ex. B was also discredited. The matter is then resolved into a simple question of fact on the evidence and the defendants' version has been accepted.

There is a patent mistake in the decree of the lower Appellate Court. The appeal was dismissed with costs (except as regards item 5, as to which there was no order as to costs.) The decree, however, directs that each party shall bear his own costs. We must therefore dismiss the appeal with costs, both here and in the lower Appellate Court. Memorandum of objection is allowed, but there will be no order as to costs.

Appeal dismissed.

Memorandum of objections allowed.

✱ ✱ 1924 MADRAS 544

VENKATASUBBA RAO, J.

Gangai Ammal—Plaintiff — Appellant.

v.

Govinda Padayachi and others — Defendants—Respondents.

S. A. No. 371 of 1921, Decided on 24th January 1924, from the decree of District Court, South Arcot, in A. S. No. 161 of 1919.

(a) T. P. Act, S. 54—Vesting of title—Conditions to be carried out by vendee, unless they distinctly specify to the contrary, do not suspend vesting of title in vendee.

Where the father of a minor got a sale-deed in the name of his son by which the father agreed to discharge certain

debts binding upon the property sold to the minor, and the relevant portion of the deed on this point was as follows "the debt shall be discharged and the minor may hold and enjoy under the under-mentioned lands exclusively with power to alienate by way of gift, exchange, sale etc."

Held: that the property vested in the minor though the debts were not discharged, the discharge of debts being not a condition precedent to the vesting of the property, and that discharge by the vendee himself was a sufficient compliance with the condition.[P,545,C.2]

(b) *Minor—Vendee.*

Sale in favour of minor at the instance of his father is valid, minor personally not being a contracting party. [P. 546, C. 3]

(c) *T. P. Act, S. 55 (v) (d)—Buyer's duty.*

The duty of a buyer is not a duty that arises from an implied contract but is a statutory obligation imposed on the buyer. [P. 546, C. 2]

P. R. Ganapathi Aiyar for *T. R. Ramachandra Aiyar*, *T. R. Krishnaswamy Aiyar* and *S. Ramaswamy Aiyar* —for Appellant.

N. S Rangaswamy Aiyangar and *C. R. Vasudeva Rao*—for Respondents.

Judgment.—This suit was instituted for the purpose of recovering certain property after setting aside a sale deed. One Muruga Padayachi executed a deed of sale on the 25th October, 1905 in favour of his sister's grandson Boorasamy. Eleven years after this transaction Muruga Padayachi's widow seeks to set aside the sale on the ground that it was conditional upon the vendee fulfilling certain terms, that there was default on his part, and that consequently the sale was inoperative. It is said that one of the conditions was that the vendee should marry an infant daughter of Murugan. Another condition is said to be that the vendee's father should discharge certain debts binding upon the property. In regard to the first condition, the District Judge has held that the marrying by Boorasamy of the daughter of Murugan was not a condition precedent, and with this finding of fact I cannot interfere in Second Appeal. In regard to the second condition, the debts referred to are those covered by Exs. 11 and A. So far as Ex. II is concerned, the lower appellate Court has arrived at the finding that it was fully discharged Ex. II is a deed of mortgage. and on it, there is an endorsement by Govinda Padayachi, the father of Booraswami, which shows that Rs. 392 were paid by him on the 9th April, 1906 towards the deed in question. The balance of the amount due under Ex. II was discharged by the execution of a hypothecation bond on the 1st August 1913, by Booraswami himself, but it is argued that the discharge of the debt by the vendee is no compliance with the condition. I do not see how it can be said that, when there is payment of the debt and discharge of the mortgage, there has been no compliance. It was intended by the vendor that the debts should be paid, and it would be strange to hold that it was not his desire that, if the debt was paid by the vendee himself, the property should not become his absolute property. As regards the second debt, the District Judge has also held that the plaintiff has failed to prove that the first defendant Govinda Padayachi had not paid Rs. 100 which was the amount which he was directed to pay by the sale-deed.

Apart from these findings of fact, I think the conclusion of the District Judge is correct, namely that the term that the debts should be paid is not a condition precedent to the vesting of the property in the vendee. The translation before me of the material portion seems to be inaccurate. The correct rendering of the concluding part of Ex. I. the sale deed is: "The debts shall be discharged and the minor Booraswami may hold and enjoy the undermentioned lands exclusively with power to alienate by way of gift, exchange, sale, etc" It is perfectly clear that the discharge of the debt is not a condition precedent to the vesting of the property in Booraswami.

The last argument advanced by Mr. P. R. Ganapathy Iyer, the learned Vakil for the appellant, is that the sale deed was taken in the name of a minor and that the transaction is therefore void. I must say in this connection that this contention was given up when the appeal was argued before the learned Subordinate Judge who made the order of remand and I do not think it is open to the appellant now to raise the point. No doubt

this is merely a question of law, and if for the purpose of advancing justice, it would be necessary to allow the appellant to raise afresh a question of law, in Second Appeal, I shall not have the slightest hesitation to permit him to do so, but, in this particular case, the object of the contention is to defeat a just claim by a technicality, and I do not think, I would be justified in allowing a contention of this kind to be put forward for the first time here when it was expressly given up at an earlier stage. However, in view of the long argument that was advanced by Mr Ganapathi Iyer, I may state what my view on this matter is.

In *Navakoti Narayana Chetty* v. *Logalinga Chetty* (1) it was held that a sale in favour of a minor was void, but the ground of the decision is very clearly stated to be, that it is impossible to conceive of a sale without there being a contract on the part of the minor. It is said that, if there is a promise to pay a price, it would be invalid as the minor cannot make a contract in regard to the payment of price. If, on the other hand, money was already due to the minor, the transaction is equally void as the minor's consent to make it a price is essential to convert the mere transfer of ownership into a sale. But the Judgment makes the mistake of assuming that these are the only two possible alternatives and a later case that came up for decision, *Mnnia* v. *Perumal* (2) made clear this mistake. There the minor was not a contracting party and no contractual obligations were undertaken by him; and the learned Judges, who decided that case, held that the sale in favour of the minor was not void. The minor became the beneficial owner under the deed of purchase but he was not a party to the contract of sale. On that ground, the sale was upheld. The observations in *Navakoti Narayana Chetty* v. *Logalinga Chetty* (1), as I pointed out, are too general, and this is the view taken in a later Full Bench case, *Raghavachari* v. *Srinivasa Raghavachari* (3). In the case before me, there is a transfer in favour of the minor. He is not, however, a contracting party. On the other hand, it is his father who undertakes to discharge the encumbrances, and in these circumstances it is obvious that the sale cannot be treated as void. But Mr. Ganapathi Iyer seeks to distinguish the Full Bench case on the ground that there the whole of the purchase money had been previously advanced but that in the present case the price was to be paid on a future date. There is no force in this argument. The principle underlying *Munia* v. *Perumal* (2) is equally applicable to the facts of this case. I therefore, am of opinion that the sale in the present case is not invalid.

But then it is said that under S. 55 (5) (*d*) of the Transfer of Property Act, the buyer would be under an obligation to pay off monies due under previous encumbrances that there should be deemed to exist an implied contract to pay the monies due under Exs. II and A and the minor being incompetent to contract the sale is void. The stout answer is that, as a matter of fact, there is an express contract between the minor's father and the vendor to discharge the encumbrances and the question of implied contract does not arise.

Even apart from that, I do not think it can be said that the duty that is incumbent upon the buyer under S. 55 (5) (*d*) is a duty that arises from an implied contract; it is a statutory obligation imposed on the vendee. A mere perusal of the various clauses and sub-clauses of S. 55 will reveal the utter unsoundness of the argument that the section deals with implied contracts and both Sir John Wallis C. J. and Srinivas Iyengar, J., in *Raghavachari* v. *Srinivasa Raghavachari* (3) expressed the opinion that the duties specified in the section are in the nature of statutory obligations and with respect that seems to be the right view.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(1) [1909] 33 Mad. 312.
(2) [1911] 37 Mad. 390.
(3) [1916] 40 Mad. 308 (F.B.)

✱ ✱ 1924 MADRAS 547

SCHWABE, C. J. AND RAMESAM, J.

V. Krishnayya—Defendant—Appellant.

v.

S. Ponnuswami Iyer and another—Plaintiffs—Respondents.

F. A. No. 54 of 1922, Decided on 30th November 1923, from the Judgment of Phillips, J., D/- 3rd March 1922.

✱✱ *Transfer of Property Act, S. 59—Equitable mortgage is created by document constituting the bargain but not by document merely recording already completed transaction—Proof of mortgage by proof of fact of deposit of title-deeds is permissible only in the latter case which is generally indicated by cash payment prior to execution of document—Terms of document are preferred to oral evidence.*

The test is, did the document constitute the bargain between the parties or was it merely the record of an already completed transaction? If it constitutes the bargain, then the rule applies that where contracts are reduced to writing parol evidence can't be given of their contents. In order to prove the mortgage the plaintiff would have to attempt to put in as evidence the document and if it is a mortgage document he would be precluded from so doing by the Transfer of Property Act and under the Registeration Act, if it is not registered. 41, M. L J. 297 Diss. The easiest guide is the question whether or not the money was paid before the making of the document, because if the money is handed over contemporaneously with or in exchange for, the document or after the document, it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. As a general rule the terms of the document itself are a better guide to the truth than the verbal evidence given afterwards by persons either trying to escape from the liability or to establish it. (1919) 57 I. C. 686 dist. (1923) I. L. R. 50 C. 338 Foll. [P 547 C 2; 548 C 1]

V. Radhakrishnayya—for Appellant.

H. Rama Rao—for Respondents.

Schwabe, C. J.—This is an appeal from the jdugment of Phillips, J. in which he decided that a loan made to the defendant by the plaintiffs' firm secured by promissory notes and by deposit of title-deeds was secured by a valid equitable mortgage.

The facts of the case are that the defendant was a servant in a certain firm and had borrowed from time to time monies from that firm secured by promissory notes and by deposit of title-deeds of his house. The firm dissolved and the plaintiffs' firm took over the asets and liabilities of the firm and continued the defendant in their employment. Shortly after the taking over of the firm, they made an advance of Rs. 500 to the defendant and took a promissory-note from him for the outstanding amount of his indebtedness to the old firm plus Rs. 500 and at a later date they made further advance to him, same secured by promissory notes. About the time of the advance of Rs 500 the document Ex B was executed by the defendant and it runs thus. "Collateral security letter in respect of a house executed in favour of Messrs. Perur Viswanadham and Koneti Desikacharyulu Company of Madras. As you have this-day obtained an assignment of the sum of Rs. 1,945 due by me to Messrs Peruru Viswanadham and Co., the same being the sum of principal and interest due, I have this day executed a pro-note in your favour for this sum and the sum of Rs. 500 taken to day, *i. e.*, the total of Rs. 2,445; so let it be known that for that I have retained with you as collateral security my document of the Collector's certificate No. 815, in respect of my house bearing door No. 11 in Tiruvateeswaranpet, Madras." This, I understand from my learned brother, is a more accurate translation than that printed in the documents. The defendant says that, that document, is in itself an equitable mortgage of his house and, as it has not been registered, it cannot be given in evidence.

The law on the subject has on several occasions been said to be quite clear, but the application of the law, as far as I can see, has not been easy. The Privy Council in *Subramanyan* v. *Latchman* (1) applying the principles laid down by Lord Cairns in the leading case of *Shaw* v. *Foster* (2) said, "the test is, did the document constitute the bargain between the parties or was it merely the record of an already completed transaction?". If it constitutes the bargain, then, on the well-known rule that, where contracts are reduced to writing, you

(1) [1923] 50 Cal.—338 44 M. L. J 602 (P.C.)
(2) L. R. 5 H. L. 321.

cannot give parol evidence of their contents, in order to prove the mortgage, the plaintiff would have to attempt to put in as evidence the document and, if it is a mortgage-document, he would be precluded from so doing by the Transfer of Property Act, and under the Registration, Act. The question in each case, which it is difficult to decide, is whether or not, the document does constitute the bargain, or is merely a record of a completed transaction : and I think that when one looks at the cases, the easiest guide is the question whether or not the money was paid before the making of the document, because, if the money is handed over contemporaneously with, or in exchange for, the document or after the document, it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. In order te arrive at the true facts in respect of that question, I think that the first thing to do is to look at the document itself. In many cases, it will appear from the document that the document is handed over before any advance is made ; in some cases it will appear from the document, that the document comes into existence in reference to a past advance, as for instance, where an advance is secured by a promissory note and the document giving equitable mortgage of the property as security is dated at a later date than the time of the advance; and, as a general rule, the terms of the document itself are a better guide to the truth than the verbal evidence given afterwards by persons either trying to escape from the liability or to establish it. The terms of the document are to the effect that the matter had already been completed, and I do not think that this document was made to create a charge. I think, it was merely recording the charge which had already been created, and I think, it can be said that there was here a completed contract of mortgage before the letter was passed, so distinguishing it from *Bairab Chandra Bose* v. *Anathnath De* (3), where, on the terms of the document there, and from the surrounding circumstances, it was held that it could not be said that there had been a completed contract before the letter was passsd. I rely mainly on the past tense used in the letter. It says that the promissor has executed the promissory note and that he has taken a sum of Rs. 500 and he purports to inform the new firm that he has left with them his documents as collateral security. I think, on the whole it is merely recording the facts for their information and, of course, in order to provide them with strong evidence if necessary, and not making the bargain by the letter.

The oral evidence is not satisfactory. The defendant himself does not make good on his evidence the case for which he is contending. The evidence called by the plaintiff is not satisfactory because it is that of gumastas who knew very little about the facts and that of a partner of the firm who, though gives some strong evidence from which it could be inferred that the bargain had been in fact completed before this document, he does not pretend to have been present or to be able to give definite first-hand evidence of the facts.

On the whole, I must come to the conclusion that the learned Judge is right. I should add that, in his judgment, he expressed the view that, even if this document did contain the terms of the contract made, it would be possible for the plaintiffs to prove their equitable mortgage by proving the fact of the deposit of the title-deeds with them. In so holding, he was following the decision in *Elumalai Chitti* v, *Balakrishna Mudali* (4), which, I think, in view of the later decision of the Privy Council in *Subrahmaniam* v. *Latchman* (1), can no longer be taken to be the law.

The appeal must be dismissed with costs. The Receivers may take their costs from the estate in the first instance. Six months' time is allowed for redemption.

Ramesam. J.—I would add, that the translation of Ex. B, even in the first sentence, is not strictly accurate. It ought to run, "As I have this day got novated in your favour the sum of Rs. 1,945. etc." The Telugu is "*Avala*"

(3) [1919] 57 I. C. 686.

(4) [1921] 41 M. L. J. 297.

which means *novation* and not *assignment.* If the plaintiffs' firm are assignees from the old firm, strictly the assignment would have to be by a registered instrument. But no such difficulty arises. I agree with my Lord's judgment.

Appeal dismissed.

✱ ✱ 1924 MADRAS 549

ODGERS, J.

Bharata Ayyar, In Re.

Cr. Rev. No. 913 of 1923, Decided on 13th December 1923, from the order the Sub Divl. Magistrate of Malappuram, D/-27th October 1923.

✱ ✱ *Criminal P. C., S. 488—Inability is physical or pecuniary inability.*

The ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained and is being maintained as to a child which is able to earn a living by its own exertions. 39 Mad. 957, 10 L. W. 339 foll. [P. 549 C. 2]

N. R. Sesha Aiyar—for Petitioner.

Order.—This is an application to revise the order of the Sub-Divisional Magistrate of Malappuram, made under S. 488, Criminal Procedure Code, wherein he ordered the petitioner to pay a monthly allowance of Rs. 4, for the maintenance of the child of the respondent, a Nair woman, the petitioner being a Brahmin. The petitioner denied the *sambandham* and disowned the paternity of the child. The learned Magistrate, however, observed that his Vakil did not press this point seriously, either in the cross-examination of the prosecution witnesses, or in his own defence, and has come to the finding that the paternity of the child is proved. The main point relied upon before the lower Court was that the woman was in a position to maintain the child, and therefore the father was not liable to maintain it. Mr. N. R. Sesha Aiyar before me has taken the same point and relies on two decisions of this Court, namely *Chantan* v. *Mathu* (1), and *Thillu Amma* v. *Sankunni Menon.* (2). In the former case, it was held that a child that possesses a right to maintenance from its mother's *tavazhi* is not entitled to an order for maintenace against its father. It was also held that the words "unable to maintain" are not confined to physical inability, but to include also pecuniary inability. Abdur Rahim, J., in that case said:

"I think the ability contemplated by the section applies as much to the case of a child, which has got means of its own, or which is entitled in law to be maintained, and is being maintained, as in this case by some other person, as to a child which is able to earn a living by its own exertions."

In the later case, in *Thillu Amma* v. *Sankunni Menon* (2), to which Ayling, J., was also a party, as in the earlier case which was followed, the learned Judges say that the offspring of a *sambandhan* are entitled to maintenance from their *tavazhi* and if the *tavazhi* or *tarwad* has sufficient means to maintain them, they are not entitled to an order for maintenance against their father. And the reason, which prompted the learned judges there, to revise the order of the Magistrate, was that the lower Court had not found what the income of the *tavazhi* was, nor had it given any finding as to the income of the *tarwad.* In this case, the learned Magistrate has found as a fact that the respondent's *tarwad* is not in a position to maintain the child, without an allowance from the petitioner. Sitting here in revision, I am bound by that finding of fact. I must therefore dismiss this Criminal Revision Case.

Petition dismissed.

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(1) [1916] 39 Mad. 957.
(2) [1919] 10 L. W. 229.

✱ ✱ 1924 MADRAS 550

PHILLIPS AND VENKATASUBBA RAO, JJ.

Sankaranarayana Pillai and others—Defendants—Appellants.

v.

Rajamani and others—Plaintiffs and Defendants—Respondents.

F. A. Nos. 216 and 272 of 1921' Decided on 21st November 1923, from the decree of Addl. Sub. J. Tinnevelly in O. S. No. 9 of 1920.

✱ ✱ (*a*) *Provincial Insolvency Act, 1907, S. 18—Property of sons of insolvent can be sold by Official Receiver and sale by him without express exclusion of son's interests passes interest of sons.*

Where the Official Receiver had power to sell not only the share of the adult insolvents but had also vested in him the power of these insolvents as fathers to sell their sons' interest in the property for the payment of antecedent debts and where the recital in the deed was that the property belonging to all the members of the family was sold and there was no specific recital that the shares of the various persons were sold separately.

Held: the property which purported to be sold and which actually was vested in the Official Receiver would pass to the vendees and that property includes the shares of the sons. R. 43 C. 56; I. L. R. 25 A. 407 (P, C.) (1915) M. W. N. 908. (1919) M. W. N. 356 foll. 34 A. 296. (1913) 36 M. 295 Dist. 28 I. C. 365 not appr. [P. 551, C. 1]

✱ ✱ (*b*) *Provincial Insolvency Act (1907), S. 18—An order "referred to official receiver for further proceedings" vests property in Receiver.*

Where the order of the District Judge on the insolvency petition was as follows. "Petitioner examined. No opposition. Adjudication order passed. Referred to Official Receiver for urther proceedings."

Held: the Court having passed an order of adjudication and referred the insolvency petition to the Official Receiver for further proceedings, must have intended to appoint and be deemed to have appointed the gentleman called "Official Receiver" as the receiver in this particular insolvency. The proceedings referred to in the District Judge's order must not be read as meaning judicial proceedings only. [P. 552, C. 2]

T. R. Venkatarama Sastri, T. L. Venkatarama Aiyar, K. Rajah Aiyar and *P. V. Krishnaswami Aiyar* — for Appellants.

A. Krishnaswami Aiyar, and *K. V. Sesha Aiyangar*—for Respondents.

Phillips, J.—The plaintiffs in this suit are the sons of defendants 1 and 2 and in 1912, defendants 1 and 2 and 3rd defendant who were carrying on business together were adjudicated insolvents, and at the same time the plaintiffs who were made parties to the insolvency petition were also adjudicated. The family properties of defendants 1 and 2 were sold by the Official Receiver and now the plaintiffs bring this suit to recover their 4/9ths share in that property on the ground that they were wrongly adjudicated insolvents and that consequently, the sale of their property by the Official Receiver was void as against them.

Assuming that the plaintiffs who were then minors were wrongly adjudicated insolvents, the question remains whether the sales effected by the Official Receiver did or did not pass their interest in the family property.

The sale is objected to, on two grounds, firstly, that the Official Receiver purported to sell the share of the plaintiffs and, not having authority to do so as their adjudication was illegal, the property did not pass; and, secondly, it is contended that the property of the insolvents did not vest in the Official Receiver. The Subordinate-Judge has decided the second point against the plaintiffs but has found on the first point that the Official Receiver purported to sell the plaintiffs' share as well as the shares of their fathers, defendants 1 and 2, and that, as he had no right to sell the minors' shares, the same is not binding upon them. On referring to the sale-deeds Exhibits XVI, XXII, XXVIII, XXX, etc., we find that the Official Receiver sold the properties belonging to defendants 1 to 3 and the plaintiffs. In several of the sale-deeds there is also a recital that these persons had all been adjudicated insolvents, and it is these documents that the Subordinate Judge has interpreted as constituting a sale of the minors' rights in the property separately from the rights of those legally adjudicated insolvents. The appellants, however, rely on two cases decided by the Privy Council, namely

Bijraj Neopani v. *Pura Sundary Dasee* (1) and *Gharibullah* v. *Khalak Singh* (2). The former was a case of a sale wherein the vendor purported to sell certain property as the beneficial owner. As a matter of fact, he was not entitled to the property as beneficial owner, but, as an executor, he had full title to the property and it was held that, inasmuch as he purported to pass the whole of the property and had power to do so as executor, the title passed, it being held that "the plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution." Applying this principle to the present case, we find, that the Official Receiver had power to sell not only the share of the adult insolvents, but had also vested in him the power of these insolvents as fathers to sell their sons' interest in the property for the payment of antecedent debts. The Official Receiver had therefore, power to sell the shares of the plaintiffs as well as of the fathers. The recital in the deed is that the property belonging to all the members of the family is sold and there is no specific recital that the shares of the various persons are sold separately. It is, therefore, difficult to read into the document any intention to sell the shares separately, and, in accordance with the principle of *Bijraj Neopani* v. *Pura Sundary Dasee* (1) it must be held that the property which purported to be sold and which actually was vested in the Official Receiver would pass to the vendees, and that property includes the shares of the sons. The second case *Gharibullah* v. *Khalak Singh* (2) is a case where the manager of a family mortgaged, in conjunction with another major member of the family and a minor represented by his mother as guardian, the whole family property. Although it was held that the mother as guardian of the minor could not make a mortgage of the minors' property without the sanction of the Court which was not obtained, it was held that the managing member had power to sell the whole property for the benefit of the family, and that, therefore, the whole of the property passed. Here again although the minor's interest purported to be conveyed, and the minor through his guardian was a party to the document yet as the manager had the right to dispose of the minor's interest also, the minor's interest was deemed to have been mortgaged. On the authority of these two decisions, I think it is clear that the sale deeds executed by the Official Receiver had the effect of passing the interest of the minors but it is argued for the respondents that there are other cases of the Privy Council which take a contrary view, namely, *Balwant Singh* v. *R. Clancy* (3) and *Ganesh Rao* v. *Tuljaram Rao* (4), but both these cases are distinguishable. In the former case there was a specific statement in the sale deeds that the vendor was the only sharer in the property and he did not in any way purport to dispose of the rights of his brother who was subsequently found to be entitled to a share. The document was explicit and referred only to the interest of the actual vendor. In the second case a father and his son entered into a compromise of a suit, the father purporting to act as guardian of the son. It was there held that, as the father had not obtained the permission of the Court to enter into the compromise the compromise was not binding on the son, and the plea that the father could have entered into the compromise in his personal capacity and thereby made it binding on his minor son was not accepted, although the case in which the minor is represented by some other person as guardian was expressly left open, possibly with reference to the decision in *Gharibullah* v. *Khalak Singh* (2). On the ground therefore that the compromise was entered into by the father not only on his own behalf but on behalf of his son, and that he had not obtained the permission of the Court, the compromise was held not to be binding

(1) [1914] 42 Cal. 56 (P.C.)
(2) [1903] 25 All. 407 (P.C.)
(3) [1912] 34 All. 296 (P.C.)
(4) [1913] 36 Mad. 295 (P.C.)

under S. 462 C. P. C. I am, therefore of opinion that the sales by the Official Receiver which purported to sell the whole property belonging to the family had the effect of passing the whole property, for the right of disposing of the whole property had become vested in the Official Receiver, and he must be deemed to have sold that right. I may also refer to two decisions of this Court in support of this conclusion: *Surappa Raju* v. *Venkayya* (5) and *Rajagopalan* v. *Subbarama Iyer* (6). Another case relied on by the appellants, *Sabapathy Chetty* v. *Ponnuswami Chetty* (7) is apparently in conflict with the Privy Council decision in *Balwant Singh* v. *R. Clancy* (3), but it is unnecessary to discuss that question here. It has been repeatedly decided that the power of a father to dispose of his son's share does vest in the Official Receiver, when the father becomes insolvent, and there was nothing in Mr. Krishnaswami Iyer's argument of sufficient force to induce me to re-open the question. In view of this finding, the plaintiff's suit would have to be dismissed; but Mr. A. Krishnaswami Iyer seeks to support the decree on the ground that the decision of the Subordinate Judge that the property of the insolvents had become vested in the Official Receiver is wrong. The order of the District Judge on the insolvency petition was as follows— Petitioner examined. No opposition. Adjudication order passed. Referred to Official Receiver for further proceedings. * * * * * It is now contended that this order does not amount to the appointment of a receiver under S. 18 (1) of the Provincial Insolvency Act and that, consequently, the property did not vest in the Official Receiver. That section runs as follows. "The Court may at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver." It has been held in several cases in this Court that an appointment order is necessary and that the property does not vest in the Official Receiver without such order, but I would hold that even if this proposition is conceded it does not help the respondents because there is an order of appointment in this case. Under S. 19 (1) "the Local Government may appoint such persons as it thinks fit (to be called Official Receiver) to be receiver under this Act." In the present case such a receiver had been appointed by the Local Government for the District of Tinnevelly and it appears to me that the Court, having passed an order of adjudication and referred the insolvency petition to the Official Receiver for further proceedings, must have intended to appoint and be deemed to have appointed the gentleman called "Officeial Receiver" as the receiver in this particular insolvency. I am not prepared to hold, as contended by Mr. Krishnaswami Iyer, that the proceedings in the District Judge's order must be read as meaning judicial proceedings only, his argument being that the reference was merely a reference to the Official Receiver to exercise the powers which could be delegated to him under S. 52 of the Act. No such limitation is found in the order itself and therefore, the order "Referred for further proceedings" is only intelligible in the view that the case was referred to the person who had been appointed receiver under the Act, with the intention that he should act as a receiver in this particular case and the order amounts, to an order of appointment. It is quite clear that the Court, the Official Receiver and all the parties acted under the impression that a receiver had been appointed and that the insolvents' property vested in him. This order was in 1912 and even when this suit was brought in 1918, it was recited in the plaint that the property vested in the Official Receiver, and it was only during the course of the trial that the question was raised by the plaintiffs, apparently upon a perusal of the order of the District Judge and of a subsequent formal order passed by him in 1916 appointing the Official Receiver for the property of the insolvents in this case. This subsequent

(5) [1915] M.W.N. 908.
(6) [1919] M.W.N. 356.
(7) [1915] 28 I.C. 365.

order was not passed by the same Judge who passed the original order and cannot affect in any way the meaning of the former order. The cases relied upon, namely, *Official Receiver of Trichinopoly* v. *Soma Sundaram Chettiar* (8), *Muthuwswami Swamiar* v. *Somo Kandiar* (9) and *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (10) are cases in which no order of appointment had been made. The petitions of the insolvents having been sent to the Official Receiver before adjudication, such an order passed before adjudication, could hardly be interpreted as an order passed at the time, or after adjudication, under S. 18 (1). Those cases are therefore, of little value in the present case in the view that I take of the District Judge's order of 1912 which was passed at the time of adjudication. There is another case reported in *Subba Iyer* v. *Ramaswami Iyengar* (11) in which it was held that, although there had been no order appointing a receiver, yet the acts done by the the official Receiver in administering the estate would be deemed to be acts done as agent of the Court, such acts being subsequently ratified and, therefore, valid. It is suggested that the decision in *Subba Iyer* v. *Ramaswami Iyengar* (11) is not right, because at the time the order of agency was passed property had not vested in the Court; but whether or not this is a valid objection the same objection cannot be taken in the present case, because by the order of adjudication the property became vested in the Court. Accepting this case as an authority for the proposition that the Official Receiver could act as an agent, it is clear that the subsequent ratification by the Court would make the proceedings valid. I would, therefore, hold that the property of the major insolvents was vested in the Official Receiver at the date of the sale and, consequently, the sales are effective either as acts of the Receiver properly appointed, or as the agent of the Court.

Several other pleas were raised by the plaintiffs, such as the immoral nature of the debts incurred by their father, the fraud practised by the Official Receiver in administering the estate, and collusion between him and the creditors. These points have been found against the plaintiff in the lower Court, although there are several remarks in the Judgment which go to show that the learned Subordinate Judge thought that there was a good deal of force in the contentions but it is now conceded by Mr. Krishnaswami Aiyar that he can point to nothing in the evidence to substantiate these pleas of immorality or fraud. I may add that the fraud was not specifically pleaded, nor was an issue taken thereupon, and it would hardly be fair to allow fraud to be proved without specific allegation thereof.

As a result of the above, the appeals are allowed and the plaintiff's suit dismissed with costs throughout.

Venkatasubba Rao, J.—I agree.

Mr. T. R. Venkatarama Sastri, the learned Vakil for the appellant, assumed without admitting that the adjudication of the minor plaintiffs as insolvents was illegal, and the appeal was argued on this footing. The first question that arises is under the conveyances from the Official Assignee does the entire property pass to the alienees or does the interest only of the adult co-parceners pass? The learned Sub-Judge has found that the debts of the 1st and 2nd defendants were not incurred for illegal or immoral purposes and it is now a settled rule that the Official Receiver can exercise the right of the father to dispose of the sons' interest in ancestral immoveable estate for the payment of the father's debts not tainted with illegality or immorality. The sale-deeds filed in the case show that the Official Receiver purported to convey his entire interest in the properties in question. It is no doubt true that he professed to act as the assignee of the adult as well as the minor insolvents and that he did not purport to exercise the power possessed by a Hindu

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(8) [1916] 30 M.L.J. 415.
(9) [1920] 43 Mad. 869.
(10) [1921] 41 M.L.J. 78.
(11) [1921] 44 Mad. 547.

father to dispose of his sons' interest, for causes which are recognised as just and proper. But all the same, I think in the circumstances the alienees acquired the right and title of the Official Receiver which he possessed in every capacity.

In *Bijraj Neopani* v. *Pura Sundary Dasee* (1) it was held that the title vested in an executor passed under the deed by which he purported to convey all his right and title in the property sold although he did not expressly state in it, that he was conveying the property in his capacity as executor. Their Lordships observe : "The deeds state plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used, interpreted in its natural sense."

This principle was also recognised in *Gharibullah* v. *Khalak Singh* (2). One of the three brothers constituting an undivided Mitakshara family was a minor, and his mother as his guardian executed the mortgage deed along with the two adult brothers. It was found that the mother was incompetent to act as the minor's guardian but their Lordships held that the mortgage must be considered to be a mortgage by the family entered into by its *Karta* and could, so far as the mortgage was found to have been made for the benefit of the family and for legal necessity, be enforced against all the members.

The true principle deducible from these cases seems to be this. The first question that arises is, did the executant purport to pass the whole property ? The next question is was he in a position to validly convey it ? If the two questions are answered in the affirmative, the third question arises ; is there anything in the deed to repel the presumption that he intended to convey the title he possessed in every capacity ? Judged by this test there can be no doubt that the alienees before us acquired the interest of the fathers as well as of the sons in the properties conveyed by the Official Receiver.

Mr. Alladi Krishnaswami Aiyar, the learned Vakil for the respondent, contended that the interest of the sons did not pass and relied upon *Balwant Singh* v. *R. Clancy* (3). The ancestral family in that case consisted of Sheoraj Singh and Maharaj Singh. The former was the sole mortgagor and by the deed of mortgage, after declaring that he was the absolute owner and that there was no sharer in the property, he purported to mortgage it. Maharaj Singh was not a mortgagor and he was made a party to the deed in order that the fact of his having signed it, might afford evidence that he had assented to the taking of the loan and the granting of the mortgage by Sheorai Singh. Their Lordships found as a fact that Maharaj Singh was a minor on the date of the mortgage and held that as the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh the mortgage-deed did not affect the latter, or his interest in the estate.

This decision is not opposed to the two cases already cited for in it the essential elements I have referred to are wanting. Sheoraj Singh obtained the loan in his assumed position of the absolute owner of the estate and not as the manager of the joint Hindu family. There was an implied denial by him of his possessing any capacity which is consistent with the recognition of the minor's title and while he denied the minor's right, he could not be held to have conveyed the estate on behalf of the minor. In the circumstances it was unnecessary to find whether Sheoraj Singh was in a position to validly convey the property and accordingly although the High Court gave a finding that he was not, the Judicial Committee did not consider it necessary to deal with that question.

I am of opinion that the present case comes within the principle enunciated and acted upon in *Bijraj Neopani* v. *Pura Sundary Dasee* (1) and *Gharibulla* v. *Khalak Singh* (2) and that our decision on this point must therefore be in favour of the appellant.

I now proceed to deal with the next argument of Mr. A. Krishnaswami Iyer that the properties did not vest

in the Official Receiver. S. 18 (1) of the Provincial Insolvency Act III of 1907 runs thus—"The Court may at the time of the order of adjudication, or any time afterwards, appoint a receiver for the property of the Insolvent, and such property shall thereupon vest in such receiver." On the 29th November 1922, the District Judge made the following order; "Adjudication order passed. Referred to Official Receiver for further proceedings." The argument is that the Court did not appoint a receiver for the property of the insolvent and that therefore it did not vest in the receiver. I do not think this argument is sound. No set form of words is prescribed to make the appointment of Receiver. In this case the order directs Official Receiver to take further proceedings. S. 20 of the Act sets out some of the proceedings he was to take. It says that the Receiver shall realise the property of the debtor and for that purpose may perform certain acts. These proceedings the Official Receiver could not take, unless he was the receiver of the estate. The order by implication, therefore appoints the Official Receiver, for the property of the insolvent. The parties, the Court, the Receiver himself and strangers to the estate, understood the order in this sense. That the plaintiffs also understood it in the same way is apparent from their plaint. Mr. Krishnaswami Aiyar contends that the word "proceedings" means "Judical Proceedings" and that the order is to be construed as directing the Receiver to exercise the jurisdiction delegated to him under S. 52 of the Act. But I am unable to accede to this contention. The word "Proceedings" does not occur in S. 52 whereas it occurs in S. 20, and in the latter section the proceedings contemplated have reference to the administration of the insolvents' estate. This being my construction of the order in question, the cases relied upon by the learned Vakil, namely, *Official Receiver, Trichinopoly* v. *Somasundaram Chettiar* (8), *Muthuswami Swamiar* v. *Somoo Kandiar* (9), *Vythiling Padayachi* v. *Ponnuswami Padayachi* (10) and *Kavali Sankara Rao* v. *Ramakrishnayya* (12) are distinguishable.

There is yet another ground on which the sales by the Official Receiver may be upheld. Under S. 16 (2) (*a*) on the making of an order of adjudication the property of the insolvents vests in the Court and under S. 23 where no Receiver is appointed the Court has the rights of a Receiver. S. 20 provides that the Receiver shall realise the property of the debtor and for that purpose may sell any property of the insolvent. Cl. (*e*) of the same section says that the Receiver may appoint an agent to take any proceedings. Reading the order in question in the light of the above sections, it is obvious that in any event the Official Receiver was empowered by the Court as its agent to sell the properties, and the sales effected by him are valid in this view. This was in effect what was held in *Subba Iyer* v. *Ramaswami Iyengar* (11) and I am prepared to follow it. On this point also, therefore, the respondent fails.

In the result I agree with the order proposed by my learned brother.

By the Court.— The memorandum of objections in Appeal No. 216 of 1921 is dismissed. There will be no costs.

Appeal allowed.

(12) [1923] 46 M.L.J. 184.

✱ ✱ 1924 MADRAS 555

KRISHNAN, J.

Appaswamy Mudali and others, In Re.

Cr. Rev. Case No. 715 of 1923, and Cr. Rev. P. No. 573 of 1923, Decided on 7th February, 1924, against the judgment of joint Magistrate, Hosur in Cr. A. No. 13 of 1923.

✱ (*a*) *Criminal P. C., S. 55 (c) — Suspicion does not justify arrest.*

Arrest under S. 55 (c) is not justified by mere suspicion that the accused was concerned in several offences since the section refers to reputed habitual offenders. [P. 557 C. 1]

* * (*b*) *Penal Code, S. 225 (b)—Resisting arrest on ground that it was unlawful under the alleged section though legal under another section is no offence—Cr. P. Code. Ss. 54 and 55 (c)*

When a constable arrests a man and tells him expressly that he is doing so under a particular authority, which he claims to have, to arrest him and if such arrest is resisted, it will be for the prosecution afterwards to establish that the constable who arrested the man had power to act under the authority that he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority under some other provision of law. Any man who is being arrested, has a right to ask the officer arresting him to show him what power he has to do so. If the arrest is under a warrant, the man arrested is entitled to ask that the warrant be shown to him to see that he is being properly arrested and when the warrant is not shown to him and the arrest is made, such an arrest will not be a legal arrest A man is entitled to know when a constable is arresting him, under what power he is acting and if he (constable) states that he acts under certain power, which the man knows he has not got, he is entitled to object to arrest and to escape from custody when he is arrested.

[P. 556, C. 2]

V. L. Ethiraj—for Petitioners.

J. C. Adam—for the Crown.

Order—In this case the three petitioners before me have been convicted, under S 225-B of the Indian Penal Code and sentenced to various fines by the Sub-Magistrate of Denkanikota, and their conviction has been confirmed by the Joint Magistrate of Hosur.

The prosecution case is that certain constables were sent to the village of Ullugurkki on the 29th May, 1922 and P. W. 1, a constable, arrested the first accused and took him by his hand. Then, it is said, the accused asked him why he arrested him and that the constable told him that he was arresting him under S. 54 of the Criminal Procedure Code. The accused seems to have resisted this arrest, on the ground that he was not liable to be arrested under S. 54 Criminal Procedure Code. The constable who arrested him had no warrant for his arrest. Accused 2 and 3, who are the sons of the first accused, also seem to have taken part in resisting the arrest. All the same, all the three accused were arrested by the constable and taken to the Police Station. The charge under S. 225-B is on the ground that the father tried to escape from custody, after he was arrested and that the sons helped him to do so. S. 225-B requires that the custody from which a man tries to escape must be a lawful custody; he must have been lawfully arrested and detained; then only he is liable to conviction under S. 225-B. It is not denied in this case that the constable had no power to arrest the first accused, under S. 54 Criminal Procedure Code. When the prosecution found its weakness after the case was almost nearly over in the lower Court, they changed the case and contended that the 1st accused was arrested under S. 55 (*c*) and that the arrest was legal.

The question that arises before me is whether, when a constable goes and arrests a man and tells him under what authority he is arresting him, when that authority is not a lawful authority, can the man arrested, be convicted and punished under S. 225-B for resisting such arrest, although the constable might have authority to arrest him under some other provision of law. For the purpose of deciding the point, I will assume that if the arrest had been under S. 55 (c), it would have been a lawful arrest. That is a question which I shall consider presently. I have come to the conclusion that when a constable arrests a man and tells him expressly that he is doing so under a particular authority, which he claims to have to arrest him and if such arrest is resisted, it will be for the prosecution afterwards to establish that the constable who arrested the man had power to act under the authority that he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority under some other provision of law. I think, any man who is being arrested, has a right to ask the officer arresting him to show him what power he has to do so. If the arrest is under a warrant it has been held that the man arrested is entitled to ask that the warrant be shown to him to see that he is being properly arrested and that, when the warrant is not shown to him and the arrest is made, such an arrest will not be a legal arrest. A man is entitled to know when a constable is arresting him, under what power he is acting

and if he (the constable) states that he acts under certain power, which the man knows he has not got, I am not prepared to say that he is not entitled to object to such arrest and to escape from custody when he is arrested. So far as S. 54 is concerned, no attempt has been made before me to justify the arrest, and it seems to me that on that ground this petition ought to succeed.

Apart from it, even under S. 55 (c), I am not satisfied that the prosecution has proved that the constable has authority to arrest the man. That clause says: "Any person who is by repute an habitual offender, housebreaker or thief, or a habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or, in order to the committing of extortion, habitually puts or attempts to put persons in fear of injury," may be arrested by an officer in charge of a Police Station There is nothing before me to show that there was any ground for taking action under S. 55 (c), by the Police in this case. The officer, who ordered his arrest and gave evidence as C. W. 1, only says that he had reason to suspect that the first accused was concerned in several offences. He does not say anything about his being reputed to be a habitual robber, or house-breaker; at the time he gave evidence, the prosecution case was that the arrest was made under S. 54 and not under S 55 (c); so that his evidence does not relate to a case under S. 55 (c) at all.

In these circumstances, it seems to me that the arrest of the first accused cannot be considered to have been a lawful arrest and his attempt to escape from custody would not fall under S. 225-B, Indian Penal Code. He must therefore be acquitted, and as a result of his acquittal, accused 2 and 3 must also be acquitted. The fines, if paid, will be refunded to them.

Accused acquitted.

✱ 1924 MADRAS 557

SCHWABE, C. J. AND WALLER, J.

C. Doraivelu Mudaliar and others—Plaintiffs—Appellants.

v.

G. R. Audikesavalu Naidu—Defendant—Respondent.

O. S. Appl. No. 46 of 1922, Decided on 14th November 1923, from the order of Kumaraswami Sastri. J., D/- 27th February 1922.

✱ *Receiver—Receiver appointed in pursuance of scheme decree is not discharged by slight modifications in scheme by appellate Court.*

A suit was brought on the original side for a scheme to be framed in relation to a temple. It was decreed and a scheme was framed. During pendency of an appeal from it application was made to a Judge sitting on the original side for the appointment of a receiver and an order was made appointing a receiver. The appellate Court affirmed the decree of the Court below with slight modifications in the scheme. After the order in appeal a Judge's summons was taken out on the original side for the discharge of the receiver on the sole ground that the effect of the order of the Court of appeal was to put an end to the receivership.

Held that the effect of the order of the Court of appeal was not *ipso facto* to discharge the receiver and that the summons was therefore taken out on entirely wrong grounds and must be dismissed. [P 558 C 1]

V. Sivaprakasa Mudaliar—for Appellants.

A. Duraiswami Aiyar—for Respondent.

Schwabe, C. J.—This is an appeal from an order of Kumaraswami Sastri, J., in Chambers on Judge's summons to discharge the receiver of certain temple property and to order the receiver to put the hereditary trustee of that temple in possession of properties and documents relating to the temple. The facts are these. A suit was brought asking for a scheme to be framed in relation to the temple, which was tried by Kumaraswami Sastri J., and he in due course gave a decree and framed a scheme. An appeal was lodged against that decree and there was a cross-appeal. Before the case came on in appeal, an application was made before Phillips, J. for the appointment of a receiver, there being allegations made that the trustee did not properly account, would not hand

over or produce books, and was not behaving as a trustee should behave under the scheme as framed by Kumaraswami Sastri, J., and having heard the application on several occasions with the trustee before him, Phillips, J., ordered that a receiver should be appointed. The appeal then came on and this Court confirmed the order of Kumaraswami Sastri, J., but to some extent, not to a very great extent, modified the scheme as framed by him. The scheme stands in operation as from the date fixed by Mr. Justice Kumaraswami Sastri's order with the modifications decreed by the Court of appeal. After the order in Appeal, this summons was issued and the case was put before the Court solely on the ground that the effect of the order of the Court of appeal was to put an end to the receivership and in the words of the affidavit "that the receiver became *functus officio* and automatically ceases to be receiver." The plaintiff and the receiver, alleging, as I understand, that they were supported by the Advisory Board, opposed this summons and alleged that the trustee was still an unfit person to have control. The matter came before Kumaraswami Sastri, J., again and he decided that the effect of the order of the Court of appeal was *ipso facto* to discharge the receiver, and declined to go into any question as to whether or not the trustee was a fit person to have charge or to go into the question whether it was advisable in the interest of the temple that the receiver should be continued.

In my judgment that is wrong. The order of Phillips, J., was made quite irrespective of there being any appeal. His jurisdiction to make the order depended on one or two things, either on the scheme then in operation which provided that applications be made to the Court by summons, or by reason of his powers under O. 40, R 1 of the Civil Procedure Code which gives the Court power to appoint a receiver of any property whether before or after decree, where it appears to the Court to be just and convenient to do so, and that order continued until it was put an end to. It was not put an end to by the Court of appeal which merely varied the scheme. That being so, this order, in my judgment, is wrong, and this appeal must be allowed with costs. The summons which was taken out before the learned Judge was taken out on entirely wrong grounds and must be dismissed with costs. But I wish to make it quite plain that this does not in any way dispose of the real question which both parties say they desire to have decided. It is perfectly open to the trustee, if he is so advised, to take out a fresh summons asking among other things for the discharge of the receiver. It would be open to him on that application to contend that the scheme as framed by the Court of appeal gives ample protection to those interested, and that it is no longer necessary on the facts of this case to have a receiver. It would also be open on that application for the plaintiff, the receiver and the Board, if so advised, to bring any circumstances before the Court as to the conduct of the trustee or otherwise to enable it to arrive at a proper decision on that point. I think that it is unnecessary for me to point out that there are also ample powers under the scheme for the Board or other persons with the consent of the Advocate General to take steps in reference to the conduct of the trustee, if he has been guilty of any misconduct in recent times, as to which we say nothing and express no views.

The result is that this appeal should be allowed and the order of Kumaraswami Sastri, J., is set aside with the result that pending any fresh proceedings, the receiver will be reinstated.

Waller, J.—I agree and have nothing to add.

Appeal allowed.

✱ ✱ 1924 MADRAS 559

SPENCER, OG. C. J. AND KUMARASWAMY SASTRY, J.

B. Baluswamy Aiyar and another—Defendants—Appellants.

v.

C.V. Krishnaswamy Aiyar and others—Plaintiff and Defendants—Respondents.

A. S. No. 39 of 1923, Decided on 28th January 1924, from the Decree of A. J. Madura in O. S. No. 84 of 1922.

✱ ✱ *T. P. Act, S. 83—Amount due being deposited, disputes among the heirs of the mortgagee will not affect the validity of the deposit.*

On a petition under S. 83 the Court is bound to give notice to the mortgagee who must state the amount due on the mortgage and his willingness to accept the amount deposited in full discharge of the mortgage and to deposit the mortgage deeds in the Court and to receive the money. Disputes among legal representatives of the mortgagee as to each other's title to receive the mortgage money will not render the deposit conditional and the mortgagor cannot be made to suffer in consequence, where the correctness of the amount is not disputed. [P 560 C 1,2]

C. V. Anantakrishna Aiyar and R. Srinivasa Aiyangar—for Appellants.

C. Krishnamachariar—for Respondents.

Spencer, Og. C. J.—This is a suit for sale of mortgaged property brought upon a hypothecation bond dated 6th of December, 1917 The interest was at 9 per cent. per annum and in default of payment in regular monthly instalments, it was to be at 15 per cent. Interest was regularly paid until the mortgagee died on the 30th July, 1918. Upon his death, there was a dispute between his widow and his adopted son, as to who was entitled to his estate. Each gave notice, (Exs. VIII and IX) to the mortgagor, not to pay interest to the other claimant. The appellants, who are purchasers of the equity of redemption, paid the money due upto date on the 16th of January, 1920, into Court under S. 83 of the Transfer of Property Act. There was a suit by a stranger against the widow and the adopted son, O. S. No. 49 of 1921, which was compromised by the widow admitting the right of the adopted son.

The Subordinate Judge has given the latter, who is the plaintiff in this suit, a preliminary decree for sale of the hypotheca, in default of payment of the amount claimed including interest and costs within two weeks from the decree. The Subordinate Judge had held that the deposit made by the appellants was not a proper deposit under S. 83, because it was conditional. He says that the appellants, when depositing the amount into Court, requested the Court to decide which of the two counter-petitioners was entitled to receive the amount and also to decide whether the higher rate of interest was payable or not, and further to fix the amount of compensation due for breach of contract, in case the high rate of interest was considered to be penal. We have perused the petition put in by the appellants which is Ex I. The prayer portion of this petition merely asks for the issue of notice to the counter-petitioners, for cancellation of hypothecation deed and the return of the title deeds, and for a direction, that they should take the amount due from the amount deposited in Court and to pay the petitioner's costs. There is no request that the Court should decide whether the higher rate of interest was payable or not and should fix the amount of compensation payable, as the Subordinate Judge surmises. In the body of the petition there is a statement, that it is just, that an order should be passed directing either the two counter-petitioners, or any body, who may be entitled to receive the whole of the said amount, or the amount that may be found due. The Court refused to pass an order upon this petition, on the ground that the counter-petitioners were disputing each other's title to receive the mortgage money, not on the ground that the amount due had not been determined. Neither the widow nor the adopted son in their replies to the petition raised any objections as to the correctness of the amount, deposited. The 2nd counter-petitioner, who is the plaintiff in this suit, stated that he was advised that he was entitled to a larger amount, but he did not say what amount was actually

due to him. The other counter-petitioner said that she was not able to say whether the amounts deposited into Court were the correct amounts, because the 2nd counter-petitioner had taken away the bond. The present plaintiff expressed his willingness to receive the amount deposited, if it was paid to him unconditionally and said that if that was done, he would waive all other objections. The other counter-petitioner similarly asked for the whole amount to be paid to her. There was no prayer on the part of either the petitioner or the counter-petitioner for a regular enquiry as to the exact amount due. On receiving a petition under S. 83, it was the statutory duty of the Court to give notice to the mortgagee, and it was the mortgagee's duty upon receiving such notice to state the amount due on the mortgage and his willingness to accept the money deposited, in full discharge of that mortgage and to deposit the mortgage deed in Court and receive the money. The Court's reason for refusing to pass orders upon this petition was clearly wrong. It has been decided in *Subba Rao* v. *Pakkiammai Nadathi* (1) that the expression "mortgagee" in S. 83 of the Transfer of Property Act includes the legal representatives of the mortgagee and that a deposit by the mortgagor of the mortgage money is payable to the legal representatives as a legal deposit: and in *Nagathal* v. *Arumugam Pillai* (2), it has been held that, where there are disputes amoung the heirs of the mortgagee and money is deposited in Court, but the money is not drawn out owing to those disputes, interest will cease to run from the date of the deposit. In *Ram Sumran* v. *Sahibzada Bijai Partab Narain Singh* (3) where there was a dispute as to the sucession to the estate of a mortgagee and the mortgagor deposited the money in Court on account of the persons so claiming, it was held that he had complied with the requirements of S. 83. The Subordinate Judge was, therefore, in error in treating the deposit as having been conditional on account of the title of the legal representatives being undivided. It was no fault of the mortgagors that the succession to the mortgagor's estate was in dispute and they cannot therefore, be made to suffer in consequence.

As regards the rate of interest due, the 2nd counter-petitioner did not in his reply petition, as he should have done, state how much money was due at that time, nor did he question the sufficiency of the amount deposited. He, therefore, cannot now be heard to argue that the deposit was invalid, because the rate of interest was undecided. The depositors were willing that he should take the whole of the amount deposited, if the principal and interest came to that amount; and it is not now suggested that anything more was due. The Subordinate Judge has further held that the deposit was not a proper one, because interes. was not calculated for the date of the deposit, 16th September, 1920, but interest was deposited for the 5th July, 1918, treating that as the firs: date of the default. The hypothecation deed, being dated the 6th of December, 1917, there could be no default before the 6th of July, and therefore, if interest for one day, namely, the date of the deposit was in defect, it was made up by the amount deposited for the 5th July, 1918, when nothing was due for that date.

It is not necessary to decide the further question, which has been raised before us, that is, whether the Subordinate Judge was right in ordering penal interest to be paid from the date of the default, or whether the Court should allow a reasonable rate of compensation.

Holding that the deposit made by the appellants was a proper deposit, we must allow the appeal and modify the decree, by dissallowing i terest from the date of the deposit in Court, 16th Junuary, 1920. The respondents must pay the costs of the appellants in this Court. Each party will bear his own costs in the Lower Court.

Decree modified

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(1) [1924] 19 M. L. W. 294.
(2) 1923 Mad 354.
(3) [1885] A. W. N. 328.

* * **1924 Madras 561.**

(FULL BENCH.)

SCHWABE, C.J., RAMESAM AND WALLER, JJ.

K. Parthasaradhi Naidu Garu—Petr.

v.

C. Koteswara Rao Garu and another—Respondents.

C.R.P. No. 17 of 1923, decided on 12th November, 1923, from the order of District Court of Guntur, dated the 22nd December, 1922.

(a) *Jurisdiction—Civil Court—Revision.*

Where by statute matters are referred to the determination of a Court of Record with no further provision, the necessary implication is that the Court will determine the matters as a Court. Its jurisdiction is enlarged but all the incidents of such jurisdiction including the right of appeal from its decision remain the same. (1913 A.C. 546, *Foll.*) [P. 561, C. 2.]

(b) *Madras Local Boards Act, 1920, S. 57—Revision.*

The fact that the decision of the Judge is by S. 57 of the Act and by the rules final does preclude any revision. [P. 562, C. 1.]

(c) *Civ. Pro. Code, S. 115—Final decision is revisable for want of jurisdiction.*

There is no better way of directing that there shall be no appeal than by the legislature stating that the decision of a particular Court shall be final. But even a decision which is final is open to revision. [P. 562, C. 1.]

(d) *Madras Local Boards Act, Ss. 56 and 57—Appointment of nominated member can be held invalid only under Ss. 56 and 57.*

There in nothing either in the section or rules giving powers to a District or Subordinate Judge to question the appointment of a nominated member except on the specified ground, namely, disqualification under Ss. 56 and 57. A District or a Subordinate Judge is not intended to have any jurisdiction to decide whether the Local Government or the President of the District or Taluq Board as the case may be, properly exercised their power of appointing members. What he has jurisdiction to decide is whether a person so appointed is disqualified under S. 55 or S. 56 and nothing else. If it is desired to question the appointment of a member it is probably open to question it in Court by proceedings in the nature of *quo warranto*. [P. 563, C. 1.]

(e) *Madras Local Boards Act, S. 23—Absence on visit to Madras is not temporary absence—Appointment order signed at Madras but re-signed again in the district is valid.*

The mere absence for a few days of the President from his district on a visit to Madras does not necessarily vest in the Vice-President the power of appointing members of the Board. But even if it did, the fact that the Vice-President did not make any appointment and the President returned to his district and signed again in his district list of appointments of these members and directed it to be posted on the board where and not in the Fort St. George Gazette, it had by the Act to be posted shows a perfectly proper exercise of the President's powers of appointment. [P. 563, C. 2.]

Dr. Swaminathan—for Petitioner.

C. V. Ananthakrishna Aiyar, V. Ramadas and *Ch. Ragava Rao*—for Respondents.

Schwabe, C.J.:—This is an application for the revision of the decision of the District Judge acting under the powers conferred upon him by the rules framed under the Madras Local Boards Act of 1920. By the rule of the rules issued by the Local Government under the powers conferred on them by section 199 (2) (*c*), "No election of a Member or of a President of a District, Taluq, or Union Board shall be called in question except by an election petition presented in accordance with these rules, to the District or Subordinate Judge having jurisdiction." A preliminary point is taken that this Court has no power of revision, under section 115 of the Code of Civil Procedure over the decision of a District or Subordinate Judge when acting under that rule. That depends on whether the Judges therein referred to are acting as Courts, or acting merely as *persona designata*, that is to say, persons selected to act in the matter in their private capacity and not in their capacity as Judges. There has been considerable conflict of opinion on this point since the coming into force of this Act, and I do not think that the decisions that have been given on the matter are of great assistance to us in arriving at the proper conclusion, and we have to look at the Act and the rules and the law as it stands. The law is, I think, quite definitely established by the decision in *National Telephone Company, Ltd.* v. *Postmaster General* (1) in the words of Lord Parker at page 562 that "where by statute matters are referred to the determination of a Court of Record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction, is enlarged but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same." If this matter had been referred to the District Court or Subordinate Judge's Court in terms, in my judgment, no question could arise, because, following the words

(1) (1913) A.C. 546.

of the judgment just quoted, the matter would be determined by the Court as a Court, it being given jurisdiction for this particular purpose, and all the incidents which include the incident of being liable to revision must follow, although no appeal would lie in this particular case because an appeal has been expressly precluded, for by section 57 (2) of the Act, and by the rules "this decision is to be final." But as the word "Judge" is used and not the word "Court," one has to look carefully to see whether the word "Judge" was used of him in his capacity as Judge or in his personal capacity, and I think great light is thrown upon this by two other rules. Rule 12 (2) of the rules for election refers to "an election or other competent Court" and it is quite clear that it is there referring to a Court of a District Judge or Subordinate Judge; and, by Rule 4 (3) of the rules for the conduct of inquiries, power is given to the District or Subordinate Judge in certain cases "to direct any Court subordinate to him to hold the inquiry." I find it impossible to hold that a reference to a Judge with power to refer to a Court subordinate to him can mean anything else than reference to a Judge sitting as a Judge in the exercise of his ordinary jurisdiction extended for that purpose. For these reasons, in my judgment the power of revision lies.

It is further argued that the fact that the decision of this Judge is, by section 57 of the Act and by the rules final, preclude any revision. There is really no authority adduced in support of that proposition and, in my judgment, it would be quite contrary to the whole object and intention of section 115 of the Code of Civil Procedure so to hold. That section only applies where there is no appeal. I know of no better way of directing that there shall be no appeal than by the legislature stating that the decision of a particular Court shall be final. It is the ordinary mode of expression used for the purpose in much of the legislation in England on which this legislation is founded; and, where the whole object of revision is to prevent a Court, from which there is no appeal, acting contrary to its jurisdiction, a finding that it is the law that, because the words used are "the decision shall be final," a Court ordinarily subject to the revisional powers of this Court, should be permitted to act wholly without jurisdiction without the aggrieved party being entitled to any remedy, would in my judgment be untenable, and that would be the effect of deciding this second point in favour of the contention put forward.

On these grounds, in my judgment, this Court has revisional power and the preliminary point fails.

The petitioner was duly elected President of the Narasaraopet Taluq Board. A petition was subsequently filed before the District Judge of Guntur for a declaration that this election may be declared void and annulled and that the petitioner one Chinnatalacheruvu Koteswara Rao, a defeated candidate in the election, should be declared to be duly elected. The District Judge found that the petitioner had not been properly appointed a member of the Taluq Board and was, therefore, not eligible for election to the Presidentship of that Board, and the matter comes before us on a petition for revision of that order.

It is contended, on the one side, that the decision of the District Judge was wrong and that this is a case for the exercise by the High Court of its revisional powers under section 115, Civil Procedure Code, and, on the other side, that the decision of the District Judge is right, and that, even if it was wrong, his order is not a proper subject-matter for revision.

The powers of a District Judge in the matter of election petitions are contained in section 57 of the Madras Local Boards Act of 1920, and in the "Rules for the conduct of inquiries and the decision of disputes relating to elections," issued by the Local Government under their powers in that behalf under section 199 of the Act. By section 57 the Judge has power to determine whether an appointed member is disqualified under section 55 or section 56 by reason of the various grounds set out in those sections such as insanity, bankruptcy, being interested in contracts with a local board and the like, none of which are alleged in this case. The petitioner had been appointed by the President of the District Board purporting to act under section 9 of the Act. By the rules above referred to, save as provided in section 57, no election of a member or a President can be called in question except by an election petition presented to the District or Subordinate Judge. This rule is somewhat obscure. I understand it to mean that apart from the powers under section 57 a petition to the District or Subordinate

Judge is the only way of questioning the election. But I can find nothing either in the section or rules giving powers to a District or Subordinate Judge to question the appointment of a nominated member such as the petitioner except on the specified ground, namely, disqualification under sections 56 and 57. At the time of his election as President, he, the petitioner, was *de facto* a member of the Board and as such eligible for election to the Presidentship. It is not suggested that there was any irregularity in the election; but what is suggested is that he was not eligible for election because he was not properly appointed a member by the President of the District Board. Now the appointments of members other than elected members are in certain cases in the hands of the Local Government, in certain cases in the hands of the President of the District Board and in certain cases in the hands of the President of the Taluq Board under section 9 of the Act, and I can find nothing in the Act to suggest that a District or Subordinate Judge is intended to have any jurisdiction to decide whether the Local Government or the President of the District or Taluq Board as the case may be, properly exercised their power of appointment. What he has jurisdiction to decide is whether a person so appointed is disqualified under section 55 or section 56 and nothing else, and in my judgment, on a petition dealing with an election to Presidentship, he cannot go into the question whether a particular candidate was duly appointed a member of the Board. Therefore, in my judgment, the District Judge in this case was acting wholly without jurisdiction in investigating that question and giving his decision upon it, and the matter therefore comes directly under section 115 (*a*) of the Civil Procedure Code. If it is desired to question the appointment of a member, it is probably open to question it in Court by proceedings in the nature of *quo warranto*.

Assuming that the District Judge had power to inquire into this matter, whether it can be said that the High Court has power to revise his order under section 115 (*c*) is a very difficult question and one upon which I do not think it necessary or advisable to express any opinion or to add one more to the many judgments dealing with what does come under that section and what does not; nor do I consider it necessary for the decision of this case to go into the question whether the District Judge was right or wrong in the decision to which he came. But as the matter has been fully argued before us and as it is of considerable importance, I think it desirable that we should express our opinion, *obiter* though it may be.

The facts are that the President of the District Board while temporarily in Madras prepared and signed a list of his appointments including therein the petitioner, and sent a copy of that to the *Fort St. George Gazette*. The District Judge held that, by reason of section 23 (2) of the Madras Local Boards Act, all the appointments thus made were void. That section enacts that "during the temporary absence or incapacity of the President of a District or Taluk Board, the President's functions shall devolve on the Vice-President." By section 25, "the exercise of these powers by the Vice-President shall be subject to such restrictions, limitations and conditions as may be laid down by the President and shall also be subject to his control and revision." I do not think that the mere absence for a few days of the President from his district on a visit to Madras necessarily vests in the Vice-President the power of appointing members of the Board. But even if it did, the fact is in this case the Vice-President did not make any appointment and the President returned to his district, and signed again in his district the list of appointment of these members and directed it to be posted on the board where, and not in the *Fort St. George Gazette*, it had by the Act to be posted. This was a perfectly proper exercise of the President's powers of appointment and, in my judgment, there was nothing wrong with the appointment of the petitioner at all.

It follows that this petition must be allowed, that the order of the District Judge must be set aside. The 1st respondent must pay costs throughout, including the costs of the 2nd respondent.

Ramesam, J.:—I agree with my Lord's conclusion in the judgment delivered that, in the light of the Rules made under the Act, the District Judge must be considered to be a Court and that, notwithstanding the use of the word 'final' in section 57, a revision petition lies to this Court.

The next question is whether there is any question of jurisdiction or material irregularity within the meaning of section 115, Civil Procedure Code. It is not suggested that the District Judge acted with materia

irregularity in the exercise of his jurisdiction. As to jurisdiction, I think, one must start with the principles laid down by the Privy Council in *Balakrishna Odayar* v. *Vasudeva Aiyar* (2). "The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." It follows that an error of law leading to an erroneous order only, does not justify our interference. An error of law leading to the exercise of a jurisdiction which did not exist or to the failure to exercise a jurisdiction which did exist, justifies such interference [see *Atchayya* v. *Sri Seetharamachandra Rao* (3)]. It must be remembered that every error of law cannot be regarded as the exercise of a jurisdiction which does not exist merely because, but for such error, the order of the Court would have been different; otherwise, all erroneous decisions can be modified or revised in revision. I agree with the observations of my brother Wallace, J., in *Ahmed Thambi Maracair* v. *Basava Maracair* (4).

Applying these principles, it follows that, where a District Judge, who has jurisdiction to enquire into an election petition under the rules made under the Local Boards Act, 1920, passed, as the result of his enquiry, an erroneous order based on an erroneous construction of the sections of the Act or the rules, the order cannot be interfered with in revision; and it cannot be said in such a case, that, on account of his error of law, the District Judge exercised a jurisdiction which did not exist or failed to exercise a jurisdiction which existed. For instance when he held erroneously that the appointment of a member or president was void, it cannot be said merely by reason of such error that there was an erroneous assumption of jurisdiction. I do not think that the observations of Channell, J., in *Rex* v. *Manchester Justices* (5) help us in the application of section 115. It is true that these observations have been quoted and applied by my brother Krishnan, J., in *Ramaswami Goundan* v. *Muthu Velappa Gounder* (6), I am unable to agree with all the observations in that case. I also observe that, in that case, the ground of material irregularity was also available.

In the present case before us, I agree with my Lord the Cheif Justice, in holding that the District Judge acted without jurisdiction. Under section 57 he had jurisdiction to enquire into the validity of the appointment of a member only if it is questioned on the ground that he was disqualified under sections 55 and 56. No such ground was alleged or proved and the District Judge had no jurisdiction to enquire into the election petition. We have not here a case of his holding that he had jurisdiction to enquire by an erroneous construction of some section or rule of law. He merely enquired into a petition in which no ground, such as is mentioned in the section, was alleged.

I agree with the order proposed by my Lord.

Waller, J.:—On the first point I agree that the Judge referred to in rule I is not a *persona designata*. Rule IV (3) is, I think, conclusive. A Judge acting as *persona designata* has no Court subordinate to him. I agree also that the description of his decision as final means no more than that there is no appeal against it. It does not mean that a decision made without jurisdiction is not open to revision under section 115, Civil Procedure Code.

It seems to me clear that, in this case, the Judge had no jurisdiction to decide what he did decide. Petitioner was an appointed member of the Board and his appointment could be questioned before the Judge only with reference to sections 55 and 56 of the Act. It could certainly not be questioned in a proceeding of this kind. The Act, no doubt provides that the President shall be elected from among the members of the Board but that provision does not give the Judge jurisdiction on an election petition to consider whether the members have or have not been properly appointed. He cannot disqualify them save on grounds that are not applicable here. The result in the present instance, was the petitioner remained an appointed member of the Board although the Judge had set aside his election as president on the ground that he had not been properly appointed a member. On the last point I agree that petitioner was properly appointed and concur in the order allowing the petition and as to costs.

Petition allowed.

(2) (1917) 40 Mad. 793 (P.C.).
(3) (1913) 39 Mad. 195 (F.B.).
(4) 1923 Mad. 264.
(5) (1899) 1 Q.B. 571.
(6) 1923 Mad. 192.

* * 1924 Madras 565.

SCHWABE, C.J., AND RAMESAM, J.

W. H. Nurse—Defendant-Appellant

v.

Rustomji Dorabji—Plaintiff-Respondent.

O. S. A. No. 78 of 1921, decided on 5th December, 1923.

***Malicious prosecution** — False allegations to the knowledge of the prosecutor indicate malice and advice of Counsel is no justification for the prosecution where true facts are not fully and fairly laid before Counsel.*

By an agreement between the parties plaintiff contracted with the defendant to take on lease a cinema which was to be constructed by the defendant. There was time limit for the building in the contract which was on four sheets of paper bearing a certain original date. The solicitor of both the parties added a fresh front sheet on a stamp paper each time the contract period was altered and it was signed and initialled by the parties. Owing to quarrels due to a desire to alter the contract in a particular way on the side of both parties, the defendant applied for prosecution of the plaintiff for cheating and forgery on the ground that the plaintiff took the new front sheet, attached to it the remaining back sheets of the original agreement and tried to have the documents so prepared registered. The result of this prosecution was acquittal in the Sessions. Plaintiff sued for damages for malicious prosecution, *held*, that as it was the intention of the parties that the new front sheet was to be a part of the document, the prosecution of the plaintiff was without reasonable and probable cause and was also malicious since the object of the defendant was to take undue advantage on account of a pending prosecution of the plaintiff. No doubt where true facts are laid fairly before the legal adviser and on his advice prosecution is started a party is ordinarily protected but not where facts are not fairly laid before the adviser. Where damages of Rs. 35,000 were awarded *held*, they were not excessive in view of the fact that the plaintiff was a Bombay merchant carrying on business in Madras.

V. V. Srinivasa Aiyangar, A. Krishnaswamy Aiyer and *N. S. Rangaswamy Aiyangar*—for Appellant.

Messrs. Short Bewes and Co.—for Respondent.

Schwabe, C.J. :—This is an appeal from a judgment of Coutts-Trotter, J., in an action for malicious prosecution. He found for the plaintiff with Rs. 35,000, damages. The defences set up were that there was no malice and that there was reasonable and probable cause for the prosecution. As regards the latter point, I entirely agree with what was said by the learned Judge that there was no reasonable and probable cause for this prosecution. In considering that, I consider what the position was of the plaintiff in respect of the charge made against him in the Criminal Court, and I am quite satisfied that there was no ground at all for even suggesting that he had been guilty of any criminal offence. No criminal offence in fact, had been committed, and I can see no reason at all for suggesting that Mr. Nurse, the defendant, really had any reasonable ground for thinking that a criminal offence had been committed.

On the other part of the case, namely, whether there was malice, there are two matters to be considered. The first is whether the defendant acted with an indirect motive. The learned Judge found that he did and I have no doubt that he was right. There was a dispute going on between the plaintiff and the defendant. The plaintiff had entered into a contract with the defendant, under which the defendant was to build for him a cinema and then let it out to him. A point arrived in the relationship between them in relation to that cinema when things were at a deadlock. The defendant was no doubt contending that there would have to be some alteration in the terms up to that time existing between the parties, and I think it is fairly clear that the plaintiff recognised that there would have to be some modification or alteration. The defendant put forward a draft lease on terms which he thought reasonable; the plaintiff rejected those terms and put forward an alternative which in turn the defendant rejected and the plaintiff claimed to fall back or stand upon the written agreement. He said that there had been and was an agreement between the parties binding and effective. Whether that agreement was binding and effective or not at that date is matter with which we are not concerned and it is a matter on which I think it desirable to say nothing, in view of the fact that it is the subject-matter of litigation between the the parties. But that was the position, when the defendant chose to apply for the arrest of the plaintiff on what, as I have already said, are wholly frivolous grounds; and I think the learned Judge was amply justified in coming to the conclusion, that he did so with the indirect motive of hoping to be in a better position to negotiate with his opponent, with a criminal charge hanging over his head, than he would be in negotiating as between two persons on

equal terms. I think it right to say that, in my view, I do not think that, on this evidence, Mr. Nurse had or could have had any honest belief in the guilt of Mr. Rustomji. Either of those views is quite enough to justify the finding of my brother Coutts-Trotter, J.

A further point arose on this point, which is really a subsidiary part of this case, namely, that the defendant contends that he acted in launching this prosecution on the advice of Counsel and that he claims to be protected by reason of that fact. It is no doubt the law that that protection is given where Counsel's opinion has been obtained and where it is believed to be correct and acted upon. I think the law is correctly stated in the judgment of Bayley, J., in *Ravenga* v. *Mackintosh* (1), in which he said :

> "I accede to the proposition that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel, (however erroneous that opinion may be) he is not liable to an action of this description."

It may be observed that, in order to escape by reason of the opinion of Counsel, the first condition is that all the facts of the case are laid fairly before Counsel, and the second condition is that he acts, *bona fide* upon the opinion, given by that Counsel. I think it is quite clear in this case that all the facts were not laid fairly before Counsel. The main ground of the prosecution was that a certain agreement between the parties, contained on four sheets of paper bearing a certain original date and giving a time limit for the building of the Cinema, was from time to time altered by a fresh front sheet on a stamp paper with a new date being prepared by the solicitor to both parties and signed or initialled by the parties ; and it was alleged that, because the plaintiff took the new front sheet, attached it to the remaining sheets of the original agreement and tried to have the document so composed registered, he was committing the crime of cheating and of forgery. The greater part of the evidence in this case ranged round the question of what was the intention of the parties in having these front sheets prepared. The prosecution story was that they were prepared in order to become the front sheet to some subsequent agreement to be executed. The defence story was that it was the intention of everybody throughout, that the new sheet should be substituted for the old. The defendant went before his Counsel and told him that it was the intention of both parties, when the new front sheets were made at different times that they were not to be attached to the remaining sheets of the original agreement, and on that basis apparently Counsel advised. It is quite clear to my mind, on the evidence, that so far from it being the intention of both parties that the new front sheets should not be attached to the original back sheets, it was the intention of both parties that they should be so attached and indeed, that they were brought into existence for the purpose of being so attached. I do not think it is a very creditable story to any one concerned. They desired to extend the time under an existing agreement. They did it by substituting a new front sheet, with a different date, treating that the execution of the original contract, witnessed as it was by several witnesses, as still being the execution of the final contract with a new date. I think also there was a desire on the part, at any rate, of some of the parties concerned, that as the stamp for agreement for lease was an inadequate stamp, it might be possible to get a reduction of the penalty, which was being incurred by reason of the stamp not being the right stamp, by putting before the registration authorities that the document was of recent date, whereas the chance of getting a reduction of penalty would be very much less, if the authorities had been aware that the contract had been in existence for a very considerable time, and acted upon, and was, in fact renewed from time to time by this addition of a front sheet. However that may be, I am quite satisfied that it was the intention of both parties that it should be so used. In fact, the solicitor, who was the solicitor for both the parties and who gave evidence at the Police Court and at the Sessions Court, although he at first, particularly in the Police Court, tried to make out that it was contrary to the agreement that the front sheet should be attached to the others, when he got before the Sessions Court and was fully cross-examined, ultimately said in the plainest terms, that the whole intention of the parties was that the new front sheet in his words, "was to form part and take the place of the front sheet of the old

(1) (1824) 2 B. & Co. 693.

agreement." That being so, it cannot, in my judgment, be said that the truth of facts was placed fairly by the defendant before Counsel, when Counsel advised, if he did so advise, that this prosecution should take place. Under these circumstances, I think that in this case there was ample evidence both of absence of reasonable and probable cause and of malice in fact.

There remains only the question of damages. In countries, where these question of tort are tried before a Jury, damages are eminently in the province of Jury. Where, however, a case is tried before a Judge, the Judge has a very wide discretion, on the facts of the case before him, to say what, in his view, the damages should be; but it is no doubt easier, to get the damages reduced on a judgment from a Judge than, as in England in the case of a verdict by a Jury; because a Judge, in his judgment, states his reasons, when he gives damages and states what influences him, or what is in his mind when he gives those damages; whereas in England, where the Jury give no reasons, it is almost impossible for the Court of Appeal to know what operated on the mind of the Jury and it is difficult to establish that the damages are so excessive that no reasonable body of twelve men could have come to that measure of damages. I have had some little doubt in this case whether the learned judge, who quite fully states his reasons for taking rather a strong view of the case as to damages, was not inclined to severity; but, on the whole, I think not. I am not certain as to whether I should not have awarded a lesser amount, but that is not what I have to consider. What I have to consider is whether the learned judge was wrong in awarding the damages that he did. As has been pointed out, it is a serious thing, indeed, for a business man of position more especially when he carries on business in another place, to be brought before the Criminal Court of Madras and kept here for some months, with the anxiety of prosecution hanging over his head, having to incur very heavy costs here, which are separately provided for, in the judgment, and having to incur expenditure by reasons of his being away from house and being subjected to the injury, which must necessarily accrue to the man's business, when he must be away from his business for a considerable time, and under a suspicion of having been guilty of serious criminal offences. Under these circumstances I do not think it right to interfere with the judgment here, and this appeal must be dismissed with costs. Certified for two Counsel.

Ramesam, J.:—I agree and have nothing to add.

Appeal dismissed.

1924 Madras 567.

WALLER, J.

South Indian Ry. Co.—Appellant

v.

S. P. R. S. Narayana Iyer—Respondent.

C.R.P. No. 418 of 1921, decided on 8th November, 1923, from the decree of Sub-Judge, Mayavaram, in S.C.S. No. 911 of 1920.

(a) *Limitation Act, Art. 31—Scope.*

Art. 31 applies to a suit by a consignee for damages for the loss of goods in transit, the starting point being the date when the Railway Company finally says that the goods cannot be delivered.

(b) *Railways Act, S. 77—Notice to District Traffic Superintendent may be valid if empowered expressly or by course of conduct.*

A notice under Ss. 77 and 140 given to a subordinate officer like the District Traffic Superintendent is not valid unless there is evidence (1) either that the power of the Agent to receive notices under S. 140 had been delegated to the subordinate officer who actually received the notice, or (2) that the Company by its rules or course of business had held out to the public that notices might be given to such an officer instead of to the Agent and thus estopped itself from raising a technical defence.

(c) *Railways Act, S. 72—Burden of proving neglect lies on consignor and of theft in a running train on Railway.*

Burden of proving neglect on the part of the company lies on the plaintiff. It is open to the company to say that the bale was lost by theft while the train was running in which case they are as a matter of course exempted from liability; but the burden of proof on this point lies on the Railway Company.

V. Viswanatha Sastri—for Appellant.

C. S. Venkatachariar—for Respondent.

Ayling, J.:—This Revision Petition arises out of a Small Cause Suit in which the respondent, the consignee of a bale of cotton thread entrusted for transport to the South Indian Railway Company, sued the Company for Rs. 470 damages for the loss of the said bale in transit. The bale was entrusted to the Railway Company on 2-4-1919. Nothing has been heard of it

since and there can be no possible doubt that it must be treated as lost. The loss of the bale is the basis of the suit.

The liability of the company has to be determined with reference to a special agreement Exhibit I entered into between them and the consignor at the time of the despatch of the bale. This provides that in consideration of the carriage of the bale being at a lower rate the consignee (under whom, of course, plaintiff claims) has no right to compensation for loss of the goods except in the event of wilful neglect of the railway administration or theft by or wilful neglect of its servants during transit. It is further provided *inter alia* that a robbery from a running train does not constitute wilful neglect. This question of the liability of the Railway Company has been dealt with by the Subordinate Judge in paragraphs 4 and 5 of his judgment. The issue framed is this :—

" Whether the bale in question was lost by theft while the train was running and whether the defendant company took the necessary steps to prevent such a risk ?"

The issue seems to me to have been very badly drafted because there are really two distinct questions involved, the burden of which is not on the same side in each case. Under the terms of the agreement the burden of proving neglect on the part of the company lies on the plaintiff as explained by Kumaraswami Sastri, J., in *P. Albuquerque and Sons* v. *S. I. Railway* (1). It is open to the company to say that the bale was lost by theft while the train was running, in which case, they are, as a matter of course, exempted from liability ; but the burden of proof on this point lies on the Railway Company. The issue framed by the Subordinate Judge does not cover the first point at all. He has set himself simply to consider whether the Railway Company has shown that the bale was lost by theft from a particular wagon number 1897 during transit between Perundurai and Erode. He has laid down the extraordinary proposition that even if the bale was so stolen, it will not be theft from a running train if the thief got into the wagon before the train started, a proposition which seems to me to have no foundation ; and his arguments on the evidence relating to the loading of the bale in the particular wagon specified seem to me to be most inconclusive. I cannot accept the finding such as it is and must call for a specific finding from the Subordinate Judge on the following two issues :—

(i) Was the suit bale lost in consequence of the wilful neglect of the Railway administration or theft by, or wilful neglect of, its servants, transport-agents or carriers ?

(ii) Was it lost by robbery from a running train within the meaning of Ex. I ?

Another point taken by the learned vakil for the petitioner relates to the question of notice. This is governed by sections 77 and 140 of the Railways Act, IX of 1890. The former provides that a person entitled to compensation for loss of goods can only recover it if his claim has been preferred in writing by him or on his behalf, to the Railway administration within six months from the date of the delivery of the goods for carriage by rail. Section 140 of the same Act provides for the method of service of notices on the Railway administration. The effect of these two sections has been considered by a Full Bench of this Court in *Mahadeva Aiyar* v. *S. I. Ry. Co.* (2). In the present case, the plaintiff relies on a notice, Ex. A, which was addressed to the District Traffic Superintendent on 5th September, 1919, within six months of the consignment of the bale. The question is whether those specific conditions of sections 77 and 140 have been complied with. Here again I cannot accept the findings of the Subordinate Judge. The judgment of the Full Bench above referred to lays down the conditions on which notice to a Subordinate Officer like the District Traffic Superintendent could be deemed sufficient compliance ; and it is sufficient to say that the Subordinate Judge's judgment is entirely without reference to the conditions therein laid down. I must therefore call for a proper finding on issue (ii), " whether the suit is barred for want of proper notice," in view of what is contained in the Full Bench judgment above referred to.

The last point taken on behalf of the Company is that the suit is barred by limitation. The proper article applicable appears to be article 31 of the Indian Limitation Act, IX of 1908. On this point, I think the

(1) 1922 Mad. 231.

(2) 1922 Mad. 362 (F.B.).

Subordinate Judge's finding must be accepted. Paragraph 7 of his judgment deals with it and he relies on a judgment of this Court in *M. & S. M. Ry. Co.* v. *Bhimappan* (3). I can see no ground for distinguishing that case from the present one, and it appears to be an authority for the Subordinate Judge's calculation of the time prescribed, from the date when the defendant Company finally said that the bale could not be delivered. I do not think on the question of limitation there is any ground for interference.

Findings on the issues referred to the Subordinate Judge must be returned within two months from this date. Either side will be at liberty to adduce fresh evidence, if they wish, on the two issues which have been referred to, in substitution of issue (1) as originally framed by the Subordinate Judge. Seven days will be allowed for filing objections.

[The Subordinate Judge of Mayavaram submitted the following findings:]

On the issues 1 and 2 referred to therein, *viz.*,

(1) Was the suit bale lost in consequence of the wilful neglect of the Railway administration or theft by, or wilful neglect of its servants, transport-agents or carriers?

(2) Was it lost by Robbery from a running train within the meaning of Exhibit I?

2. A bale of cotton twist was consigned by Ramaswami Chettiar at Tiruppur Station on the South Indian Railway on 2-4-1919 to Tiruvalur, the plaintiff Narayana Aiyar being the consignee. The plaintiff not having received the consignment wrote to the District Traffic Superintendent, Trichinopoly, on 5th May, 1919, informing him that he had not received the bale consigned to him and asking the Superintendent to get the bale delivered to him. To this the Superintendent replied that the matter was receiving his attention (*vide* Exhibit B). On 29th May, 1919, the plaintiff again wrote a letter to the District Traffic Superintendent that the bale had not yet been delivered up to him and that either the bale might be delivered up to him or its value Rs. 438 might be paid to him (*vide* Exhibit C). The District Traffic Superintendent thereupon instructed the Station Master, Tiruvalur, to ascertain from plaintiff what amount he was willing to receive in final adjustment of his claim. The Station Master, after taking a statement from the plaintiff on 30th June, 1919, wrote to the District Traffic Superintendent that at his instance the plaintiff was willing to accept Rs. 428 and that the said amount may be paid to the plaintiff at an early date (*vide* Exs. G and G-1). The plaintiff not having received any further information wrote on 19th August, 1919, to the District Traffic Superintendent requesting him to settle his claim and informing him that on failure to do so, he would have to institute a suit (D). To this a letter has been sent from the office of the General Traffic Manager on 30th August, 1919, that the bale in question had been stolen away from a running train and as the consignment was booked at owner's risk form note H, the Company is relieved from all liability for loss and that, therefore, the plaintiff's claim could not be entertained (D-1). On 28-11-1919, the plaintiff gave a notice to the Agent, South Indian Railway, that unless the full value of the bale was paid to him within two weeks, he will sue the Company for recovering the sum with interest (E). This letter has been forwarded in original to the General Traffic Manager for disposal on 1st December, 1919, and on 12th December, 1919, a reply to the plaintiff has been sent from the office of the General Traffic Manager, that it was reported that the bale was stolen away by some thieves from the train conveying the same while it was running between Perundurai and Erode Stations and that the Railway is not therefore liable as already intimated to the plaintiff in the letter, dated 30th August, 1919, in special view of the contract referred to therein and that the enquiry made with reference to the value of the bale was not an admission of liability on the part of the Company and that the plaintiff's claim cannot, in the circumstances, be admitted (E-1). The plaintiff has thereafter instituted his suit on 5th July, 1920.

3. The defendant has raised various pleas. The plaint contains substantially the same facts as are already set forth, and the defence is also the same as disclosed in the replies of the General Traffic Manager. The evidence of defendant's witness is to the effect that the suit bale was loaded at Tiruppur on 2nd April in B. N. R. C. G. waggon No. 1897, and that the said waggon was attached to a goods train running on the same day to Erode. My predecessor was of opinion that the evidence as to such loading is not of a reliable character. The goods clerk spoke only from his memory that it was so loaded in waggon No. 1897. The loading book in which the above particulars would have been entered has not been produced on the ground that it could not be found and further Ex. H, the railway receipt, does not also unfortunately contain the number of the waggon in which the bale was loaded: though it should properly contain such information. I am of opinion that in the circumstances, it cannot be held that the said bale had been actually loaded at Tiruppur in waggon No. 1897. The evidence therefore as to whether there was found any tampering with the seal of the waggon at Erode is of little or no importance. No doubt, there has been an attempt to show that the suit load was found missing at Erode when the waggon was examined. But in the absence of any record as to the waggon having been examined and to the bale having been found missing, the evidence of the defendant's witnesses cannot carry any conviction. It is not disputed that when the Railway officials had found that there was theft in one of the waggons there would be reports sent in writing to the officials higher up. This is admitted by Neelakanta Ayyar, D. W. 5. He states that in addition to this bale there were two other articles missing and that he gave a report of the loss to the District Traffic Superintendent and to the police. But no such report either from the Railway office or from the police is forthcoming. I am, therefore, of opinion that the bale was not, as a matter of fact, loaded in Tiruppur and that the evidence as to its having been loaded or to its having been found lost at Erode cannot be believed.

(3) (1912) 23 M.L.J. 511.

4. With the above facts, I
question remitted to this Court fo

5. *On the 1st issue.*— It follows that the bale had been lost on account of the neglect of the Railway Transport Officer. The further question is whether the neglect could be called wilful. When the bale had been consigned by an officer of the Railway Company or by his neglect the bale is not consigned, the neglect cannot but be considered to be wilful, unless there are extenuating circumstances to prove the contrary. In such cases, where the transport has to be done by a Railway Officer, if no explanation is forthcoming as to why the bale had not been loaded, he cannot be exonerated on the ground that the plaintiff has not proved that he (the officer) had wilfully kept it back. All neglect is wilful unless there are circumstances to show that the neglect was due to accident or to circumstances over which the Railway Officer had no control. In the absence of any such extenuating circumstances. I cannot but hold that the non-loading of the bale was due to the wilful neglect of the transport agent. This conclusion is fully supported by the decision reported in 24 Bombay Law Reporter, page 272.

6. *As to the 2nd issue.*—I find it in the negative as the oral evidence is untrustworthy and as the loss could have been proved by very satisfactory documentary evidence in the possession of the Company. It must be noted that no intimation was given of any such loss to the plaintiff promptly and that the theft was suggested by the Company only on 30th August, 1919, though the bale is alleged to have been lost on 2nd April.

7. Then as regards the question whether proper notice had been given to the Company of the claim under section 77 of the Railways Act, the section only requires that notice should be given to the Administration. As a matter of convenience, section 140 lays down that the notice may be given to the Agent. But it has been held by their Lordships of the Madras High Court in the Full Bench decision in 45 Madras 135, that where there have been officers deputed to whom complaints could be made and who could settle the claims, and if it is shown to have reached the responsible officer for the Railway administration, the notice would be sufficient. In the present case, it would be seen that in answer to the letter written by the plaintiff to the District Traffic Superintendent, reply is sent to the plaintiff by the General Traffic Manager for disposal. The consignment receipt Exhibit I (*a*), also shows that the person to whom the plaintiff should complain is the General Traffic Manager. Even in his last reply, the General Traffic Manager refers to the reply he had already sent. It therefore follows that the notice given by the plaintiff had reached the proper officer to whom it should be sent, I accordingly hold that the notice given by the plaintiff to the District Traffic Superintendent on 19th August is a proper notice as contemplated by section 77 of the Railways Act.

This petition coming on for final hearing on Thursday, the 1st day of November, 1923, the Court (Waller, J.) delivered the following:—

Judgment:—The findings called for have been received. I will deal first with that relating to the claim under section 77 of the Railways Act. The finding of the Subordinate Judge is that the notice given by plaintiff reached the proper officer to whom it should have been sent. The particular notice was, I take it, the letter addressed by plaintiff on 19-8-1919 to the District Traffic Superintendent, Trichinopoly (Ex. D), and replied to by the Deputy Traffic Manager (Freight). It is not quite clear whom the Subordinate Judge considered to be the " proper Officer," but I imagine that he meant by this expression the General Traffic Manager of the Railway. His argument, I understand, is this. Plaintiff's letter to the District Traffic Superintendent was replied to by the General Traffic Manager (as a matter of fact, the reply came from his Deputy) ; the notice sent by plaintiffs to the Agent was referred by the latter to the General Traffic Manager ; the consignment receipt indicates that consignors should complain to the General Traffic Manager ; therefore, the General Traffic Manager must have been authorized to receive claims under section 77 and notice to him is a sufficient compliance with section 140 of the Act.

This finding is based on the Full Bench Ruling in *Mahadeva Aiyar* v. *S. I. Ry. Co.* (2). As I read that ruling, what two of the three Judges, decided was this, that there should be evidence (1) either that the power of the Agent to receive notices under section 140 had been delegated to some subordinate officer, who had actually received the notice, or (2) that the company by its rules or course of business had held out to the public that notices might be given to such an officer instead of to the agent and thus estopped itself from raising a technical defence.

In this case, I can find no such evidence. The rules of the company have not been produced and there is nothing to show that the Agent has delegated to any of his subordinates his power under section 140. Nor is there any evidence from which it can be inferred that plaintiff's first claim came to his notice. The circumstances referred to by the Subordinate Judge do not justify the conclusion that the company's course of business has led the public to believe that notice may be given to the District Traffic Superintendent, the Deputy Traffic Manager or the General Traffic Manager instead of to the Agent. Even plaintiff, when he came to issue his formal notice,

addressed it to the Agent, when, unfortunately for himself, it was out of time. He cannot, I think, fall back on informal correspondence between himself and subordinate officers of the Railway at an earlier date.

I think that the Subordicate Judge's finding that plaintiff's letter to the District Traffic Superintendent of 19th August, 1919, was a proper notice is supported by no evidence. Nothing has been proved that would bring the case within the Full Bench ruling referred to above. It is not necessary to consider the other findings. The suit is barred. The Revision Petition is allowed with costs throughout.

Petition allowed.

1924 Madras 571.

SPENCER AND DEVADOSS, JJ.

Meyyappan Servai—Appellant

v.

Meyyappan Ambalam and others—Respondents.

F.A. No. 63 of 1922, decided on 15th August, 1923, from the order of Sub-Judge of Sivaganga, dated 19th August, 1921.

* (a) *Hindu Law—Joint family—Decrees.*

A decree against father in respect of joint family properties binds sons, father being deemed to be their representative. [P. 574, C. 1.]

* (b) *Civ. Pro. Code, S. 11*—Ex parte.

Where a number of defendants in a case have a common interest and the contest is carried on by some of them *bona fide* against the plaintiff's claim the defendants who are *ex parte* are as much bound by the decision as those who contested. [P. 573, C. 1.]

* (c) *Civ. Pro. Code, S. 53—Scope.*

S. 53 is not confined to money decrees and a decree passed in respect of joint family properties can be executed against the sons after the father's death.

T. Rangachariar and *K. V. Rajagopalan*—for Appellant.

S. Srinivasa Iyengar, A. Krishnaswami Aiyar and *M. Patanjali Sastri*—for Respondents.

Devadoss, J.:—The lessees of the Sivaganga Zamindari brought O. S. No. 68 of 1901, against a number of defendants, for possession of about 13 and odd Kurrukkams of land, lying within the limits of *Sekkalakkottai*, Sivaganga Zamin. The Zamindar was subsequently added as the fourth plaintiff and one Karuthan Ambalam was also added as fifth plaintiff. The suit which was originally instituted in the Court of the Subordinate Judge of Madura East, was decreed, in plaintiff's favour, by the Temporary Sub-Court of Madura, on 22nd February, 1908. The High Court confirmed the decision of the Temporary Sub-Court in A. S. No. 77 of 1901, on 4th February, 1914. One Meyyappan Servai is the transferee of the decree and is the appellant herein. Defendants 129 and 130 are the sons of the 61st defendant. They were brought on record after their father's death, in E. P. No. 734 of 1918. The appellant applied for execution of the decree, against the defendants 129 and 130, in E. P. No. 555 of 1919, in respect of two plots, one rectangular plot on which there is a house and another a traingular plot which is vacant and which is situate to the south of the former. They both form part of the extensive plot decreed to the plaintiff. The defendants 129 and 130 opposed the application for execution on the ground that they were not the legal representatives of the 61st defendant, that the plots in question fell to their share on partition with their father some yeare before 1901, when the suit was instituted; that the 61st defendant had no right or title to it, and the building was put up by them out of their own earnings; and that the father was never in possession of the house. The Subordinate Judge of Sivaganga held that the partition arrangement set up by the defendant was not proved; that they were not the legal representatives of the 61st defendant, and that they acquired a title to the property by prescription and dismissed the application for execution. Against this order, Meyyappan Servai has preferred this appeal and defendants 129 and 130 are respondents 1 and 2. The appeal was fully argued, on both sides, and there is no reason to doubt the correctness of the finding of the Subordinate Judge, on the question of the partition arrangement. Mr. S. Srinivasa Iyengar stated that he did not rely on the partition set up by his clients. His contention is that the defendants 129 and 130 are not the legal representatives of the 61st defendant and they being members of an undivided Hindu family, the decree against the 61st defendant could not be executed against them. Before considering the question of law raised, it is necessary to consider what facts are established by the evidence.

The appellant's contention is that the rectangular plot was acquired by the 61st defendant, from defendants 40 and 50 and the triangular plot was never the property of the 61st defendant and has always belonged to the 50th defendant.

[His Lordship then discussed the evidence and held that the rectangular plot was purchased by the 61st defendant, from defendants 40 and 50, under Ex. B, during the pendency of the suit, and the triangular plot never belonged to the 61st defendant, or his sons. His Lordship then proceeded as follows.]

It is contended that the defendants 129 and 130 have acquired a title to the plots in question, by prescription. It is difficult to see how they could have acquired a title by prescription. The finding in the case is that the trespass by the defendants was within ten years before the suit. So they could not have acquired by prescription a title against the Zamindar, before the date of suit. They could acquire a title by prescription, only if the plots were not included in the suit, or the persons in real occupation of the plots were not made parties to it. There is nothing to show that the father was not in possession of this rectangular plot. There is nothing to warrant the supposition that the plaintiffs omitted to make the defendants 129 and 130, parties to the suit, when they were in exclusive possession of that plot, and that they made 61st defendant, a party, who was not in actual possession. The defendants never pleaded that their title was traceable to trespass by them and that the father was not in occupation of the plot. The plots in question are admittedly parts of the extensive piece of land, claimed by the plaintiffs and decreed to them, as the plan attached to the decree shows. The onus is very heavily on the defendants to show that they were in exclusive occupation of the plots, before the suit, and that the plaintiffs failed to make them parties. They have not been able to discharge the onus; and I have no hesitation in holding that they were not in exclusive possession of the plots in dispute. On the other hand, the evidence on record supports the contention that the father was in occupation and that he claimed title to them under Ex. B. A number of union receipts are produced, for the purpose of showing that defendant No. 129 was in occupation to the exclusion of the father. Union receipts are not in the first place evidence of title and the payment of Union tax does not show that the person who pays it must necessarily be in occupation. It is next contended that defendants 129 and 130 are not the legal representatives of the 61st defendant and the decree against the father cannot be executed against the sons. Mr. Srinivasa Iyengar fairly admitted that if it be held that the 61st defendant was sued in a representative character, his clients would be bound by the decree and they could not resist execution. But his contention is that there is no evidence to show that the father was sued in a representative capacity, and that the defendants 129 and 130, being undivided members of a joint Hindu family, the decree against their father alone cannot bind the sons and cannot be executed against them, after the father's death. Considering the array of the defendants in the case and considering the fact that in no case were the father and son made parties to the suit, the inference can safely be drawn that the plaintiffs made the managing member of each family, party to the suit, and they did not implead the defendants in their individual capacity. When a suit is brought, in respect of the family property, impleading the father as a defendant, the decree passed against the father binds the sons. The case of a managing member, other than the father, may perhaps stand on a different footing. But where there is a dispute about property, which is admittedly family property, and when the father is made a party to the suit, it cannot be said that the father is made a party, in his individual capacity, and not as the manager of the family. In Trevelyan on Hindu Law, at p. 278, there is the following passage :—

"The members of a family are all bound by a decree, obtained *bona fide* against the father, or other manager, as such manager, for a debt duly incurred in the management of the property, whether it were or were not charged upon the family property, and by a sale of the family property in pursuance of such decree, or in a suit brought against the manager of a joint family business, in respect of such business, or in any suit brought in respect of the family property, although they were not parties to the suit."

In *Minakshi Achi* v. *Chinnappa Udayan* (1) it was held that the decree for maintenance

(1) (1901) 24 Mad. 689.

against the father, which gave a charge in favour of the plaintiff, could be executed against the son, after the death of the father, even though the son was not made a party to the suit. In *Kamal Kutti* v. *Ibrayi* (2), it was held that a decree, obtained against the Karnavan of a Malabar Tarwad, could be executed against the tarwad property. The question in all these cases is, what was the nature of the suit and what was the relief claimed? The mere form should not be held to decide the question one way or the other. The contentions of the parties to the relief claimed and the relief decreed should be considered, in arriving at a decision, as to whether a person was made a party in his individual capacity, or as representing the family. In *Sheo Shankar Ram* v. *Jaddo Kunwar* (3), their Lordships of the Privy Council held:

"There are occasions, including foreclosure actions, when the manager of a joint Hindu family so effectively represents all the members of the family, that the family as a whole is bound."

Vide also *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (4). In this case, there is no allegation that the father was negligent, or acted against the interests of the family. He no doubt remained *ex parte*. But that does not necessarily mean that he was careless of the interests of the family. All the defendants had one common purpose, namely, that of claiming the property in the suit as the property of the Kottayyur Vallambars and that the Zamindar had no title to it. The defendants did not put up separate defences and they had only a common defence. The mere fact therefore of the 61st defendant remaining *ex parte* does not lead to the inference that he was either careless or indifferent to the interests of the family.

When a number of defendants have a common interest, and when the contest is carried on by some of them against the claim of the plaintiff *bona fide*, the defendants who were *ex parte* areas much bound by the decision in the case, as those who are not *ex parte*. In *Gopalacharyulu* v. *Subbamma* (5), it was held:

"A decision in a suit instituted and conducted *bona fide*, by some only of the Agraharamdars of a village against the Zamindar and the other Agraharamdars, for a declaration as to the Kattubadi payable by them to the Zamindar, is *res judicata*, against the representative of an Agraharamdar, who was a defendant, but died pending the appeal, whose legal representative was accidentally not brought on record, either in the appeal, or the second appeal."

This case and the case in *Sheo Shankar Ram* v. *Jaddo Kunwar* (3) are clear authorities for the position, that if by mistake or oversight persons who have an interest in the property in dispute are not joined as parties, but a person or persons who could represent the interest of such persons are made parties, the decision would bind all those who have an interest in the property. It must be so, in the case of an undivided joint Hindu family. Can it be reasonably contended that if children are born to the members of the joint Hindu family, during the pendency of a suit extending over several years, the shares of the after-born children are not bound, inasmuch as they are not parties to the suit? It is very strongly urged that section 53 of the Civil Procedure Code applies only to money decrees and that if a decree is passed in respect of family property against the father it cannot be executed against the sons. It is very difficult to see, how if the decree binds the members of the joint family, it cannot be executed against them. Mr. Srinivasa Iyengar's contention is that a separate suit should be brought for enforcing the decree. Under Order 21, rule 35, possession can be taken from all persons who are bound by the decree. But it is urged that section 53 should be read as applying only to money decrees, passed against the father, which could be executed against the sons or other descendants. Section 53 is a new section, which explains the expression legal representative, contained in section 50. It was intended to reconcile the conflict of views, that existed between the Bombay and Madras High Courts. It is in these terms:—

"For the purpose of S. 50, and S. 52, property in the hands of a son, or other descendant, which is liable under Hindu Law, for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased, which has come to the hands of the son or other descendant, as his legal representative."

As I understand the section, if the property is one, which is liable under the Hindu Law, for the payment of a debt of a deceased ancestor, that property shall be deemed to be property, which has come to

(2) (1901) 24 Mad. 658.
(3) (1914) 36 All 383 (P.C.).
(4) (1907) 30 Mad. 215.
(5) (1920) 43 Mad. 487.

the hands of the son, or other descendant, as his legal representative. The contention of the respondent would necessitate the addition of the words, "in respect of the decree so obtained." There is no warrant for adding these words, and it must be held that where a decree is passed against the father, in respect of property which would ordinarily be liable, under the Hindu Law, for the payment of his debt, that that property is the property of the deceased in the hands of the son or other descendant, for the purposes of sections 50 and sections 52. Great reliance is placed by the respondents upon a decision of the Bombay High Court in *Chunilal Hirilal* v. *Bai Mani* (6). In that case, a decree for injunction was sought to be executed against the surviving co-parceners, who were not parties to the decree. It was held that the surviving co-parceners were not bound by the decree; for, on no construction of the term "legal representatives," could the members of a joint Hindu family be brought, within its definition, as contained in section 2 (11) of the Civil Procedure Code. Heaton, J., in the course of his delivering the judgment, observes as follows:—

"The decree-holder justified his rights to do this, on the ground, the only possible ground, that he could take, that the sons were the legal representatives of the persons, against whom the decree was obtained. There is a definition of the expression "legal representative" in the Code of Civil Procedure. The sons here certainly do not fall within the meaning of that definition. They do not in law represent the estate of a deceased person and they are not persons on whom has devolved the estate of a person, sued in a representative character. So long as they do not come within the definition of "legal representative," then of course it is futile for the decree-holder to refer to S. 50, or S. 52 of the Code. But it is argued that S. 53 gives to the decree-holder in this case a legal right to enforce the injunction against the sons of the brother; and that might be so, if S. 53 were purely descriptive of the kind of property, which was deemed to be property of the deceased, which has come to the hands of the sons, or other descendants, as their legal representatives. If that section were purely descriptive and not limitative, then there would be force in the contention I am considering. But I think it is limitative as well as descriptive."

With all respect to the learned Judges, I am unable to agree with their view that sections 53, Civil Procedure Code, is limitative and not descriptive. The judgment can, however, be supported, on the ground, that an injunction, is purely a personal remedy and a decree for injunction, obtained against the father's apprehended interference with the plaintiffs' property, cannot bind the sons, who are not parties to the suit. This decision has been followed in *Dwarka Das* v. *Krishna Kishore* (7). There, the brother of a deceased member of a joint Hindu family, was sought to be brought within the definition of the expression "legal representative." It was held that he was not his legal representative. The case has no application to the facts of the present case. It is well settled, that a decree against a member of a joint Hindu family cannot be executed, after his death, against the family property, in the hands of the other members, unless he was sued in a representative capacity; but where the dispute is about property, which is liable to be sold for payment of the debt of a deceased ancestor, a decree against him in respect of that property is binding upon the son, or other descendant, of the deceased ancestor. If the property could be made liable for the debt of a deceased ancestor, it is difficult to see, why a decision, in respect of such property, should not be held, to be binding upon persons, who are the descendants of such ancestor. The position of a father is different in several respects from that of an ordinary manager of a Hindu family; and in view of that, the law allows execution of a decree passed against the father, against joint family property, in the hands of the sons, the limitation being that the property should be such as would be liable for the payment of his debt. In *Sahib Thambi Marakayar* v. *Hamid Marakayar* (8) it was held: "The general rule of law undoubtedly, is that in suits where one person is allowed to represent others, as defendant in a representative capacity, any decree passed can bind those others, only with respect to the property of those others, which he can in law represent and no personal decree can be passed against them, although the parties on record *co-nominee* may be made personally liable. This is the principle applied in suits against a Hindu family, as represented by its managing member, and in suits to which Order 1, rule 8 of the Civil Procedure Code, 1908, is applicable. In this case, taking all the

(6) (1918) 43 Bom. 504.

(7) (1921) 2 Lah. 114.
(8) (1911) 36 Mad. 414.

circumstances into consideration, I have no hesitation in holding that the father, 61st defendant, represented the family. The defendants 129 and 130 cannot object to the execution of the decree, on the ground that they were not parties to the suit. The decree was passed, in respect of the family property, which the father could sell and which is liable to be sold for his debts. In this view also, I hold that the contention of the respondents must fail. In the result, the appeal is allowed with costs in both Courts.

Spencer, J.:—Mr. Srinivasa Iyengar conceded that if the respondents were bound by the judgment in O.S. No. 68 of 1901, as they must be, if they claimed through the 61st defendant, they could not set up any title by adverse possession.

But he argued that there was no proof that the 61st defendant was other than a trespasser, and secondly that there was no authority for holding that any decree obtained against the manager of a joint family, other than a decree for the recovery of a debt, could be executed against members of that family, who succeeded to the family property by survivorship, unless they were parties to the decree.

On the facts, it seems to be clear from the admission of Meyyappan (129th respondent), at the enquiry in the lower Court, from the admission of Vellayyan (130th respondent), in prior proceedings (Exs. E and D) that the disputed site was ancestral property acquired by purchase, and partitioned between the 61st defendant (Annamalai), and his sons (129th and 130th respondents); and from the statement of Chinnayya Ambalam (50th defendant and P.W. 2), and from Exs B. and I, it appears that the purchase was made *pendente lite*, from the 40th defendant and another, who themselves purchased from the Kottaiyur Vallambars, who set up rights opposed to those of the Zamindar of Sivaganga in the suits.

As the father of respondents 129 and 130 and the Kottaiyur Vallambars were all litigating *bona fide*, under the same title, all, including the 61st defendant's sons, are equally bound by the result: (*vide Gopala Charyulu* v. *Subbamma* (5).

The point of law as to execution, based upon Beaman and Heaton, JJ's judgments in *Chunilal Harilal* v. *Bai Mani* (6) is a very strange and novel one to my mind. These learned Judges declare that section 53, Civil Procedure Code, is limitative and not descriptive. With due respect, I can see no justification for limiting the word 'decree' in section 53 to that class of decrees, which are known as money decrees. The limitation in section 52 is express. But section 53 refers both to section 50 and to section 52. Seeing that when the legislature intends to make a limitation the same is clearly expressed, as it is in section 52, there is every reason against implying such limitation, when it is not expressed in section 50. If the word 'decree' is to be understood, as used in that limited sense in section 53, how is it to be understood in sections 49 and 50? Nobody has ever hitherto thought of suggesting that no other decree except decrees for money can be transferred, or can be executed against legal representatives of judgment-debtors.

In *Kamal Kutti* v. *Ibrayi* (2), Benson, J., observed pointedly that if members of a family are bound by a decree obtained against the manager, it was difficult to see on what principle they could be treated as strangers to the decree for the purpose of execution. If the decree could be executed against them, this implied that they were parties or representatives of parties. In *Ananthanarayana* v. *Swaminatha Aiyar* (9), a decree for the recovery of immoveable properties obtained against a father of a family, governed by Mitakshara Law was held to be executable against the sons.

In *Sahib Thambi Marakayar* v. *Hamid Marakayar* (8), it was stated that in suits against a Hindu family, as represented by its managing member, any decree passed would bind those others, with respect to their property, which he can in law represent.

It is unnecessary to multiply authorities. It seems too obvious a proposition to require to be supported by a series of decisions. I agree with my learned brother that the lower Court's order cannot be supported and that the appeal should be allowed with costs in both Courts.

Appeal allowed.

(9) (1914) 1 L.W. 643.

1924 Madras 576.

KRISHNAN, J.

Nallamuthu Padayachi— Appellant

v.

Srinivasa Ayyar—Respondent.

S.A. No. 31 of 1922, decided on 3rd December, 1923, from the Decree of the Court of the Sub-Judge, Kumbakonam, in A. S. No. 35 of 1921.

Civ. Pro. Code, S. 11—Litigating under same title.

A lessor is not bound by a finding as between the lessee and a third party. A lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and third parties. (40 Mad. 389, 14 L.W. 387, *Foll.*) [P. 577, C. 1.]

R. Rajagopala Aiyangar—for Appellant.

M. S. Venkatarama Aiyar—for Respondent.

Judgment:—In this case, both the lower Courts have decreed the plaintiff's suit for ejectment, holding that the defendant's pleas that he had a permanent right of occupancy in the suit lands and that the Civil Court had no jurisdiction to try the suit were both barred on the ground of *res judicata*. The question argued before me is as regards the plea of *res judicata*. The way in which that plea of *res judicata*, is raised is this: The plaintiff in this suit, who was the lessee under the Receiver of the Tanjore Palace estate, brought O.S. No. 580 of 1911 on the file of the same District Munsif's Court, to eject the 1st defendant and the 1st defendant therein had raised the same pleas. Those pleas were overruled and a decree was given for ejectment. The plaintiff's lease, which he then sued on, was for a period which expired six years after that suit was filed. The plaintiff had again given a sub-lease for the remaining period of three years of his lease to the 1st defendant. But the 1st defendant continued in possession even after the plaintiff's lease from the Receiver of the Palace estate had expired Subsequently, for 2 or 3 years, the plaintiff had nothing to do with these properties. But he obtained after the lapse of some three years a new lease from the said Receiver. He brings this suit again to eject the 1st defendant from his possession of the same lands and the 1st defendant has raised, as already stated, the pleas that he has got occupancy right and that the Civil Court has no jurisdiction to try the suit. The finding of the lower Courts is that the matter is *res judicata* between the parties and that the 1st defendant cannot be allowed to raise those pleas. This finding is attacked before me by the learned Vakil for the 1st defendant on three grounds. He says first of all that no plea of *res judicata* can be advanced against the plea of want of jurisdiction and he relies upon *Subba Rao* v. *Perumal Reddi*, (1) as authority for the proposition. The second point raised by him is that at any rate the previous decision cannot conclude rights, which have accrued to him, since the disposal of that suit and he says that it is open to him to contend in this suit that by being put into possession of the properties he has obtained a right of permenant occupancy and for that purpose to show that the Tanjore Palace Estate is an "estate", within the meaning of the Estates Land Act, as was subsequently held by a Full Bench of this Court, in *Sundaram Aiyar* v. *Ramachandra Aiyar* (2). That case no doubt dealt with another village and not with this; but the finding of the Full Bench was a general finding that the whole Tanjore Palace Estate was an estate under the Estates Land Act. The third plea raised by him is that the plaintiff is not now litigating under the same title, as he was litigating under, in the previous suit, as he is now claiming under a new lease from the Receiver, the old lease having come to an end by lapse of time.

I shall take up the last ground first, because if that is found in favour of the appellant and against the respondent, it is not necessary to consider the other two pleas. It seems to me quite clear that that plea is a well-founded one. Section 11, Civil Procedure Code, which deals with *res judicata*, requires as one of the conditions for the plea of *res judicata* to be supported, that the parties should be litigating under the same title in the subsequent suit, as they were litigating under, in the first suit. The lower Courts have not considered the case from this point of view at all. They seem to have thought that because the plaintiff and the defendant were parties to the previous litigation, therefore, the plea of *res judicata* would stand; but the effect of the words "litigating under the same title" was not considered. Here, there can be no

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(1) (1917) 5 L.W. 467.
(2) (1917) 40 Mad. 389.

doubt whatsoever, that the plaintiff is now litigating under a new title, derived from the Receiver, subsequent to the date of the decision of the previous suit. That a lessor is not bound by a finding as between the lessee and a third party was laid down in *Anakaran Puthiavalappil* v. *Thiyan Thavara Koran* (3) ; it has also been laid down that a lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and third parties. It follows, therefore, that as the Receiver of the Tanjore Palace Estate was certainly not bound by the finding between the plaintiff and the defendant in O. S. No. 580 of 1911, and was not entitled to take advantage of it, any person claiming under that Receiver, under a title obtained subsequent to the suit, cannot be held to be bound by it, or to take advantage of it, even though that person may be the identical person who contested the suit. He is clearly litigating under a new title. On this footing, the plea of *res judicata* has to fail. I do not think it necessary to deal with the other two grounds raised.

As a result of this, the appeal must be allowed and the plea of *res judicata* raised by the plaintiff must be disallowed and the case remanded to the first Court for disposal on the merits. The appellant will have his costs in appeal and in second appeal from the respondent ; but the costs of the first Court will abide and follow the result. The Court-fee paid here and in the Appellate Court will be refunded.

Appeal allowed.

(3) (1921) 14 L.W. 387.

* 1924 Madras 577.

SCHWABE, C.J.

Abdul Rahiman Sahib Chowdry and others—Appellants

v.

Murugappa Naicker and others—Respondents.

F.A. No. 37 of 1922, decided on 27th November, 1923, from the decree of the City Civil Court, Madras, dated 21st April, 1922.

Mahomedan Law—Wakf—Public dedication or user necessary for burial ground to be wakf.

The mere fact that a Muhammadan chooses to bury the body of another Muhammadan in his garden would not make that property wakf property, inalienable for all time. There must be some public user, or public dedication. [*P.* 578, C. 1.]

Muhammad Ibrahim and *G. Ramakrishna Aiyar*—for Appellants.

C. V. Venkatasubbaramiah—for Respondents.

Judgment :—This is an appeal from a decision of the Judge, City Civil Court, in which he finds that the plaintiffs, who are suing as representative Muhammadans, failed to make out their claim that the suit land is wakf property, having been dedicated a long time ago and used as a public burial ground for Muhammadans. The evidence for the defendants was to the effect that, beginning somewhere in 1916, attempts were made by the original first plaintiff, who styled himself Muthawali, to set up a claim to this land, as having been dedicated for religious purposes, and with that object, he started holding religious ceremonies there, and built a platform which was used in those ceremonies. The plaintiffs, on the other hand, adduced evidence to show that certain persons had been buried in this land some time more than thirty years ago. At an earlier stage, it had been the case of the first plaintiff that there was an actual dedication of this land for religious purposes. The then Judge of the City Civil Court decided against that view. The case came up to this Court and this Court upheld that finding but remitted the case back to the City Civil Court, because the learned Judge had not gone into the question, whether or not there had been such user of this land as a burial ground, as to render it wakf property and inalienable. The Judge, to whom the case was remanded gave the parties an opportunity of adducing further evidence ; but they both said that they were prepared to stand on the evidence as it had been given before, and the learned Judge had therefore the opportunity of examining the evidence in the same way that I have to deal with it, namely, by having the printed record before him of the oral evidence given, and of the exhibits, and to some extent the views of the first Judge who had seen the witnesses. He was not satisfied that the plaintiffs, on whom the onus lay, had made out their case. He was not satisfied that there had been any burials in this part of the land and he was not satisfied that this land had become, in any way, dedicated by user or otherwise, as a public burial ground. I agree with that finding.

I think that, if there were any such dedication or user, much stronger evidence could have been found. I think too that there are indications against that view, in the way in which this property had been dealt with. It was registered in the Corporation books, as a burial ground in the name of a private owner. It is not enough that the property was used as a burial ground, for that to amount to a dedication of the property as wakf property. The mere fact that a Muhammadan chooses to bury the body of another Muhammadan in his garden would not, as I understand the law, make that property wakf property, inalienable for all time. There must be some public user, or public dedication, and I can find no sufficient evidence of that in this case.

My attention was called to a case in *Court of Wards* v. *Ilahi Baksh* (1), decision of the Privy Council, which is only interesting, in that it shows that though there is no public dedication, the user of part of the land, as a Muhammadan burial ground, for a long time, will itself make the land wakf land. In that case, there was evidence that the land had been used, from time immemorial by the Muhammadan community, for the purpose of burying their dead, and on that evidence, it was held that it formed part of a grave-yard, set apart for Muhammadans, and by user, if not by dedication, the land was wakf. In that case, the registers contained the name of an individual, as the owner and the register described the property as burial ground; but it appeared from the evidence that the person, who was there named as the owner of the land, was the leading Muhammadan of the place and it was as the leading Muhammadan of the place that his name had been put in, as the owner of the property. In this case, in the books of the Corporation, there is the entry of the land being burial ground, but no evidence was attempted to be adduced that the man whose name is put down, as the owner of the land, was a representative Muhammadan and that his name was entered as such.

I am clear that the plaintiffs in this case have failed to make out their case and it follows that the appeal must be dismissed, and the suit dismissed with costs throughout.

Appeal dismissed.

(1) (1913) 40 Cal. 297 (P.C.).

* 1924 Madras 578.

ODGERS AND WALLACE, JJ.

Venkatarathnam and others—Petitioners-Appellants

v.

Satyavati and others—Respondents.

A. A. O. No. 376 of 1922, decided on 18th January, 1924.

(a) *Civ. Pro. Code, S 11—Probate proceedings—Contesting caveators are bound by the decision unless good cause under S. 50 of the Probate and Administration Act is made out.*

Decisions after contest in a probate proceeding are *res judicata* in any subsequent proceeding of any kind against the caveator who contested it. On general principles of the Probate and Administration Act grant of probate by a competent Court binds all contesting parties unless good cause under S. 50 to set it aside is made out.

(b) *Probate and Administration Act S 50—No limitation exists for putting forth a good and just cause—Omission to take the plea precludes taking the plea later—Rejection of application to revoke grant on any ground has the same effect.*

S. 50 prescribes no period of limitation for alleging a just cause. Omission to put a particular just cause precludes reagitating the cause later. Rejection of an application to revoke a grant for a just cause on the ground of *res judicata* does not differ in principle from rejection on the ground that the party failed to put it when the opportunity was given to him. Absence of special citation by itself is not a just cause for revocation of the grant of probate where the person to whom citation has not been issued is otherwise aware of the proceedings. No doubt S. 50 allows one party after another to attack in turn the grant of probate but this does not mean that every succeeding opponent is entitled to reopen all previous attacks nor does it enable parties already defeated to press their attacks over again. [P. 591, C. 1.]

C. S. Venkatachariar and *A. Venkatachellam*—for Appellants.

P. Somasundaram—for Respondents.

Odgers, J :—This is an appeal against the order of the District Judge of Godavari whereby he dismissed the appellant's petition to revoke a probate under section 50, Probate and Administration Act. The previous history of the case is set out in the learned District Judge's order. The only facts we need consider are the following: an application was made by the widow of one Appa Rao, deceased in 1908, for Letters of Administration to his estate with the will annexed. The will is printed at page 17 of the documents in A.A.O. No. 275 of 1920, and it is to be noted that the only property of the testator on which it could take effect was a sum of

insurance money, Rs. 1,000. The father of the testator entered a caveat to the proceedings of 1908 but withdrew it apparently in consequence of an agreement (printed at page 5 of the documents in appeal No. 110 of 1915) to which this (1st) appellant *inter alias* was a party. The agreement shortly provided that the widow should take the Rs. 1,000, should adopt the son of the 1st appellant, (authority to her to adopt was given in the will) and withdraw her application for Letters of Administration. The first appellant was a respondent to the application for Letters of Administration though he was not cited. The agreement fell through, the father of the testator did not appear in the proceedings and the widow obtained Letters of Administration. It appears that she subsequently adopted another boy. The present 1st appellant thereupon petitioned for a revocation of the Letters of Administration granted to the widow. This was dismissed both by the District Judge and by the High Court (Ayling and Napier, JJ.) in A.A.O. No. 132 of 1911 the learned Judges held that no just cause was shown for revoking the Letters of Administration. Several years afterwards two brothers of the 1st appellant in 1916 filed revocation proceedings. Their petition was allowed and the Letters of Administration to the widow were recalled; the 1st appellant was, along with the widow, a respondent to the proceedings. The matter being contentious took the form of a suit (No. 55 of 1917). The first appellant was not a party in his own right and applied to be brought on in I. A. No. 609 of 1919. This was dismissed by the District Judge as he had not objected to the grant originally and his subsequent petition for revocation had been dismissed. He was held not to be a proper or necessary party as he had no power in himself to ask for revocation. In the result the will was upheld and Letters of Administration were ordered to be re-issued to the widow. As a matter of fact this was never done as there was nothing left for the Letters of Administration to operate upon. Further the 1st appellant, as representing the widow would be the person or one of the persons to whom the Letters of Administration would be issued. The question is, can the 1st appellant be now heard to reagitate the whole matter for his own purposes. It has first to be premised that the first appellant is clearly not interested in upsetting the will *qua* will. His grievance has nothing to do with the disposal of the Rs. 1,000 but with the power of adoption given by the will. He wants to use this means to upset the adoption, made by the widow, and which was not in accordance with the agreement above referred to. It is perfectly clear that the authority to adopt could have been given to the widow otherwise than by the testator's will. The present application is based on section 50, Probate and Administration Act, and the particular just cause relied on is the second,—the fraud alleged being the concealment of the agreement. I am by no means convinced that it was a duty incumbent on any of the parties to bring this agreement to the notice of the Court in 1908; nor am I convinced on the evidence that is before us that the testator's father failed to appear in the proceedings of 1908 because the agreement was then subsisting. The judgment in No. 132 of 1911 (page 7) shows to my mind that first appellant was aware of the proceedings and also that the agreement had by that time fallen through. The learned Judge there found as follows:—"The respondent's fourth witness's deposition clearly shows that the petitioner was aware of the proceedings during their pendency and such evidence receives support from the unimpeachable evidence of the other witnesses though the latter cannot fix the dates accurately; the compromise attempted and referred to by these witnesses clearly shows that the petitioner was aware of the proceedings while they were pending." In *Nistariny Debya* v. *Brahmomoyi* (1) it was held that the mere absence of a special citation in proceedings in which probate of a will is granted, is not, where the person to whom a citation has not been issued, is otherwise aware of the proceedings, a 'just cause' for revocation. I therefore hold that the first appellant was a party to the proceedings in 1908 and is bound by the decision of the Court. The learned Judge has held that the first appellant is debarred from reagitating the matter on account of *res judicata*. It is contended that it has been so held solely on the ground that first appellant was aware of the proceedings, which was not strictly a suit. Further it will be noticed that the validity of the will has been upheld by this Court,

(1) (1890) 18 Cal. 45.

in A. A. O. No. 275 of 1920 (Phillips, J., and myself). There this first appellant put in a memo. of objections wherein he repeated his allegation, that, in view of the agreement, the Court ought to have made him a necessary party, and enabled him to call evidence. He also adopted all the grounds of appeal against the validity of the will filed by the then petitioners (his brothers). It is not disputed that these form his grounds in the present appeal. This memo. of objections was not pressed and was dismissed by us. In my opinion the first appellant is barred by the application of the principle of *res judicata* though the words of section 11 may not be strictly applicable. The matter has previously been in issue between the same parties and the validity of the will has been fully and finally established, and in my opinion it would only be encouraging this protracted litigation to proceed to further lengths to hold the opposite. It is contended that the 1st appellant has up to now not had a chance to present his case. I am unable to agree. He had every chance to attend at the original hearing in 1908. He was heard in 1910 when his application to revoke was dismissed. He did not take steps to displace the order refusing to make him a party to suit No. 55 of 1917; but he filed as stated a memorandum of objections to the appeal. The Privy Council has held in *Hook* v. *Administrator General of Bengal* (2) that the plea of *res judicata* still remains apart from the limited provisions of the Code, and in *Sheoparsan Singh* v. *Ramanandam Prasad Singh* (3) their Lordships held that the application of the rules by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. The learned District Judge has further dismissed the appellants' petition on the ground that the judgment of the Court of Probate substantiating the will is a judgment *in rem*. So long as this is in force it is conclusive not only upon all the parties who may be before the Court, but also upon all other persons, whatsoever, in all proceedings arising out of the will, or claims under or connected therewith, *Sarodakanto Dass* v. *Gobind Mohand Das* (4). It is contended by Mr. Venkatachariar that this conclusive character cannot apply to an attempt to set it aside. He further contended that the argument has no force as the Letters of Administration having been recalled and not re-issued there is in fact no such judgment in existence. In my view this is a fallacy; letters were recalled, but the validity of the will was finally established in suit No. 55 of 1917 and Letters of Administration were ordered to be re-issued. The will must, therefore, be treated as having been valid all through, and it is this judgment in No. 55 of 1917 which has the force of a judgment *in rem*. It may be that a judgment *in rem* proved to have been obtained by fraud can be set aside. In my opinion there is no such evidence here. The validity of the will has been considered over and over again and has been finally established; and the appellant is under the circumstances of this case bound by that decision. The appeal fails and must be dismissed with costs throughout.

Wallace, J.:—The original petition is in substance, though not in terms, an application to revoke the grant of a probate. The first appellant contends that the order granting probate on 13-3-1909 is not *res judicata* against him because first, it was not passed after contention and therefore the proceedings are not of the nature of a suit and therefore section 11 of the Civ. Pro. Code does not apply, and secondly that, in any case that grant was set aside by an order of the Court on the petition of his minor brothers, and that thereby the order of the Court was revoked. As to the first point it is clear law that any order passed after contention in a probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it, see *Nuzhatud Dowla Abbas Hussain* v. *Mirza Kurratuland* (5), *Sheoparsan Singh* v. *Ramanandan Prasad Singh* (3) and *Hook* v. *The Administrator-General of Bengal* (2), and it would come within the purview of section 11 of the Civ. Pro. Code. Now, the appellant was aware of the probate proceedings, had an opportunity to contest but did not choose to contest them: so that, it was owing to his own neglect that the proceedings did not become contentious. It appears to me that he is barred from re-opening the matter any more, and this conclusion is

(2) (1921) 48 Cal. 499 (P.C.).
(3) (1916) 43 Cal. 694 (P.C.).
(4) (1910) 12 C.L.J. 91.
(5) (1903) 31 Cal. 186.

based not so much on section 11 of the Civ. Pro. Code itself but on the general principle of the Probate and Administration Act that the grant of probate by a competent Court is binding on all persons who had an opportunity of putting forward their objections before it was passed, unless they can make out a good case under section 50 for setting it aside, section 50 lays down that for "just cause" the grant of probate of Letters of Administration may be revoked or annulled. There is no period of limitation for putting forward such a cause, since obviously the cause may only appear long after the grant: but it is an elementary principle that, where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. No Court would, in my opinion, allow a just cause already agitated and decided upon before the grant of probate to be again made the subject of an application to revoke that grant, and I see no difference in principle between disallowing such an application on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. So that the question before us, as I view it, is whether the 1st appellant had an opportunity, before the grant was made, of urging the very grounds he now puts forward, or whether he urges any new grounds that have arisen since he had that opportunity which he refused to utilise.

I find that he urges nothing new. His petition does not arrange clearly his points of attack or state under which clause of section 50 he appeals; but although he does not ask for the revocation of the order of 13-3-1909, his main points of attack seems to me to be (*a*) that the will was forged, (*b*) that there was fraudulent conduct of the widow, in reference to an agreement, (*c*) his ignorance of the probate proceedings, (*d*) the non-service of summons or citation on him, (*e*) attacks on the conduct of O.S. No. 55 of 1917 into which the petition of his minor brothers was converted after their I.A. No. 383 of 1916 was allowed, and (*f*) the plea that the High Court by recalling the grant in C.M.A. No. 305 of 1917 vacated the original order, so that the whole proceedings are open in this Court. The first four points should have been made grounds of attack before the first grant of probate, for, though no citation was served on him, he was aware of the proceedings. The citation was properly issued and the first appellant had sufficient knowledge of the proceedings—*vide* High Court's findings in A. A. O. No. 132 of 1911 and in Appeal No. 110 of 1915—and such knowledge was enough to render it incumbent upon him to put forward then any case he had. As to the attack on the conduct of O. S. No 55 of 1917, it is an irrelevant matter in this petition, as such conduct would have no retrospective effect on the probate proceedings which the 1st appellant now seeks to reprobate.

As to the last point some discussion is necessary. The 1st appellant contends that the fact that the grant of probate to the widow under O.P. No. 534 of 1908 was revoked by the District Court in I.A. No. 383 of 1916 on the petition of his brothers enables him to plead that that grant is not *res judicata* against him, and that therefore the civil suit O. S. No. 79 of 1909 filed by him to set aside the adoption and the suit for partition by the adopted son of the widow, O. S. No. 6 of 1914, should also be allowed to be re-opened since he was not allowed in those suits to challenge the genuineness of the will, because of the previous grant of the Letters of Administration.

Now, as has been clearly pointed out in A. A. O. No. 305 of 1917, on the appeal by the widow against the order of revocation, that order was in any case wrong and the proper order was to recall the letters, which had the effect of holding the letters, in abeyance until the contention between the widow and the petitioners in I. A. No. 383 of 1916 should have been tried in the form of a suit as provided by the Probate and Administration Act. The mere recall of the letters does not open to the 1st appellant any fresh opportunity to challenge the original grant, since it is in no way the result of his attack. Any attack by others will not avail to set his attack on its legs again. Section 50, in certain circumstances, would allow one party after another to attack in turn the grant of probate, but nothing in it supports the contention that each of such attacks in turn re-opens all previous attacks and enables parties already defeated to press their attacks anew. There is no substance therefore in this last ground of attack under section 50, Probate and Administration Act, on the grant of probate on 13th March 1909.

The present 1st appellant applied to be added as a party-defendant in O. S. 55 of 1917. That application was refused on the ground that his right to oppose the issue of Letters of Administration had been negatived by the proceedings in 1909 granting Letters of Administration and could not be revived. No Civil Revision Petition was preferred from this order. When against the decree in this suit in favour of the widow the petitioners, in I.P. No. 383 of 1916, appealed to the High Court in A. A. O. No. 275 of 1920, the present 1st appellant did not in the High Court ask to be brought on record so that he might agitate his right to be made a party-defendant to the suit. That he knew of the appeal is not open to question, since he himself was brought on record in it as the legal representative of the widow who died during its pendency. As such legal representative he put in a memorandum of objections in which incidentally he alleged that the lower Court ought to have brought him on record in his own right, but that memorandum was not pressed and was dismissed. No doubt it was futile to press such a contention in his capacity as the legal representative of the widow, but that forms no excuse for his not himself applying to the High Court to bring him on record in his own right, so that he might contest the refusal of the District Court to make him a party. This is sufficient to dispose of the vague prayers in this petition to declare that the final order in O. S. No. 55 of 1917 and the connected suits Nos. 79 of 1909 and 6 of 1914 are invalid, since it was rightly held in those suits that the petitioner cannot attack the probate proceedings declaring the genuineness of the will or the authority to adopt covered by it. There is no reason for re-opening these suits on the ground that he was wrongly prohibited from agitating these questions: while as regards the allegation of fraud no decree can be set aside on such a ground by mere petition. I am clear that, so far as the 1st appellant is concerned, he has for ever lost his opportunity of challenging the grant, unless he discovers in future some fresh ground for challenge, which he has not up till now put forward. This disposes of the 1st appellant's case.

The cases of the other appellants have not been separately pressed. Appellants 2 and 3 are the sons of the 1st appellant and appellants 4 to 6 are the sons of the defendants in O. S. No. 55 of 1917 and obviously cannot re-open that decree by means of this petition. The 7th appellant is the mother of the original testator and has no interest in these proceedings.

I, therefore, agree that the petition should be dismissed with costs throughout.

Petition dismissed.

1924 Madras 582.

KRISHNAN AND WALLER, JJ.

Subbayyar—Appellant

v.

M. L. M. Ramanathan Chettiar—Respondent.

F.A. No. 213 of 1923, decided on 12th December, 1923, from the order of the Court of the Second Addl. Sub-Judge, Madura, dated 10th April, 1923.

*(a) *Civ. Pro. Code, O. 11, r. 2.—Does not apply to production.*

Rule 21 in terms does not apply to an order for production; it speaks only of interrogatories or discovery or inspection. An order for production is quite different from an order for discovery or an order for inspection and cannot be said to imply either. [P. 583, C. 1.]

(b) *Civ. Pro. Code, O. 11, r. 14—Refers to further orders on production such as inspection.*

Rule 14 contemplates further orders being passed on the documents being produced. An order for inspection of documents may therefore be passed under that rule itself after hearing parties. Rule 18 also enables a party to obtain an order for inspection. Form 6 cannot be relied on as showing that an order under rule 14 involves an order for inspection, for documents may be directed to be produced in Court, for various other reasons, for example, for preventing tampering with them. [P. 583, C. 2.]

K. V. Krishnaswami Aiyar, C. A. Seshagiri Sastri and *N. Swaminatha Aiyar*—for Appellant.

T. M. Ramaswami Aiyar and *C. Rama Rao*—for Respondent.

Krishnan, J.:—In this case, the defendant had applied to the Subordinate Judge for an order of discovery of documents, against the plaintiff, under Order 11, rule 12, Civil Procedure Code. The learned Judge refused to give such an order but directed the defendant to file a list of documents, which he alleged were with the plaintiff and on his doing so passed an order under rule 14, directing production of such documents upon oath. The plaintiff produced certain documents in Court and prayed the Court to keep them under lock and key. He also

filed an affidavit. Under the Subordinate Judge's orders, the documents were kept under lock and key. The defendant then applied for the inspection and by a separate order after hearing parties, inspection was ordered of the documents filed in Court by the plaintiff. On defendant inspecting those documents, he found that some of the documents included in his lists were not produced, in particular, the rough chitta books he had asked for. Thereupon, the defendant applied to the Court to take action under Order 11, rule 21, and to dismiss the suit. The Subordinate Judge, dismissed the application, holding that the rule did not apply to cases of non-compliance with an order for production and that the order for inspection, which referred only to documents filed in Court, was fully complied with. The appeal to us is by the defendant, against that order of the Subordinate Judge.

Rule 21 in terms does not apply to an order for production; it speaks only of interrogatories or discovery or inspection. In the repealed Code, the words "or production" were in the corresponding section but they have been omitted in the new Code. It is argued that the omission is due to a desire to avoid redundancy, as an order for production implied discovery and inspection. The opinion of Broadway, J., of the Lahore High Court, in the case reported in *Ram Nath* v. *Parabhu Daya* (1), is cited in support of the argument that the object of the omission was to avoid redundancy. The learned Judge does not give a very decided opinion on the point; nor has he discussed the question. On the other hand, a Bench of the Allahabad High Court has held that the rule 21 does not apply to cases of "production" orders. With all respect to the opinion of the learned Judge of the Lahore High Court, I am unable to follow his view. In the corresponding English Rule, Order 31, rule 21 of the English Rules of Practice, the words "or production" do not occur and it was apparently to bring the practice before, into conformity with the English practice on the point, that the omission was made. An order for production is quite different from an order for discovery, or an order for inspection and cannot be said to imply either. In the present case, the order for discovery was refused and the order for inspection was passed, as a subsequent order. It is impossible to hold, therefore, that in the present case the order for production was anything more, than for bare production in Court of specified documents. In the case, *Jay* v. *Hadely* (2), the order was for production and inspection, it was in reality an order for inspection in Court of documents to be produced in Court for the purpose. That case is thus not an authority on the point before us. Some support was sought to be drawn from the wording of Form 6, under Order 11, rule 14, first Schedule, Appendix C, of the Code. That form can be properly used, only where the order is "produce for inspection", as the title of the Form shows. Rule 14 contemplates further orders being passed on the documents being produced. An order for inspection of documents may, I think, therefore be passed under that rule itself, after hearing parties. Rule 18 also enables a party to obtain an order for inspection. Form 6 cannot be relied on, as showing that an order under rule 14, involves an order for inspection, for documents may be directed to be produced in Court, for various other reasons, for example, for preventing tampering with them.

It was suggested that if we do not apply the provisions of rule 21, in cases of orders for production, there will not be a sufficiently effective method to make the party obey the order of the Court. There is no basis for this argument; for there are several ways of making a party produce a document shown to be in his possession and for which privilege is not established, and the presumption that arises against a party who is called upon and does not produce a document in his possession or power is in itself of serious consequence to him.

In the view I take, rule 21 does not apply to orders for production, and the appeal fails. It is true that plaintiff has not definitely stated in his affidavit, whether he has the chitta books with him or not. Defendant may apply to the lower Court to call for a further affidavit from him. Defendant can always take any further steps, he may be advised to, under the rule for inspection. This appeal fails and is dismissed with costs.

Waller, J.:—I agree.

Appeal dismissed.

(1) 65 I.C. 661.

(2) 22 Ch. D. 571.

1924 Madras 584.

ODGERS AND WALLACE, JJ.

Kottoora Thevan and others —Petitioners.

Crl. Rev. Nos. 278 and 386 of 1923, decided on 20th November, 1923, from the orders of Coleridge, J., dated 10th April, 1923.

• (a) *Penal Code, S. 395—Charge and evidence.*

A conviction for dacoity founded on a common object not charged, or on evidence, which does not prove the necessary ingredients of the offence, is not sustainable.

• (b) *Penal Code, Ss. 34 and 149—Without a charge of dacoity, conviction is illegal.*

The charge framed against the accused was, that of being members of an unlawful assembly whose common object was mischief and hurt. In the course of evidence it appeared that some two or three of the accused beat some of the prosecution witnesses, entered their houses and carried off some articles. On this the accused were convicted of dacoity under section 395, Indian Penal Code.

Held, that on the facts of the case a conviction for dacoity can be sustained only by the application of sections 34 and 149, Indian Penal Code and it was necessary to charge and prove that the assembly as a whole had for its common object the committing of dacoity or that each of the members knew that dacoity was likely to be committed in the prosecution of their common object; and that there having been no such charge the conviction for dacoity was bad and illegal.

V. L. Ethiraj for *the Public Prosecutor*—for Crown.

T. Rangachariar and *A. Srirangachariar* —for Accused.

Order:—Petitioners in this case were convicted before the Assistant Sessions Judge of Tinnevelly, by a jury, of the offence of dacoity, and by the Assistant Sessions Judge himself of the offence of rioting, and by force of section 149, Indian Penal Code, causing various kinds of hurt. On appeal, the Sessions Judge reversed the convictions under sections 324 and 325, Indian Penal Code, by force of section 149 and sustained the convictions under sections 395, 147 and 323, Indian Penal Code. Petitioners contend that there was no legal material, on which a conviction under section 395, Indian Penal Code, can be sustained.

2. The facts, which before us, as a Court of revision, may not be traversed, are that an unlawful assembly, of which petitioners are said to have been members, attacked the Adi Dravida village of Illavankulam, with the common object of committing mischief to the properties of the residents and hurt to their persons, that mischief and hurt were so caused and that in the course of this outrage, various articles of property belonging to various inhabitants were carried off by persons in the mob.

3. Now there is no evidence that any such article was carried off by five or more persons, or that five or more persons invaded any house, caused hurt to inmates *for the purpose of committing theft there*, and carried off articles therefrom. The only evidence that, we can find of theft of articles from a house or person, accompanied by the use of hurt or violence to the inhabitants of the house, or to that person, is as follows:—Prosecution 7th witness says that accused 5, 6, and 10 beat him with sticks, and then entered his house and looted it, and prosecution 10th witness says that the 9th accused beat him with a stick and then stole vessels from his house. In neither case, is there any evidence that five or more persons joined in these robberies.

4. *Prima facie* then, there is no evidence that any dacoity was committed. The only legal justification, for a conviction for dacoity must rest on application of section 34 or section 149, Indian Penal Code. For either section to apply, it was necessary to charge and prove that the unlawful assembly as a whole had the common intention of committing dacoity, or that each accused knew that dacoity was likely to be committed, in prosecution of the common object of the unlawful assembly. No charge in such tenor was framed against the accused; nor were they called upon to defend themselves on such a count. In the charge framed, they were no doubt called upon to defend themselves, *inter alia*, against the charge of being members of an unlawful assembly, whose common object was to commit mischief and cause hurt. But there was no count in the charge that the common object of the unlawful assembly was to commit dacoity, or to cause hurt *for the purpose of* committing theft, without which no conviction for dacoity, by force of section 34 and section 149, Indian Penal Code, can be sustained. Again, no doubt, all the accused were charged substantively with the offence of 'dacoity by robbing Sankarapandyan and others:' but, as we have pointed out, there is no evidence that any or all of the accused directly committed dacoity.

5. The conviction for dacoity, based either on a finding of a common object not charged, or on evidence which does not prove the essential ingredients of the offence cannot be sustained. The learned Assistant Sessions Judge therefore misdirected the jury and should have directed them that a conviction for dacoity could not be sustained on the charge and the evidence. We must, therefore, as this is a case of an illegal conviction, interfere in revision and set aside the conviction of the petitioners for dacoity.

6. There is evidence, however, that the accused 1, 2, 3 and 9 committed theft (P. W. 5); that the accused 5, 6 and 10 committed robbery (P. W. 7); and that the 9th accused committed robbery (P. W. 10). As they have been charged with dacoity, they may be convicted of these lesser offences of the same kind. We, therefore, convict the accused 5, 6, 9 and 10 of the offence of robbery, under section 392, Indian Penal Code, and the accused 1, 2 and 3 of the offence of theft under section 379, Indian Penal Code.

7. As to sentences: the method of the Assistant Sessions Judge of passing one consolidated sentence for all offences is not a happy one, and leads to complications, as we now find. We do not know what sentence he intended to inflict for the offence of dacoity. Considering that dacoity was one of the offences which he found proved, the sentences were extremely lenient. Though we hold that no dacoity was proved to have been committed, we agree with the lower Courts that a very serious and concerted attack was made on these unfortunate villagers. We do not find ourselves inclined to reduce the sentences by much. In the case of the accused 4, 7 and 8, now acquitted of dacoity and kindred offences, we reduce the sentence by six months. In the case of the accused 1, 2, 3, 5, 6, 9 and 10 now acquitted of dacoity, but convicted of dacoity or theft, as above, we reduce the sentence by 3 months. The lower appellate Court's order, under section 106, Criminal Procedure Code, will stand.

Sentences reduced.

1924 Madras 585.

KRISHNAN and WALLER, JJ.

Sesha Aiyar—Petitioner

v.

The Public Prosecutor and another—Respondents.

Crl. Mis. Petition No. 289 of 1923, decided on 13th December, 1923, from the order of the Session Judge, Madura, in Crl. M.P. No. 28 of 1923, dated 14th April, 1923.

• *Crim. Pro. Code (1898). S. 195 (6)—Application to revoke after the passing of the amending Act is not maintainable.*

An application for the revocation of a sanction to prosecute granted by the lower Court cannot be entertained after the passing of Act XVIII of 1923 amending the Crim. Pro. Code. The law requiring sanction is repealed by Act XVIII of 1923 consequently the procedure prescribed by the new Act must be adopted for prosecutions to be launched after that Act has come into force.

S. Swaminathan and *K. R. Rama Aiyar*—for Petitioner.

The Public Prosecutor and *K. V. Krishnaswamy Aiyar*—for Respondents.

Krishnan, J.:—This is an application to revoke a sanction given under section 195 of the Criminal Procedure Code, Act V of 1898, as it stood before the recent amendment, to prosecute the petitioner under sections 467 and 109, Indian Penal Code. A preliminary objection is raised by the Public Prosecutor that this application does not lie as under the Code now in force, there is no provision for any sanction to be produced, for a Court to take cognisance of any offence. The Amending Act XVIII of 1923, which came into force in September, 1923, has abolished the procedure of obtaining sanction and has substituted for it a complaint in writing by the Court itself, or by the Court to which that Court is subordinate. The question we have to decide is what the effect of this amendment is, as to a sanction already granted before the amendment came into force. Under section 195 of the Code, as it stood before amendment, it is conceded that according to the rulings of this High Court the petitioner could bring to our notice the sanction that had been given against him and pray that it might be revoked. Is that power now gone or is it still subsisting? The question was considered at length in a judgment recently delivered by another Bench of this Court, in Crl. M. P. No. 374

of 1923, in which an order of the lower Court revoking sanction was sought to be set aside and sanction obtained from this Court. The learned Judges considered the nature of the application under section 195 to this Court and holding it was neither an appeal nor a petition under the revisional jurisdiction of this Court, following the previous rulings of this Court, and that no private party had a vested right of appeal in the matter, which would be preserved in spite of the amendment of the law, dismissed that application as incompetent. I respectfully agree with that view. It is however, argued by Dr. Swaminadhan that that case is distinguishable from the present one, as there the application was to set aside the refusal of a sanction by the lower Court and for the issue of a sanction; whereas here, the application is for the revocation of a sanction, already granted, which was being used against his client in his prosecution. I do not think this is a valid distinction. If a party had under the old law a right to get a sanction revoked, it would have to be held that a party who had got a sanction, which had been wrongly revoked, or who had been refused a sanction, which ought to have been given to him, had equally well, a right to get a sanction from the superior Court. If the one is a right, the other was equally a right; but, in my view, neither of them is a right. Under the old section, power was given to the superior Court to grant or revoke a sanction, refused or granted by a Subordinate Court. What a party did by his application was simply to bring the matter to the notice of the superior Court. That Court could, if it thought fit, have even acted *suo motu*, under section 6 of the General Clauses Act, it cannot therefore be said that any party had any vested right in the matter unaffected by the Repealing Act.

The production of a sanction for the cognisance of certain specified offences was purely a matter of procedure: it was pre-requisite for certain prosecutions. Now that the law requiring sanction is repealed, the procedure prescribed by the new Act must be adopted for such prosecutions launched after that Act has come into force. I hold, for the reasons stated above, that the present application made under the provisions of section 195, now repealed, does not lie and I would dismiss it.

Waller, J.:—I agree.

Appeal dismissed.

* 1924 Madras 586.

SPENCER AND DEVADASS, JJ.

(*John Joseph*) *Brito* — Defendant-Petitioner

v.

Mrs. S. S. Brito—Plaintiff-Respondent.

C.R.P. No. 423 of 1923, decided on 18th July, 1923.

Civ. Pro. Code, S. 115—Wrong section.

A just decision, though purporting to be under a wrong section, will not be revised, if a right section justifies the decision.

C. V. Ananthakrishna Aiyar—for the Petitioner.

B. Sitarama Rao—for the Respondent.

Judgment:—This is a petition under section 115, Code of Civil Procedure, whether or not the Subordinate Judge was acting quite regularly in entertaining this petition. Under section 151, we find there is the authority of this Court for considering that he might have reviewed his decree in the suit, under Order 47, Code of Civil Procedure (see *Alamelu Ammal* v. *Rama Aiyar* (1), and if he had acted in the exercise of his power under that Chapter of the Code, he might have passed a similar order to that, now sought to be revised. As the Judge made a regular enquiry, before passing his order setting aside previous order dismissing the suit, and as he found as the result of that enquiry that the defendant fraudulently and through undue influence caused the plaintiff to sign the compromise petition and to present it in Court, and seeing that the merits of the whole case will be thoroughly enquired into at the trial of the suit, there are no good reasons for our exercising our revisional powers in favour of the petitioner, when the order is substantially just: see *Narayanasami* v. *Natesa* (2).

The Civil Revision Petition is dismissed with costs.

Petition dismissed.

(1) 1922 Mad. 446.
(2) (1893) 16 Mad. 424.

1924 Madras 587 (1).

ODGERS AND WALLACE, JJ.

Ambayara Goundan—Petitioner

v.

Pachamuthu Goundan—Opposite party.

Crl. Rev. Nos. 459 and 460 of 1923, decided on 25th October, 1923, from the orders of the Court of Sub, Divl. Magistrate, Salem, in Crl. Appls. Nos. 7 and 9 of 1923.

• *Crim. Pro. Code (1898), S. 200—Omission to examine complainant.*

Omission to examine a complainant under S. 200 is a mere irregularity and not an illegality. The only person prejudiced by such an omission is the complainant and not the accused.

• (b) *Crim. Pro. Code, S 190—Cognizance.*

Under S. 190 a Magistrate takes cognizance of a case when the complaint is filed and even before the examination of the accused under S. 200. (6 Pat. L.J. 116, 11 Mad. 443, *Foll.*)

R. Kuppuswamy Aiyar for *S. Muthiah Mudaliar*—for Petitioner.

The Public Prosecutor (*J. C. Adam*)—on behalf of the Crown.

Order:—The objection taken is that the whole procedure illegal into to. The prosecution was initiated by the Forest Range Officer, Atur, and the accused was charged with grazing 50 goats in the Godamalai Reserve on 7th July, 1922. The Forest Range Officer was not examined on oath under section 200, Crim. Pro. Code, and under the present amended Crim. Pro. Code, there is no question that his is not required. It is said that this is in illegality, and not an irregularity. It is also said that the Magistrate, had no cognizance of this case under section 190 of the Code of Criminal Procedure. There is no doubt this is wrong: the terms of the section slow, that a Magistrate has cognizance before he examines the complainant under section 200. That the omission to examine the complainant is a mere irregularity, is borne out by the decision in *Queen-Empress* v. *Maru* (1), where it was held that the omission to examine the Tahsildar under section 200 was a mere irregularity. The point is also taken, in *In re Velu Nattan* (2), but that is a question of dismissal under section 203. As Ramesam, J., points out in *In re Ramasawmy Aiyangar* (3), the person prejudiced by such an irregularity is the complainant and when the case ends in a conviction, he has no grievance and the accused cannot in general complain of the irregularity as the omission to take a sworn statement from the complainant cannot prejudice the accused. The complainant is not examined and it must be a matter of evidence, to be decided by the Court hearing the case, as to whether the evidence without that of the complainant is sufficient for a conviction. We think, this is a mere irregularity and that the accused has not been prejudiced by the omission under section 537, Criminal Procedure Code, and that this point must fail. Two other points raised before us, were not taken in the revision petitions and must therefore fail. These Criminal Revision Petitions must be dismissed.

Petitions dismissed.

(1) (1888) 11 Mad. 443.
(2) (1912) 35 Mad. 606.
(3) 1922 Mad. 443.

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* 1924 Madras 587 (2).

ODGERS, J.

In re P. C. Perumal—Petitioner.

Crl. Rev. No. 508 of 1923, decided on 13th December, 1923, from the judgment of S.D.M., Trichinopoly, in C.R.A. No. 1 of 1923.

• (a) *Penal Code, S. 379—Evidence.*

Where the accused in order to punish a boy tied him to a tree and then his cloth was taken away from him in order to put him to shame. *Held* that it was not a case of either theft or robbery.

(b) *Crim. Pro. Code, S. 540 - Terms are wide—For just decision—Discretion may be exercised.*

Even after both parties have closed their cases Court may summon any person as a witness, if his evidence appears to it, essential to the just decision of the case.

S. Subramania Aiyar and *A. S. Srinivasa Aiyar*—for Petitioner.

V. L. Ethiraj—for the Crown.

Order:—In this case the accused was charged under sections 342, 323 and 379, Indian Penal Code, in that at about 5 o'clock on the evening of the 18th November, 1922, he bound the complainant to a tree, snatched away his loin cloth and the towel he had on the upper part of his body and the two rupees that he had in the folds of his loin cloth. He was acquitted under section 379, but convicted under section 342 and 323. The conviction was upheld by the Sub-Divisional Magistrate. Mr. S. Subramania Aiyar for the accused presents three points for consideration.

He says first that there is good and sufficient *alibi* evidence that the accused, who was employed as a building Sub-Inspector in the Loco Scheme, Golden Rock, S. I. Ry., Trichinopoly, was at work there, on that day and not at the place where the offence is said to have been committed, which is agreed to be about 7 miles distant. The second point is that the Court improperly called a Court witness, after the case of each side had been closed ; and the third point is that the Court had no jurisdiction to try the case at all, as the offence really amounted to robbery and, therefore was only cognisable by a First Class Magistrate.

With regard to the first point, the first Court disbelieved the *alibi* evidence, and the lower appellate Court says: "The lower Court also disbelieved the *alibi* evidence of defence witnesses 1, 2 and 4, as the appellant did not mention a word about it in his long statement" and proceeds to confirm the conviction. I have allowed the learned Vakil, as I thought it was a case which needed some examination, to take me through the evidence of the *alibi* witnesses. The first *alibi* witness, D.W. 1, says the accused was at the workspot in the office until 5 p. m., on the date in question. He and the accused apparently left the work together and went to Trichinopoly Junction by train together. He is a fellow workman with the accused. He and the accused work in one and the same section, under the Sub-Divisional Officer, and the Head Draftsman in the witness's office is the maternal uncle of the accused. Further the witness states from memory and not from any official record that the accused worked with him until 5 p. m. on the 18th November. I am not prepared to say that this witness can be trusted to establish the *alibi* of accused. To begin with, he is indirectly interested and again he only relies on his memory. With regard to D.W. 2, he first stated that he did not know where the accused was working on the 18th November. However, he speaks to his having met the accused on Golden Rock platform at 5 30 that evening. This man is a Draftsman. Although his office does not work on the Penultimate Saturday, he says he specially worked on the 18th November, though there is no record to show that he did. I cannot believe this man in any way. D. W. 3 was not relied on by Mr. Subramania Aiyar, because he says that no such occurrence as is charged, occurred at all. I am not prepared to believe that. D. W. 4 produces a diary of the accused. He is a clerk in the Railway Executive Engineer's Office. The diary was made up on the 22nd November and the complaint was made on the 18th. The diary is made up by the accused himself, and I must say I am unable to rely on that, in any shape or form. I am of opinion that the *alibi* evidence was sufficiently considered by the lower Court ; and having considered it myself, I find it does not establish an *alibi* in favour of the accused.

With regard to the second point, the Court witness was called under section 540, Criminal Procedure Code, when both the prosecution and the defence evidence had been closed. But neither the prosecution nor the defence had called Kambarasampettai Perimana Muthirian, who is mentioned as second witness in the complaint of Nachiar Ammal, who is the boy's (complaintant's) mother. It is true that this witness is not mentioned in the list put in by the Police in the charge-sheet, which contains the names of 7 witnesses, of whom 5 were called. The Magistrate, acting under section 540, the terms of which are extremely wide, called him as a Court witness and apparently relied on his evidence. Two cases are quoted for the defence to show that this witness ought not to have been called. The first is *Empress of India* v. *Kaliprosonna Doss* (1), where a single Judge of the Calcutta High Court refused to exercise his powers under section 540, on the ground that there was no matter necessitating enquiry or question, to be cleared up and the witness proposed to be called, was not one on whose testimony the Court could place confidence. Here, the Magistrate apparently thought there was a matter to be cleared up, as it appeared that this witness could corroborate the prosecution witness, as to the occurrence on the 18th November. The other case quoted, I may state that no Madras case has been quoted, was *Nataba Ghose* v. *Adya Nath Biswas* (2). That was a protracted hearing by the Special Deputy Magistrate lasting for about 10 months and after the case had been posted for judgment, two witnesses

(1) (1887) 14 Cal. 245.
(2) 1923 Cal. 690.

were examined before the Magistrate under section 540. I consider that that was an exceptional case, and although it is true that proper discretion has to be exercised under section 540, still the terms of the section are extremely wide, and any Court may at any stage of any enquiry, trial, or other proceedings, summon any person as a witness, if his evidence appears to it, essential to the just decision of the case. There is no ground for assuming here that the Magistrate did not think that the evidence of this man might be of importance, one way or the other, either, to support the prosecution, or to destroy the prosecution theory.

The third point is that there was no theft but robbery. I am quite unable to accede to this proposition. The Magistrate has found that the reason why the boy was tied up was to punish him for having thrown stones in the street. It is quite unreasonable to suppose that the accused meant to rob the boy of his cloth and two rupees. It is quite unnecessary that a man should have to tie up a small boy, in order to take his cloth from him; so that the object of tying up the boy was not theft at all. Therefore, the offence of robbery was not committed. The boy was tied up to punish him and then the cloth was taken away from him, to put him to shame and two rupees were found in the cloth. It has been found that the accused did not take the two rupees. In fact, the accused was not guilty of theft at all. I find these three points against the petitioner and dismiss the Criminal Revision Case.

Petition dismissed.

1924 Madras 589.

SPENCER AND KUMARASWAMY SASTRY, JJ.

Lakshmi Narasimham—Plaintiff-Appellant

v.

Veerabadra and others—Defendants-Respondents.

A.A.O. Nos. 452 and 453 of 1922, decided on 24th October, 1922.

Madras Estates Land Act, Ss. 3 and 4—Mokhasas not excluded from Zamindari are not within the jurisdiction of civil courts.

Where it appeared that the Mokhasas were not excluded from the Zamindari at the time of the Permanent Settlement and were originally granted as Mokhasas, held, that they form part of an estate which is not within the jurisdiction of the Civil Courts. Even a minor Inamdar in a Mokhasa is a landholder. The character of Mokhasas is not changed by mere exchange of lands.

U. Suryanarayana—for Appellant.

P. Narayanamurthy—for Respondent.

Judgment:—These appeals arise out of two suits filed by the plaintiff in the District Munsif's Court of Nuzvid to eject the defendants who are alleged to be his tenants.

The land in dispute is situate in Arugolam Mokhasa within the ambit of the Nuzvid Zamindari. It is alleged to have been exchanged for patta lands held under Government pattahs. The defendants pleaded *inter alia* that the Civil Court had no jurisdiction to entertain the suits as the land forms part of the estate within the meaning of the Estates Land Act. The District Munsif found the fifth issue, namely, whether the suit village is an estate, in favour of the defendants and dismissed the plaintiff's suits on the ground that the land in question was part of an estate within the meaning of the Estates Land Act. On appeal the Subordinate Judge held that the village in which the suit land is situate forms part of the Nuzvid Zamindari and is an estate as defined in section 3, clause 2 (*e*) of the Estates Land Act, that the character of the land has not changed by reason of the exchange referred to in the plaint, and that the plaintiff is therefore a landholder. He returned the plaints for presentation to the Revenue Court and against those orders the plaintiff has filed the present appeals.

The land in dispute was admittedly part of the Nuzvid Zamindari. The Village of Arugolam in which the land is situate appears to have been granted as Mokhasa in 1747 by the then holder of the Zamindari Jagannatha Appa Rao. The original grant has not been produced but the terms of the grant can be gathered from Ex. I which is an extract from the Inam Register. The Inam is classed as personal Inam. The Ayakat is said to be 1781-85, Poramboke 542-54 and the Inams 50 acres 91 cents. Under the column of the description of Inam, the entry is Bhata Vritti. The original grantees were Desapandyas. It is admitted before us that Desapandyas were the persons who were doing the duty of collecting the revenue. Under the heading of

tenure, the entry is "The tenure is Chaturbhagam, now also settled on the same tenure, on produce 450-0 0." The grant is said to be hereditary by prescription and is said to have been granted by Jagannatha Appa Rao in Fasli 1156 or A. D. 1747. The East India Company acquired the Government of the Circars in 1768, and the grant therefore was one made not only before the Permanent Settlement, but before the acquisition by the Company of the Government of the Circars. "Chaturbhagam" is defined in Wilson's Glossary as the fourth part of the annual crop received by Government from the holders of certain alienated lands. In *Sri Rajah Sobhanadri Appa Rao Bahadur* v. *Sri Raja Venkatanarasimha Appa Rao Bahadur* (1) the tenure known as Mokhasa has been defined as one which is created by an assignment of village or land to an individual either rent free or at a low quit rent on condition of service.

It is argued for the appellant that the grant was on favourable quit rent, which means something less than the actual Melwaram which the landlord would be entitled to but for the grant, and that in case of Chaturbhagam Mokhasas the grant was on condition that only a fourth of the produce was paid to the Zamindar, that the very fact that the Mokhasa was granted for Bhata Vritti, that is, service, and that the grantees were Desapandyas or Collectors of Revenue shows that the benefit to the grantees by reason of the grant of the Mokhasa was the difference between the rent which would ordinarily have been paid, and the fourth which the grantees have to pay.

It seems to us to be clear, that the grant being a pre-settlement grant, it would not form part of the Zamindari unless it can be brought under any of the clauses of section 3 clause 2 of the Estates Land Act, and for this purpose it is necessary to see, whether at the time of the permanent settlement this pre-settlement inam was treated as part of the Zamindari assets and the income taken into account for the purpose of the Sannad. In this connection, reference has to be made to Regulation XXV of 1802. S. 4 of the Regulation runs as follows:— "The Government having reserved to itself the entire exercise of its discretion of continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of salt and saltpetre of the Sayar, or duties, by sea or land—of the abkari or tax on the sale of spirituous liquors and intoxicating drugs, of the excise on articles of consumption—of all taxes personal and professional, as well as those derived from markets, fairs or bazaars—of Lakhiraj lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit rents, the permanent assessment of the land tax shall be made exclusively of the said articles now recited."

The contention of Mr. Ramdoss is that the Mokhasa being a pre-settlement inam granted on favourable quit-rent, it must have been excluded by section 4, at the time when the revenue of the Zamindari was taken into account for the purpose of the Permanent Settlement and that, even if it was included, it could not affect the rights of the Mokhasadar, as such inclusion would be opposed to the provisions of the Permanent Settlement Regulation. Reliance has been placed on *Kuppa Reddi Nookayya* v. *Beemanna* (2), in that case the Zamindar of Pittapur granted in 1800 an inam of certain lands in the Zamindari. It was made free of Kattubadi and purported to be Sarva Dumbala or absolute. It was held that the inam was not part of the Pittapur Zamindari as it was a pre-settlement inam excluded from the assessment of the Zamindari. Oldfield and Ramesam, JJ., after referring to Regulation XXV of 1802 were of opinion that in view of the unqualified terms of section 4 there was no relevancy in the enquiry, whether the inam was in fact included in the assets of the Zamindari on which the peishcush was fixed, with regard to the Circuit Committee's accounts prepared before 1786. In the other Second Appeal *Varahaliah* v. *Venkata Suryanarayana* (3) Aylng and Odgers, JJ., held that though the fact of an inam having been granted prior to 1802 raised a presumption that the lands granted were excluded from the permanent settlement, that presumption was capable of being rebutted. As pointed out by their Lordships of the Privy Council in *Secretary of State* v. *Raja of Venkatagiri* (4) the draft of

(1) (1920) M.W.N. 639.

(2) 1923 Mad. 454.
(3) 1924 Mad. 117.
(4) (1921) 44 Mad. 864 (P.C.).

section 4 "can by no means be commended for preciseness or lucidity." Objection is now taken by Mr. Ramdoss that even assuming that the income from this Mokhasa was taken into account for the Permanent Settlement, it should be ignored because of the express provisions of the Regulation. The effect of section 4 was considered by their Lordships of the Privy Council at page 875 of the report. After pointing out that so far as the actual settlement of the Venkatagiri Zamindari was concerned, the Government fixed a definite specific assessment on the whole Zamindari irrespective of the particular assets derived from each particular unit of property within the estate, their Lordships observe :—" The question now is whether the action of the Government was, in view of the provisions of Regulation XXV of 1802, valid or otherwise. As already stated, Counsel for the appellant have strongly argued that in view of the provisions of section 4 of that regulation excluding 'lakhiraj lands (or lands exempt from the payment of public revenue) and all other lands paying only a favourable quit-rent' from the permanent assessment of the land tax, it was not competent for the Governor in Council to grant a Sannad of the character that is in issue in this case." Their Lordships of the Privy Council were of opinion that the question had to be decided with reference to sections 3 and 4 of the Act and the conditions of the Sannad, and that where the Sannad contained no reference to lakhiraj lands section 4 could have no application, and the assessment fixed upon the Zamindari by virtue of the arrangements adopted in 1802 was upon a basis quite different from that provided in section 4 of the Regulation.

The question therefore in this case cannot be decided without reference to the terms of the Sannad granted by the Zamindar and to what actually took place at the time of the Permanent Settlement. We are of opinion that, where at the time of the Permanent Settlement lands, which the Government might have excluded from assessment by reason of the various grounds set forth in section 4 of the Regulation, were as a matter of fact included in calculating the assessment payable by the Zamindari, and where both the Government and the Zamindar from 1802 acted on the footing that the inam forms part of the Zamindari, the tenants, who were subsequently introduced into the property, have no right to question the acts of the persons entitled at the time of the Sannad to enter into those arrangements.

Reliance has been placed by the Subordinate Judge on the fact that at the time of the Inam Settlement an attempt was made to enfranchise the whole village but that after some enquiry the Government gave up the attempt and the matter went up to the Secretary of State with the result that the enfranchisement proceedings were given up. It is argued that the fact that the Government gave up enfranchising the village after so much correspondence shows that the income of the village must have been included in the assets of the Zamindari. It was stated before us that the order of the Government at the time of the Settlement was subpœnaed for, but that the order was not filed owing to objections taken by the Board of Revenue. As it appeared that copies were obtained by the Zamindar and were filed in other proceedings relating to the same village and as Ex. II which is a judgment of the Subordinate Judge of Masulipatam in A.S.No. 466 of 1912 relating to another portion of the same village and where the Government order is referred to, was filed without any objection in both the lower Courts, we thought it desirable in the interests of justice to call for the Government Order No. 2374, dated the 24th of December, 1861. The order of the Government and the connected papers have now been produced. The letter from Mr. Taylor, the Inam Commissioner to the Government, dated July 23rd, 1860, refers to the Mokhasas of the old Masulipatam District and it states that the full value of the Mokhasas in the Nuzvid Zamindari was included in the accounts of the Permanent Settlement. After dealing with the several reports he states as follows :—

"It was necessary to devote the most careful scrutiny to the above references as the original nature of these Mokhasas, and the circumstances of their being included in the assets of the Zamindaries had not been generally understood. The villages of the Zamindari Estates are distinguished on the back on the permanent Kaul, as Seri (*i. e.*, under the direct management of the Zamindar) Mokhasas and Agrahārams. But this distinction affords no ground for classing the Mokhasas with the Lakhiraj land exoluded by the Sannad ; whilst a different conclusion is fully established by

the accounts upon which the Permanent Settlement was based, and which ought to explain the terms of the Kaul. Should the Government concur in the justice of these observations, I submit we possess no reversionary interest in the Mukhasas nor can we claim to derive a quit-rent by their enfranchisement." The Government on the 11th of August, 1860, after referring to Mr. Taylor's letter were of opinion that as the question was one of importance, the letter of Mr. Taylor should be referred to the Board of Revenue for report. An exhaustive enquiry was made by the Board through the Collector and the Board of Revenue agreed with the opinion of the Inam Commissioner and the Collector that Mr. Taylor was right and the Mokhasas could not be enfranchised. On the 24th of December, 1861, the Government passed the following order:—"In their order of 11th August, 1860, No. 1335, the Government referred to the Board of Revenue for report a letter from the Inam Commissioner relating to the Mokhasa Villages of the Zamindaries in the old Masulipatam District. Mr. Taylor was of opinion that these villages were not excluded from the assets of the estates, as had usually been supposed, and that therefore they would not come under his operations.

The Board were at first doubtful on the matter and resolved to refer the subject for enquiry by the Collector. The result is now submitted with the proceedings recorded above.

Mr. Thornhill has conclusively shown that Mr. Taylor was correct in his surmise and the Board now agree both with him and the Inam Commissioner, that Government cannot claim the reversionary right to the villages, and therefore that the rules for redeeming that right are inapplicable to them.

In this view the Government concur."

It is now clear that these Mokhasas were not excluded from the Zamindari at the time of the Permanent Settlement and that they were treated as part of the Zamindari. They are therefore part of an "estate" within the meaning of the Estates Land Act and Civil Courts have no jurisdiction.

As regards the exchange alleged by the plaintiffs, we do not think that it would, even if true, change the character of the plaint lands. It has not been shown that the consent of the Zamindar had been obtained. The question is concluded by the decision of their Lordships of the Privy Council in *Parthasarathi Appa Rao* v. *Raja Bommadevara Satyanarayana* (5). The acts of the Inam Commissioner are not by themselves sufficient to affect the Zamindar (see *Sobhanadri Appa Rao* v. *Emperor* (6).

It is argued that the plaintiff is not a landholder within the meaning of section 3, clause 5 of the Estates Land Act as he is a minor Inamdar in a Mokhasa. It has been held by a Full Bench of the Court in *Brahmayya* v. *Ackirazu* (7) that such an Inamdar is a landholder within the meaning of the section. This decision is binding on us.

The decisions of the District Munsif and the Subordinate Judge are right. The appeals fail and are dismissed with costs.

Appeal dismissed.

(5) (1919) 42 Mad. 355 (P.C.).
(6) 1924 Mad. 242.
(7) 1922 Mad. 373.

1924 Madras 592.

KUMARASWAMI SASTRY, J.

C. Adimoola Mudaliar and others—Petitioners

v.

N. C. Manicka Mudaliar and others—Respondents.

Civ. Rev. Nos. 783, 893 and 894 of 1922, decided on 23rd November, 1923, from the orders of Court of Deputy Collector of Tiruvallur, dated 27th July, 1922.

Madras Estates Land Act (I of 1908), S. 131—On application to set aside a sale where exact amount was not known the amount required by Deputy Collector was paid—Deficiency was made up later than 30 days—Delay can be excused in such cases and no revision lies.

In an application under S. 131 the applicant not being aware of the exact amount he had to deposit, applied to the Deputy Collector himself, who conducted the sale and before whom the application was filed, paid it and subsequently when the exact amount was discovered the period of 30 days had expired but the delay was excused and the balance due was received and the sale was set aside. *Held* (1) that the delay was due to an Act of the Court and hence could be excused; (2) that there was no want of jurisdiction in the lower Court to excuse the delay under the circumstances. (25 Cal. 216, 25 Cal. 639, *Foll.*; 26 Cal. 449, *Dist.*) [P. 594, C. 1.]

T. R. Ramachandra Aiyar and *S. Krishnamachari*—for Petitioners.

S. Gopalaswami Aiyangar, *S. Rangachariar* and *V. Subramania Aiyar*—for Respondent.

Judgment :—These petitions arise out of applications filed before the Deputy Collector, under section 131 of the Estates Land Act, for setting aside the sales for arrears of rent. The sales were on the 13th of March, 1922. On the 6th April, an application was put in, for the purpose of setting aside the sale on the ground of irregularity. The Deputy Collector, probably being under the impression that no application would lie to set aside the sale, on the ground of irregularity, advised that the petitioner may, if so inclined, apply to set aside the sale under section 131 of the Estates Land Act, which corresponds to Order 21, rule 89, Civil Procedure Code. An application was put in for that purpose and a sum of Rs. 150 was deposited at the time. The petitioner was asked to come on the 10th April, for the purpose of ascertaining the balance to be deposited. On the 10th April, it appears from the record, that the petitioner appeared and wanted to know how much he was to pay. The Deputy Collector endorsed on his application, " Find out how much he has to pay " and sent it to the office, and Rs. 15-8-0 was received on that day. Having paid Rs. 15-8-0 the petitioner went away and did nothing further. On the 20th April, the purchaser who was himself the Izaradar applied to the Court for payment of the money paid in by him as purchase-money and in his petition, he states that he is informed that the judgment-debtor paid into Court the decree amount with 5 per cent and poundage and applied for getting rid of the sale under section 131 of the Estates Land Act, that he has no objection to the sale being set aside ; and he applied for payment of the money to him. Apparently no notice was taken of this application and on the 2nd of June a notice was sent by Mr. Krishnamachariar, a vakil of the High Court, to the Deputy Collector, wherein the application made by the client on 20th April, 1922, for payment of the money due to him was referred to. The notice proceeds as follows:—

" Though they did so, even without any formal notice of the petition by the other side, for the purpose of expediting payment of the said large amount to them and their request was made so early as 20th April last and a reminder was sent by my clients by registered post, dated the 6th May and registered on the 9th idem and received by the Head Clerk on the 11th of the said month and though my clients subsequently went and requested the suit clerk to send the refund order by post, which he said would soon be done, nothing has been done as yet."

After receipt of the application by the purchaser, the reminder referred to in the notice and the lawyer's notice, a notice was issued on the 15th June by the Deputy Collector calling upon the petitioner to pay Rs. 138-6-3, I find a calculation made by the Deputy Collector's office, which shows that the arrears were Rs. 168-14-3 and the commission was Rs. 135-0-0 making up a total of Rs. 303-14-3, that Rs. 165-8-0 had already been paid and that Rs. 138-6-3 was the balance that he had to pay. On receiving information to pay this amount was actually paid by the petitioner. Notice was issued by the Deputy Collector informing the parties that the petition for setting aside the sale would be disposed of. Both parties appeared and the Deputy Collector set aside the sale.

Objection was taken before the Deputy Collector that, as the amount required under section 131 of Estates Land Act was not paid within the time limited by the Act, namely, 30 days from the date of sale, the sale ought not to be set aside. The Deputy Collector set aside the sale, on three grounds. He held that the non-payment of the proper sum within 30 days was due to the fact that, owing to want of records, a sum was asked to be paid, which did not represent the full amount payable under section 131. He states that the petitioner acted on the statement made by the Deputy Collector, as to the amount payable and that, if there was a mistake, the mistake being that of the office, ought not to prejudice the petitioner. The Deputy Collector also set aside the sale on the ground that the purchaser having agreed to the sale being set aside and to the deposit being paid over to him, he is estopped from, contending that the sale ought not to be set aside, because of the payment being not in accordance with the section. The third ground which he sets out, is that there were irregularities in the sale which rendered the sale invalid. He also refers to the contention raised, that being an inam, it could not be brought to sale before enfranchisement.

These petitions are filed under section 115 of the Civil Procedure Code and section 107 of the Government of India Act, and before I can interfere, it has to be shown that the Court exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdiction

illegally, or with material irregularity. The contention of Mr. Ramachandra Aiyar for the purchaser is that the amount, which had to be paid, being an amount which had to be arrived at, merely by arithmetical calculation, the petitioner was fully competent to have known what the amount was, when he himself states the amount of the sale in his petition and that, even assuming that there was some error in calculation or an error made in the Deputy Collector's Office, it is not a ground for excusing the non-payment of the full amount required; secondly that there is nothing on the record to show that the Deputy Collector fixed the amount that was payable, or told him to pay a particular sum and that he was misled by such order; thirdly there can be no question of estoppel because the patition to refund the purchase-money proceeded on a statement, that if the amount due and payable as required by the section, had been paid, that amount ought to be paid over to the purchaser. He states that the Deputy Collector assumed a jurisdiction to set aside the sale, on grounds which are not warranted by the very facts which he sets out and that, consequently, he has acted, without jurisdiction by misdirecting himself upon the question of law. The contention for the respondent is that there is sufficient material on record to show that the petitioner before the Deputy Collector's Court was not aware of the exact amount payable, that he applied for information to the Deputy Collector, that the Deputy Collector, who might have refused the information or assistance, did render the assistance that was required, and that the question, therefore, as to whether the party was misled is a question of fact, which was within the competence of the Deputy Collector to decide and, having decided it in favour of the applicant, there is no want of jurisdiction or irregularity in procedure. It is also contended that the question as to whether the purchaser is estopped or not is a question of fact, which it was in the competence of the Deputy Collector to decide. Questions were also raised as to whether section 131 of the Estates Land Act precludes an application to set aside a sale for irregularity. It was argued that having regard to section 192 of the Act, which makes section 311 of the Code of Civil Procedure inapplicable (owing to its not being included in the category of the sections enumerated), it was open to the Deputy Collector to go into the question of irregularity also. The question as to whether a sale could be set aside, on the ground of irregularity under the Estates Land Act is not free from doubt; but I think it is unnecessary to decide that question in this application; because, if the sections of the Code are applicable, the present application being only to set aside the sale under section 131 of the Estates Land Act, which corresponds to section 310 (*a*) of the Civil Procedure Code, it is not competent to the Court to go into any question of irregularity in the sale. I do not, therefore, say anything further on this point.

As regards the question as to whether the petitioner in the lower Court, was misled by an act of the Court, I agree, with the contention raised by Mr. Varadachariar. I have already stated the facts attending on the payment of the money. There can be little doubt that the Deputy Collector on the 10th of April, when the petitioner applied and asked to know how much the actual amount payable by him was, asked the office to find out the amount due and that Rs. 15-8-0 was paid, as appears from the record, on that date. I think it is a fair inference to draw from this fact that Rs. 15-8-0 was paid in consequence of the office informing the petitioner that Rs. 15-8-0 was the amount that was due and which he had to pay to make up the amount payable under the code. It, therefore, seems to me that the amount which the petitioner paid was the amount which he paid, on information given by the Court, as to the amount payable. In his petition to set aside the sale, he says that he was not served with any papers before the sale and, if this statement is true—and there is nothing in the record to show that it is not so—he could not have known the exact amount payable except from what he heard—so that he would have had to apply to somebody for assistance in ascertaining the amount. He chose the person most competent to give details, namely, the Deputy Collector, and the Deputy Collector helped him in ascertaining the amount. It cannot be said that he had any reason to believe that the office would have given an amount which was incorrect and, even assuming that he had any doubts, he was justified in acting on the statement

of the office, in preference to what he might have thought was the amount that was payable.

On these facts, the question is whether the delay ought to be excused. Mr. Ramachandra Aiyar concedes that, if the mistake was a mistake of the Court and if the party was misled, then it will be a ground for excusing the payment after time; but he states that there is nothing to show that the Deputy Collector gave the petitioner any information by which he was misled. I have given my reasons for holding that the petitioner was misled by the figures given on application by him to the Deputy Collector. This is not a case where the petitioner applies to an irresponsible officer for information, but where he applies to the Court, which ordered the sale, for ascertainment of the amount payable by him, and such information was given by the Court. Under these circumstances, I think that the principle in *Abdool Latif Moonshi* v. *Jadub Chandra Mitter* (1), and *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry* (2), applies. Reference has been made by Mr. Ramachandra Aiyar to *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (3); but there is nothing in that case which overrules the principle of the decisions in *Abdool Latif Moonshi* v. *Jadup Chandra Mitter* (1), referred to above. McLean, C. J., begins his judgment by stating that he:

"did not intend to lay down, as an absolutely hard and fast rule, that, if the 5 per cent. on the purchase-money and the amount specified in the proclamation of sale were not paid within the thirty days, the Court was powerless to set aside the sale."

He also states that he is,

"not prepared to say that, if the judgment-debtor has been misled by a mistake of the Court, the consequences of that mistake ought to fall upon him."

The other Judges also take the same position, Jenkins, J., observes that:

"it is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake that has been made is attributable to that act:"

and he states that,

"what constitutes an act of the Court must depend on the circumstances of each case."

If I am right in holding that the petitioner in the lower Court depended upon the statements made by the Deputy Collector, I think that the present case falls within the ruling enunciated and there can be no want of jurisdiction or error, which will entitle me to set aside the order of the lower Court. I do not, therefore, think it necessary to go into the other question of estoppel.

In my opinion, there is no ground for interference with the order, which also I think is right on the merits. Civil Revision Petitions Nos. 783 and 891 of 1922 are dismissed with costs, and Civil Revision Petition No. 893 of 1922 is also dismissed, but without costs.

Petitions dismissed.

(1) (1898) 25 Cal. 216.
(2) (1898) 25 Cal. 609.
(3) (1899) 26 Cal. 449 (F.B.).

1924 Madras 595.

SCHWABE, C. J. AND RAMESAM, J.

M. Subramiah—Appellant

v.

Bansilal Abeerchand and others—Respondents.

O. S. A. No. 54 of 1923, decided on 2nd November, 1923, from the order of Coutts-Trotter, J., dated 31st January, 1923.

Presidency Towns Insolvency Act (III of 1909), S. 49, Cl. (4)—Two persons doing business in partnership—Creditors were ignorant of the partnership and were doing business with the second partner as agent of the first on insolvency of partners—Creditors can elect to proceed against separate assets of the first partner.

The creditors of two insolvents who were trading together in partnership in Madras were not aware of the partnership but were dealing with the second partner as agent of the first partner. The partners were subsequently adjudicated insolvents. The first partner had another business in Cuddappah. In a competition between the creditors of the Madras business and Cuddappah business as regards the availability of the Cuddappah assets for the Madras creditors.

Held, that it was open to the Madras creditors to elect as to which of the assets they will go against whether the general assets of the two partners or the separate assets of the partner against whom they elect. They could elect until the very end of the proceedings and only when they have actually received a dividend there is an election; even after they have received their dividend, they could still pay it back and prove against the other assets. [P. 596, C. 1.]

A. Krishnaswami Aiyar—for Appellant.

M. P. Sundararaja Aiyar—for Respondents.

Schwabe, C. J.:—This is an appeal from the dismissal of a petition in Insolvency, made on behalf of some Cuddappah.

creditors of the 1st insolvent, who claimed that as far as the assets of the Cuddappah business were concerned, they were entitled to priority, over the Madras creditors, who, they alleged, were creditors of the two insolvents in partnership in Madras. The learned Judge has found as a fact that in respect of the Madras business, the Madras creditors did not know that the second insolvent was a partner but treated him only as an agent of the firm and that therefore they are entitled to prove, in competition with the Cuddappah creditors, against what may be called the Cuddappah assets. Assuming that the finding was open to him and that it was a correct finding of fact, then on the authority of the old English cases, In *Ex parte Hodgkinson* (1) and In *Ex parte Norfolk* (2), they are entitled to elect as to which assets, they will go against, the general assets of the two partners or the separate assets of the one against whom they elect; and it is clear law that they could elect, until the very end of the proceedings and that, only when they have actually received a dividend, there is an election; and I think I am right in saying that even after they have received their dividend, they could still pay it back and prove against the other assets.

The main evidence given in this case was that of the second insolvent; there was also the evidence of the 1st insolvent given on a different occasion. There was a partnership deed, a power of attorney and the promissory notes or hundis, in respect of which the Madras creditors mainly were proving. The second insolvent swore that, although there was a partnership deed between him and the 1st insolvent, he was never in fact a partner, that that deed had never been acted upon, and that he never mentioned it to anybody and never used it; and that story is very much corroborated by the fact that the power of attorney is given to him not as a partner but as though he was somebody not a partner of the firm, and was used by him as appears from an examination of the document itself, in this Court on many occasions, as an agent of the firm and not as a partner in it. Further the documents given to the Madras creditors were signed by him not as a partner but as an agent of the firm. I think the learned Judge was entitled to come to the conclusion he came to. I think further that, he would have been, if he thought it to be the fact, entitled to the conclusion on this evidence that the second insolvent, although he entered into this agreement, was not in fact a partner at all. I think further on the document that it is fairly clear, and that in my view of the facts that, whether he was a partner or not, his interest in the Cuddappah business and his interest in the Madras business were exactly the same, and there was no separate Cuddappah or Madras business at all, but that it was one firm, and that if that is the correct view of the case, it does not matter for the present purpose, whether the second insolvent was a partner in the firm or not. I think there is ample evidence to support the learned Judge's view, namely, that, however that may be, the Madras creditors did not know that he was a partner in Madras.

It is suggested that, if that was the view taken by the Judge, the Cuddappah creditors ought to have had some further opportunity of adducing evidence to contradict it. In my judgment, there was no such evidence, which in the face of this document could have been adduced with the remotest chance of being believed. On the view I take of the facts, such evidence would be irrelevant.

In my judgment, this judgment was right and the appeal must be dismissed with costs, on the Original Side scale. There will be a separate set of costs for the Official Assignee.

Ramesam, J.:—If the finding of the learned Judge is correct that the Madras creditors, at the time of dealing with the Madras branch were under the impression that they were dealing only with the first insolvent through his agent, the second insolvent, then they are entitled to say that the debts due to them were, so far as their knowledge was concerned, separate debts within the meaning of the expression in sub-clause (4) of section 49 of the Presidency Towns Insolvency Act III of 1909. The only effect of their discovery at the time of filing the insolvency petition that there was a partnership would be merely to give them a right to an election. This is the English law according to the authorities cited in my Lord's judgment just delivered, and section 49 ought to be interpreted in accordance with the English law. On the

(1) (1815) 19 Ves. 296.
(2) 19 Ves 454.

evidence I agree with my Lord's judgment and I think that the learned Judge's finding is justified, that the Madras creditors did not know of the partnership of the second insolvent at the time of their dealings with the Madras branch.

As to the other points that were argued in the case, I feel some hesitation in saying that the whole of the Cuddappah business of the first insolvent was the same in interest as the Madras business. Whatever amounts and jewels were sent from Cuddappah to Madras, to that extent the Cuddappah dealings were no doubt identical with the Madras business; but it may be that there is much more of the Cuddappah business, the object of which cannot be said to be the furtherance of the Madras business. I also feel some hesitation in saying that the interest of the second insolvent is the same in Madras, as well as in Cuddappah. But, however, this may be, on the finding of the learned Judge that Madras creditors had no knowledge of the second insolvent's partnership, the appeal must be dismissed with costs.

Appeal dismissed.

1924 Madras 597.

KRISHNAN AND WALLER, JJ.

Sonachalam Pillai and others—Appellants

v.

Kumaravelu Chettiar and others—Respondents.

L. P. A. No. 20 of 1923, decided on 16th November, 1923, from the order of Wallace, J., dated 17th October, 1923.

Letters Patent (Madras), Cl. 15—Judgment is one that puts an end to proceeding before the Court—Appeal lies against stay of execution.

Per *Krishnan, J.*:—The test seems to me to be not what is the form of the adjudication but what is its effect on the suit or proceeding in which it is made. If its effect whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with is, to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of the Letters Patent. [P. 598, C. 1.]

"Per *Waller, J.*:—All orders passed after contest *inter partes* are judgments."

An appeal lies under the Letters Patent against the order of a single Judge refusing stay of execution pending the disposal of an Appeal or Second Appeal in this Court. The fact of there being a declaration is no bar to this Court staying the execution of the decree. (35 Mad. 1, *Foll.*; 24 Mad. 358; 14 L.W. 701, *Diss.*) [P. 599, C. 1.]

T. R. Venkatarama Sastri, Nallasivam Pillai and *K. S. Sankara Aiyar*—for Appellants.

T.R. Ramachandra Aiyar, T.L. Venkatarama Aiyar and *V. Sambandham Chetti*—for Respondent.

Krishnan J.:—This is an appeal under clause (15) of the Letters Patent against the order of Wallace, J., sitting as a single Judge in the Admission Court, refusing to stay execution of the decree in O.S. No. 2 of 1920 on the file of the Subordinate Judge's Court of Tuticorin pending disposal of Appeal No. 232 of 1923 which has been filed against that decree and which has been admitted and is now pending in this Court. The suit was brought by certain Vaniyars of Tiruchendur in the Tinnevelly District for a declaration that they were entitled to enter the well-known temple there and go up to the figure of the Nandi in front of the inner shrine and for an injunction to restrian the Trustees and others from preventing them from doing so. The suit was decreed by the Subordinate Judge in their favour, and against that decree Appeal No. 232 of 1923 has, as already stated, been filed in this Court by the Trustees and others.

An application was made to Wallace, J., for stay of execution of the decree pending the disposal of the appeal and that having been refused, this present appeal is filed against that order.

A preliminary objection is taken to the appeal on the ground that no appeal lies under clause (15) of the Letters Patent against an order refusing to stay the execution of a decree. The decision of this question turns on the meaning to be given to the word "judgment" in clause 15 of the Letters Patent. There is nothing in the Letters Patent itself to enable one to say what the exact meaning of the term "judgment" is and what orders would be covered by that term. The word "judgment" is defined in section 2 of the Code of Civil Procedure as meaning "the statement given by the Judge of the grounds of a decree or order" passed by him. As this definition is intended

for the construction of the word "judgment" as used in the Code of Civil Procedure only, it obviously cannot be applied to the word as used in the Letters Patent. The meaning of the word "judgment" in the Letters Patent has been however the subject-matter of consideration in several reported cases. The earliest one which has been brought to our notice is the case of *De Souza* v. *Coles* (1) where at page 387 Bittleston, J., laid down that "it must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or applicant." It was again defined by Couch, C.J., in the leading judgment on the point in Calcutta in *The Justice of the Peace for Calcutta* v. *The Oriental Gas Co.* (2) as being "a decision, whether final, or preliminary, or interlocutory, which affects the merits of the question between the parties by determining some right or liability," and this definition was approved by Markby, J. Since then, the meaning of the term has again been considered by a Full Bench of the Madras High Court in *Tuljaram Rao* v. *Alagappa Chettiar* (3). There the then learned Chief Justice, Sir Arnold White was of opinion that the definition given by Bittleston, J., went too far and that the one given by the Calcutta High Court was too narrow, and he himself laid down the test to be applied to decide whether any particular order amounted to a judgment or not within the meaning of the Letters Patent as follows at page 7.

> "The tests seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause." And he added, "An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent." Following this latter part of the definition as to what is not a judgment he held in the particular case before him which was one of an appeal against an order refusing to frame an issue that no appeal lay, and that view was adopted by the Full Bench. Krishnaswami Aiyar, J., who sat with the learned Chief Justice also agreed with the view taken by him as to the meaning of the word "judgment" and with the order proposed by him; Ayling, J., the third Judge in the Full Bench merely contented himself by saying that he agreed that the answer to the quesion referred for disposal should be in the negative. He did not discuss the question as to what amounted to a judgment at all. This ruling has been since accepted by this Court as correctly laying down the meaning of the word "judgment" and has been cited and followed in several subsequent decisions, see for example, the case in *Srinivasa Aiyangar* v. *Ramaswami Chettiar* (4), *Kulasekhara Naicker* v. *Jagadambal Ammal* (5), *Kanyalal* v. *Para-Basukdoss* (6) and *Krishna Reddi* v. *Thanikachala Mudali* (7). It has been brought to our notice that the same view has been accepted and followed by the Lahore High Court in *Gokal Chand* v. *Sanwal Das* (8) which, it may be noted, was an appeal against a refusal to stay the execution of a decree, and also in *Ruldu Singh* v. *Sanwal Singh* (9), where the learned Chief Justice of the Lahore High Court has considered the authorities and has accepted the view of the Madras High Court as to the meaning of the word 'judgment,' in *Tuljaram Rao* v. *Alagappa Chettiar* (3) the learned Chief Justice elaborately discussed all the cases on the point and, as his judgment has been followed, as stated above, by this High Court since then, I think it only right that we should adopt the same definition. In explaining his meaning, the learned Chief Justice has referred to a number of instances in which he thought an appeal would lie, and one of the instances he mentions in his judgment is an order refusing a stay of execution. He says at page 8, "I should be prepared to hold that an appeal lay from an order refusing a stay of execution; and he has receded from his

(1) (1868) 3 M.H.C.R. 384.
(2) (1872) 8 B.L.R. 433.
(3) (1910) 35 Mad. 1 (F.B.).
(4) (1915) 39 Mad. 235.
(5) (1919) 42 Mad. 352 (F.B.).
(6) 1923 Mad. 44.
(7) 1924 Mad 90.
(8) (1920) 1 Lah. 348.
(9) 1922 Lah. 380 (2).

view to the contrary in *Srimantu Raja Yarlagadda Prasad Nayudu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasasda Nayudu* (10), to which he was a party. No doubt, when the learned Chief Justice said that an appeal lay from an order refusing a stay of execution in the Full Bench case, his observation was in a sense in the nature of an *obiter dictum*; nevertheless we are bound to follow it and we cannot treat the case in *Srimantu Raja Yarlagadda Prasada Nayudu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayudu* (10) as good law. The case in 24 Mad. 358 as pointed out to us, has been followed in *Vairavan Chettiar* v. *Ramanathan Chettiar* (11) by another Bench of this Court, but in that case there is no discussion whatever on the point in issue as that case merely follows *Simantu Raja Yarlagadda Prasada Nayudu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayudu* (10); and if I am right in thinking that 24 Mad. 358 is no longer good law, *Vairavan Chettiar* v. *Ramanathan Chettiar* (11) cannot be accepted as good law.

On the respondents' side besides the two cases in 24 Mad. 358 and 14 L. W. 701 above referred to, our attention was drawn to a number of unreported Letters Patent Appeals, namely, Nos. 24 of 1918, 15 of 1922, 38 of 1921 and 7 of 1923 and it was contended that it was the practice of this Court not to allow Letters Patent Appeals against orders such as the one before us. But all those cases, on a reference to them, will be found to be cases where stay of proceedings in the lower Court was refused: they did not deal with stay of execution at all. Those cases stand on different footing altogether, for, they fall under the second part of the definition of the Chief Justice quoted above, namely, that "an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent." In L. P. A. No. 7 of 1923 the appeal was against an order refusing an interim injunction. The learned Judges held that an appeal lay. I have, therefore, come to the conclusion that the preliminary objection cannot stand and must be overruled, as an appeal lies under the Letters Patent against the order of a single Judge refusing stay of execution pending the disposal of an Appeal or Second Appeal in this Court.

On merits I quite recognise that the learned Judge of this Court having exercised his discretion in refusing to stay execution, we should not interfere with such exercise of discretion unless there are strong grounds for it. But in this particular case unfortunately, the learned Judge seems to have been led to the passing of the order that he made, by his view that there being a declaration of the rights of the Vaniyars in the judgment of the lower Court, he could not interfere with the injunction which formed part of the decree. I am unable to adopt this view, if it is adopted in all cases in which a consequential relief is granted along with the declaration, it would be impossible to say execution. It seems to me that the issue of the injunction ordered by the lower Court in the decree could be stated by itself, and whatever rights the decree might have declared, it would not enable the parties to enter the temple and go to the place where they want to go to. I am, therefore, of opinion that the fact of there being a declaration is no bar to this Court staying the execution of the decree.

On the merits, I think that this is a case in which we should grant a stay with some modification of the order of the lower Court pending the disposal of the appeal here. On the one hand, the Vaniyars are anxious to enter the temple, see the deity and perform their worship, and it will be a great hardship to prevent them altogether from doing so pending the appeal which must last for some time in this Court.

On the other hand, there may be a good deal of truth in what the appellants say, *viz.*, that, if the respondents are allowed to enter the temple and go up to the Nandi, the temple will be desecrated and they will have to perform the ceremony of purification at considerable expense if they succeed in the appeal. I have, therefore, come to the conclusion that the respondents may be allowed to go up from the east to the dhwajasthambam in the temple front inside the gopuram wherefrom they may have a view of the idol and perform their religious worship there but that they should not be allowed to go further pending the disposal of the appeal.

(10) (1901) 24 Mad. 358.
(11) (1921) 14 L.W. 701.

I would, therefore, order a modified stay of execution by directing the appellants not to prevent the respondents from going up to the dhwajasthambam at times of worship and also directing them to let the respondents have a view of the idol when such worship takes place. The order of the lower Court will be stayed with that reservation.

In the circumstances, I think the proper order as to costs is to direct each party to bear their own costs in the Letters Patent Appeal and of the petition for stay.

Waller, J.:—I agree that we should follow the ruling reported in *Tuljaram Rao* v. *Alagappa Chettiar* (3). Were the question still open to argument, I should myself be inclined to adopt the view of Bittleston, J., in *De Souza* v. *Coles* (1), that it is "impossible to prescribe, any limits to the right of appeal founded on the nature of the order or decree appealed against." The word "judgment" in sec. 15 of the Letters Patent includes decrees and orders. Judgment is defined in Halsbury as "any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court. In the Civil Procedure Code an order is described as the formal expression of any decision of a Civil Court which is not a decree. This description is wide enough to cover all decisions of any kind interpreted and so the Code has provided that only certain orders can be appealed against.

The word "judgment" as employed in section 15 of the Letters Patent is a very general term. The Statute does not define it or limit its operation in any way. I venture to doubt whether we are entitled to define it or limit its operation by judicial interpretation. What has been achieved by that process is an *a priori* classification of interlocutory orders into interlocutory orders proper and interlocutory orders which amount to judgments. I think that all orders passed after contest *inter partes* are judgments within the meaning of section 15 of the Letters Patent and that, if it be desired to limit the right of appeal against certain orders the proper method of achieving that end is by providing as has been done in the Civil Procedure Code that only certain orders can be appealed against.

I agree with my learned brother that the fact that part of the decree is declaratory is no bar to a stay of execution being granted. I understand that the parties are willing to accept a stay on the terms indicated. I therefore concur in the order of my learned brother.

Order modified.

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* * 1924 Madras 600.

SPENCER, O. C. J., AND KUMARASWAMY SASTRY, J.

Sesha Sastrulu and another—Defendants Appellants

v.

Kovi Venkamma — Plaintiff-Respondent.

Appeal No. 158 of 1921, decided on 23rd January, 1924, against the decree of the Sub-Judge, Bellary, dated 9th December, 1920, in O. S. No. 10 of 1920.

* *Hindu Widow's Remarriage Act, S. 2—Gift by father-in-law.*

A gift of immoveable property by a father-in-law to a widowed daughter-in-law in the absence of words of limitation in the gift deed enures for her life-time notwithstanding remarriage. Such a gift is not one of the modes by which rights and interests are acquired by a widow under S. 2.

S. T. Srinivasagopalachariar and *V. S. Govindachariar*—for Appellants.

C. Sambasiva Rao—for Respondent.

Spencer, Offg. C.J.:—This is a suit brought by a daughter against her parents, for recovery of certain properties, which she alleged were left in her parents' possession, when she left their house. The plaintiff married her own uncle, Sankariah, who died in 1908. In 1908, her father-in-law, K. Subbiah, who was also her grandfather, made a gift in her favour of certain properties, to be enjoyed during her lifetime. In September, 1917, after she became a widow, she ran away to Rajahmundry to the widow's home of Rao Bahadur M. R. Ry. Viresalingam Pantulu and got married to her second husband, K. Singaracharlu. As her parents retained her property, after her re-marriage, she gave them a lawyer's notice, to which they replied denying that they had any Stridanam Property belonging to her, and she thereupon filed this suit.

The Subordinate Judge's decree is attacked on the ground, that it has not been satisfactorily proved, that she left the jewels, which she now claims in her parents' possession, that as regards the clothes, she

did not specifically mention them in her plaint, and as regards the immoveable property, that the gift must have been made with an implied intention that, upon marriage the property should revert to the family. The Subordinate Judge has given the plaintiff a decree for certain of the jewels, which he has found to have been left in the defendant's possession and has disallowed her claim for certain other jewels. On the whole, there is no good reason for disturbing his finding as to the jewels. Some doubt has arisen in respect of her claim for a gold *kante*, of weight, 18 tolas and value Rs. 540. In her plaint, the plaintiff alleged that all the jewels claimed in Sch. A, had been left in the possession of the defendants. It came out in her evidence that she gave a pair of *koppulu* and *thodulu* to her father, to be made into a *kante* and that he had not given her the *kante*, which he promised. Her mother was examined as defence 9th witness and she denied that her daughter left any jewels and said that she took away the jewels with her when she ran away. She said, on the contrary, that she saw the *koppulu* and *gholusulu* in her possession at the Ranichatram, where she met her daughter after her re-marriage. There is very little independent evidence on this subject. A witness was examined to say that she was not wearing these jewels, when she arrived at Rajahmundry, and the photographs taken after her re-marriage are also evidence of this fact, that she did not wear them after she reached Rajahmundry. Her father, defence 10th witness, denied that his daughter left any jewels with him or his wife. He was not asked specifically whether he took any jewels to make a *kante* ; but it is not likely that he would have admitted it, after having in chief-examination denied that any jewels were left with him. That is all the evidence. D.W. 9 says that her daughter went away with her jewels. The photographs show that she was not wearing the *koppulu* and *thodulu* after her re-marriage. On the whole, there is no reason to disallow her claim for the value of the *kante*, of 18 tolas, which corresponds in weight to the *koppulu* and *thodulu*, that she says she gave to her father.

As regards the clothing, she enumerated the clothes that she claimed in the schedule to the plaint. No evidence was adduced to prove their value ; but her mother, as D. W. 9 said that the clothes given her at her first wedding had been worn out by use. There is no evidence that she left behind clothes of so much value as Rs. 240 —as claimed in the plaint. We disallow this item.

As regards the immoveable property, section 2 of Act XV of 1856, the Hindu Widow's Re-marriage Act, provides that, upon re-marriage, all rights and interests, which any widow may have in her deceased husband's property by way of maintenance, or by inheritance, or by will or testamentary disposition, shall cease and determine upon her re-marriage. But the immoveable property concerned in this case was gifted to her by her father-in-law and was not obtained in the manner referred to in this section. We have been asked to interpret the gift deed, Ex. C, as implying that the property was given to her for use during her widowhood. There is no reason why, when the document states that the donee is to enjoy during her lifetime, we should limit the enjoyment to such part of her life, as she remained unmarried, when there are no words to the effect. As re-marriage of a widow is an exceptional event, it is not likely that the donor would have contemplated his daughters-in-law re-marrying. The case of *Mahammad Umar* v. *Must. Man Kuar* (1) was a case, not of gift, but of an agreement for the settlement of family difference, in which the learned Judges were inclined to presume that there was no intention, that the plaintiff should have a right of residence in a certain house belonging to her deceased husband, if and when she became re-married. The inference that was drawn in that case as to the intention of the parties to that particular document, is not of much assistance to us for interpreting the present gift deed, which contains no words to suggest that the life-interest of the plaintiff was to be limited on the happening of any future event.

The lower Court's decree will, therefore, be confirmed, in respect of the amount decreed therein for jewels and as regards the order for delivery of possession of immoveable properties and for account of rents and profits, but deducting Rs. 240 on account of clothes from the amount decreed in respect of moveable properties. The parties will pay and receive proportionate

(1) (1917) 21 C.W.N. 906.

costs throughout, including the costs of printing.

Kumaraswamy Sastry, J.—I agree with my lord and I have nothing to add.

Appeal dismissed.

*** * 1924 Madras 602** (1).

KRISHNAN AND COLERIDGE, JJ.

K. Uni Achan—Plaintiff-Appellant

v.

P. Kunhikrishnan Nair and another—Defendants-Respondents.

S. A. No. 293 of 1921, decided on 16th April, 1923, against the decree of Sub-Judge, South Malabar.

Civ. Pro. Code, O. 21, r. 103—The bar created by r. 103 must be given effect to even in a suit instituted prior to the order under r. 101—T. P. Act, S. 52.

Where during the pendency of a suit between the parties regarding the disputed immoveable property an order under r. 101 of O. 21 was passed by which the defendant was put in possession of the property and more than a year had elapsed before the suit came to be disposed of: *held*, that the order under r. 101 became final and must be given effect to in the suit, the doctrine of *lis pendens* being not applicable as the order was no transfer.

C. Madhavan Nair—for the Appellant.

S. Ranganatha Aiyar and *A. Vasudeva Menon*—for the Respondents.

Judgment:—We think the Subordinate Judge is right in the view he has taken in the case. That view is supported by the ruling of this Court in *Peela Yarakayya* v. *Venkata Krishnamraju* (1). The order under Order 21, rule 101, Civil Procedure Code, having been against the defendant and he not having filed a suit in time to contest it, it has become conclusive against him. The fact that there was a pending suit, regarding the title to the property and the defendant had filed a written statement in it claiming title, did not absolve him from the obligation of filing a suit under rule 103, if he intended to contest the order under rule 101. That was what was held in the Law Weekly case. The fact, that in the present case the suit was already pending when the order under rule 101 was made, whereas in the Law Weekly case the suit was one subsequently instituted, makes no difference.

It was contended that the doctrine of *lis pendens* applies to the present case; but the short answer to it is that there was no transfer of any right here for that doctrine to apply. The Court merely decided that the plaintiff was the person entitled to the possession of the suit property under rule 101 and as the decision has become final before this case was disposed of, effect must be given to it in this suit.

The Second Appeal fails and is dismissed with costs.

Appeal dismissed.

*** * 1924 Madras 602** (2).

VENKATASUBBA RAO, J.

K. V. Seetharamayyah and others—Plaintiffs-Appellants

v.

Veena Tolasi Babu and others—Respondents.

S. A. No. 409 of 1921, decided on 11th February, 1924, against the decree of Sub-Judge of Vizagapatam, in A. S. No. 118 of 1917, dated 9th April, 1920.

Civ. Pro. Code, O. 47, r. 7—Appeal.

An appeal against an order granting review may be challenged only on one of the grounds specified in O. 47, r. 7.

In an appeal from the decree passed on review if the grounds of appeal relate to the granting of the review, the grounds must be those that are set out in r. 7. The appellant will not, however, be precluded from arguing the appeal on its merits.

P. Narayanamurthy—for Appellants.

S. Venkatachariar and *S. Srinivasaraghavan*—for Respondents.

Judgment:—The learned Subordinate Judge granted the application for review either on the ground that there was a mistake apparent on the face of the record or on the ground that there was "other sufficient reason" under Order 47, rule 1. An appeal against an order granting review may be challenged only on one of the grounds specified in Order 47, rule 7. No such grounds exist in the present case and can be urged in this appeal. Then the question arises as this is a final appeal from the decree itself, can the decision be challenged on grounds other than those contained in rule 7? If the grounds relate to the granting of the review, in my opinion, the grounds, must be those that are set out

(1) (1917) 6 L.W. 281.

in rule 7. [See *Baroda Churn Ghose* v. *Govinda Proshad Tewary* (1), *Muneram Chowdhury* v. *Bishea Perkash Naran Singh* (2) and *Gopala Aiyar* v. *Ramasami Sastrial* (3).] This will not, of course, preclude the appellant from arguing the second appeal on its merits. It has not been shown that the decision on the merits is wrong. In the result, the Second Appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1895) 22 Cal. 984.
(2) (1897) 24 Cal. 878.
(3) (1907) 31 Mad. 49.

* * **1924 Madras 603.**

SCHWABE, C.J., AND WALLER, J.

I. P. Aswatappa—Appellant

v.

Ankulu Gadu and others—Respondents.

Civ. Mis. S. A. No. 31 of 1922, decided on 17th September, 1923, from the order of Court of Sub-Judge, Anantapur, dated 31st January, 1921.

Transfer of Property Act, S. 88—Proceedings started under S. 88 have to be continued under it and not under Civ. Pro. Code, O. 34, r. 5 (2).

Proceedings for enforcing a mortgage started under S. 88, Transfer of Property Act prior to the new Code of Civil Procedure have to be continued under the Transfer of Property Act, as it stood before the passing of the Civil Procedure Code of 1908.

Where in the case of a mortgage decree passed prior to 1908 an order was made after 1908 in the form making the decree absolute instead of in the form of making the decree final, such an order could not be held to be invalid and further proceedings in execution on that order could be taken. (35 M.L.J. 194, *Foll.*)

B. Somayya—for Appellant.

Respondents were unrepresented.

Schwabe, C. J. :—In this case, a mortgage decree was obtained in November, 1908, under section 88 of the Transfer of Property Act, which then applied. By the terms of that decree, if the amount of the mortgage was not paid by a certain date, the mortgaged property could be brought to sale. In 1911, an application was made to make the order absolute, which was the procedure prescribed under the Transfer of Property Act, and an order was passed. In 1914, 1915 and 1917, unsuccessful attempts were made to bring the interest of the mortgagor in the mortgaged property to sale, and the application which resulted in this appeal was launched in August, 1920. An order was made for sale by the District Munsif in October, 1920. The mortgagee, having got his order after all those years, was met by an appeal to the Subordinate Judge, in which it was alleged, and it had been alleged before the District Munsif also, that the execution proceedings were all void *ab initio*, because he had not obtained a proper final decree in his mortgage suit. That was based on the fact, that between the date of the original decree in 1908 and the date of his application to make that decree absolute, the sections of the Transfer of Property Act dealing with the matter had been repealed and their place taken by the Code of Civil Procedure, 1908, Order 34, which by rule 5 (2) requires first of all, a preliminary decree to be obtained and if the money is not paid by the date named in the preliminary decree, then an application shall be made to this Court, and instead of the decree for sale being made absolute, as used to be the practice, a final decree passed. The learned Subordinate Judge found that that point was a good one and therefore these execution proceedings have got to be taken all over again. In my judgment, he was wrong. It is quite clear that where proceedings of this kind were started under the old procedure of the Transfer of Property Act, they are to be continued under that Act, although meanwhile the new Code of Civil Procedure has come into operation; there is clear authority for that proposition in *Ramaswami Reddi* v. *Sokkappa Reddi* (1). Further, it seems to me even apart from that somewhat obvious ruling, it will be quite impossible at this stage to hold that an order which *ex hypothesi* was made accidentally in the form of making a decree absolute, instead of in the form of making a decree final could be disregarded or set aside.

This appeal must be allowed with costs here and in the Court below, the District Munsif's order being restored.

Waller, J.:—I agree and I have nothing to add.

Appeal allowed.

(1) (1918) 35 M.L.J. 194.

* * 1924 Madras 604.

COUTTS-TROTTER AND RAMESAM, JJ.

K. Ramaswami Naicker—Appellant

v.

Alamelu Ammal—Respondent.

F. A. No. 52 of 1922, decided on 6th November, 1923, from the judgment of C.J. in C.S. No. 766 of 1920.

(a) *Fraud—Party to fraud can't set up fraud as defence.*

Vendor cannot plead that the transfer in favour of vendee was a benami transaction intended to cheat the creditors of his own vendor by putting his name as benamidar for his own vendor. [P. 605, C. 2.]

(b) *Civ. Pro. Code, S. 11—Co-defendants—Res judicata occurs between co-defendants only if relief to plaintiff requires decision between them.*

If a plaintiff cannot get at his right without trying and deciding a case between co-defendents the Court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. (3 Hare 627, *Foll.*) [P. 605, C. 1.]

V. Varadarajulu Mudaliar—for Appellant.

V. V. Srinivasa Aiyangar and *A. Narasimhacharya*—for Respondents.

Coutts-Trotter, J.:—This is a curious case which arises out of the rather complicated affairs of a man called Chockalinga Naicker, who was adjudicated insolvent in February, 1915. I have had occasion to go into the story at considerable length on another occasion and I need only, for the purpose of the present case, recapitulate the circumstances very briefly. On the 2nd September, 1910, Chockalingam purported to transfer the lands to Pachaimuthu Naicker for Rs. 2,000. On the 27th June, 1912, Pachaimuthu in his turn transferred them to Ramaswami Naicker, who is closely related in a double way to the insolvent Chockalingam for Rs. 3,000. On the 27th of June, 1914, Ramaswami Naicker purported to transfer the lands to Alamelu Ammal for Rs. 4,550. In the course of the insolvency of Chockalingam, the Official Assignee challenged these alienations. He challenged them as being not *bona fide* and as being without consideration, and the end of that was that I tried a proceeding in which the Official Assignee, as representing the estate of Chockalingam, sued Ramaswami Naicker and Alamelu Ammal jointly in order to get it declared that these transactions must be set aside for want of good faith and like considerations. In those proceedings Ramaswami Naicker and Alamelu had exactly the same interest, *viz.*, to resist the contentions of the Official Assignee on both points. They failed. It was held by me that the garnishees had not shown that they were purchasers in good faith, and I undoubtedly used expressions which indicated, let us say, some suspicion as to whether the purchases were for valuable consideration. But, reading my own judgment, it seems to me clear that I took very good care not to decide that point. It went on appeal and my decision was confirmed by the late Chief Justice and Napier, J., and, no doubt, they did use language which went a good deal further than mine with regard to the question of consideration or want of consideration. The present Chief Justice, who decided this case on the Original Side, has indicated the view that; even if the appellate Court must be taken to have expressed the opinion that there was no consideration in that case having regard to the fact that they agreed with the finding on which I dismissed the suit, namely, that there was a lack of good faith, that was the real ground of decision and that the other ground was *obiter dictum* being a mere expression of opinion not necessary for the decision of the case. The suit which was tried by the Chief Justice arose in this way. There was a suit brought by Alamelu Ammal against her vendor Ramaswami Naicker and she said, "Here is this conveyance in my favour. I have been ousted by the action taken by the Official Assignee. You must indemnify me for the loss on my bargain and pay me damages based on the value of the land at the time that you failed to carry out your undertaking as embodied in the covenant for quiet enjoyment which is part of the sale-deed." To that the only answer that is vouchsafed is this—at least that is the only point pressed before us—that, because the Court in those proceedings had to try whether there was a valid transfer away from the estate of Chokalingam and whether the lady Alamelu Ammal and Ramaswami Naicker, who were the garnishees who were resisting the attack in that case, were free from the charge of having in their hands property belonging to the insolvent's estate, it must

be considered that the Court decided in that case that the transaction was a fraudulent one for all purposes and that their determination in those proceedings was binding in these proceedings against the two garnishees. It is clear that, in certain circumstances, a judgment may act as *res judicata* as between two co-defendants when they litigate against one another subsequently. That doctrine while recognised is strictly circumscribed both by the English and by the Indian Law. The *locus classicus* is the judgment of Vice-Chancellor Wigram in *Cottingham* v. *Earl of Shrewsbury* (1), where he says this: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." That principle was acted on and carried out in *Ramaswami Aiyar* v. *Ponnuswami* (2), a Letters Patent Appeal, where a Bench of three Judges—the present Chief Justice, Oldfield, J., and myself—held that the principle was well established that there could be no estoppel created between co-defendants so as to invoke the doctrine of *res judicata* unless there was a *litis contestitio* as between those defendants *inter se*. There is no trace of such a thing here and we must therefore hold that the judgment of the appellate Court in the former insolvency petition, No. 62 of 1915, does not so act in this case; and as the learned Chief Justice points out, it may very well be that, even supposing that this lady was consciously intermeddling in these somewhat murky affairs of Chockalingam, she had a conveyance direct from Ramaswami Naicker as a guarantee that, if anything went wrong with the estate of Chockalingam, he would stand to her in the position of an indemnifier. One must not forget that Ramaswami Naicker was the son-in-law and brother-in-law of this Chockalingam. That seems to me to be quite sufficient to explain this transaction without any supposition at all that they must necessarily be engaged in a common fraud. Even if one has a suspicion of that kind, on the principle of *Doe de Roberts* v. *Roberts* (3) and *Prole* v. *Wiggins* (4), which has been acted upon in this Court in *Kamayya* v. *Mamayya* (5), it would not be possible to act on it here; because the plaintiff having proved a conveyance containing a covenant for quiet enjoyment, the defendant could not be heard to say "That was all a sham; that conveyance was not between me and her at all; it was a fraudulent transfer effected with intent to defeat the creditors of Chockalingam by putting my name as *benamidar*." On the principle that one *Allegans suam turpitudinem non est audiendus* the defendant will not be allowed to set up that case.

In my opinion, the learned Chief Justice came to the right conclusion in this case and this appeal must be dismissed with costs.

Ramesam, J.:—I agree.

Appeal dismissed.

(1) (1843) 3 Hare 627.
(2) 1922 Mad. 452.
(3) (1819) 2 B. and Ald. 367.
(4) (1836) 3 Bing (N.S.) 230.
(5) (1917) 32 M. L. J. 484.

* * **1924 Madras 605.**

SCHWABE, C.J., AND WALLER, J.

P. Venkatachalam Chetty—Appellant

v.

P. S. Govindasawmi Naicker—Respondent.

F. A. No. 106 of 1922, decided on 14th November, 1923, from the judgment of Kumaraswami Sastri, J., dated the 30th August, 1922.

Probate and Administration Act, S. 3—Deed making disposal of any immediate interest in property is not a gift but is a will.

Where the relevant portions of the document were as follows: "You shall yourself after my lifetime use and enjoy the two rooms built on the ground of the house Municipal No. 11.....I shall myself enjoy the rent in respect of those two rooms as long as I may be alive. You shall yourself use and enjoy after my lifetime that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage exchange and sale. No one has any right to or interest in those rooms To this effect is the gift deed document executed and given in the respect of the aforesaid two rooms and their grounds." *Held* in form it is a deed of gift and not a will, but in fact it is a declaration of the intentions of the donor with respect to her property which she desires to be carried into effect after her

death because there is no disposal of any immediate rights of possession or any immediate interest in the property. In this country in wills it is not uncommon for the donor to reserve to himself a life-interest in the property disposed of and such a reservation is not conclusive against the document being testamentary in its character. (10 Cal. 792, 802, *Foll.*). [P. 606, C. 2.]

B. Sitarama Rao, K. P. Ramakrishna Aiyar and *K. B. Ranganatha Aiyar*—for Appellant.

K. Doraisami Aiyengar—for Respondent.

Schwabe, J.:—This is an appeal from a judgment of Kumaraswami Sastri, J., in which he found that a document, dated November 10th, 1913, described as a gift deed was in fact a will. He found that it was duly executed and declined to go into the question whether certain property which passed under that document had been disposed of between the date of the will and the date of the death of the testatrix. There was ample evidence as to the execution of the document, three witnesses being called who swore that they saw the testatrix affix her mark in their presence. He believed that evidence and I can find no reason for suggesting that that decision is wrong. The question whether the document is a will or a gift is more difficult. It is contended that it is in effect a deed of gift operating *in presenti* and not a will at all, and that as it is a deed of gift in respect of immoveable property which has not been registered, it is void and has no effect. A will is defined in section 3 of the Probate and Administration Act (V of 1881), as "the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." This document which, as I have said, is described as a gift deed purports to dispose of part of a house. The relevant portions of the document are as follows:—"You shall yourself after my lifetime use and enjoy the two rooms built on the ground of the house Municipal No. 11.....I shall myself enjoy the rent in respect of those two rooms as long as I may be alive. You shall yourself use and enjoy after my lifetime that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage, exchange and sale. No one has any right to or interest in those rooms. To this effect is the gift deed document executed and given in respect of the aforesaid two rooms and their grounds." In form it is a deed of gift and not a will, but in fact it is a declaration of the intentions of the donor with respect to her property which she desires to be carried into effect after her death, because there is no disposal of any immediate rights of possession or any immediate interest in the property. The fact that the document purports to reserve a life interest in the property to the donor is an argument against its being a will, but as was pointed out by the Privy Council in *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1), no great attention need be paid to that, because it is a frequent thing in this country to find documents which are in fact wills in terms making clear that the person disposing of the property reserves a life or immediate interest in the property. The various things to consider in arriving at a decision as to whether a document is a will or a gift are discussed in that judgment in page 800. The document before their Lordships was very different to this, but there were certain matters in common between the two which were relied upon by their Lordships, and, in particular, the fact that the document in that case did not purport to give to anybody any possessory or present interest until the death of the donor. A clear instance of a document which should be held to be a gift or a deed of settlement, and not a will, is to be found in the case of *Rajammal* v. *Authiammal* (2), where the donor gave to his wife and daughter-in-law, the latter of whom was claiming maintenance, some property and provided that that property during his lifetime should be held by the donees for him, that they should receive Rs. 5 per month until his death and that after his death they should have the property absolutely. It was held that that was a deed of gift and not a will. We have to consider the proper interpretation of this document, and I have come to the conclusion that it is really a will and not a deed of gift, and I mainly base that view on the fact that the donee gets nothing until the death of the donor. It is true that the document was handed over to the donee, but I find nothing inconsistent with its being a will in that fact.

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(1) (1884) 10 Cal. 792 (P.C.).
(2) (1909) 33 Mad. 304.

Lastly it is contended that the legacy granted by this will has been redeemed by reason of the property having been sold after the date of the will to the defendant. I am not clear on the judgment whether the learned Judge intended to give any decision on that point. It is said that it is covered by the sale-deed, Ex. II, whereby the testatrix sold certain property to the defendant. I am not satisfied that it is covered by it; in fact on an examination of the documents and the further evidence, it seems clear that it is not. But that is a matter which it is not necessary to decide now. If and when the legatee tries to obtain possession of the property, there is nothing in this judgment or in the judgment of the Court below to prevent the defendant, if so advised, from setting up that this legacy has been in fact redeemed.

The appeal will be dismissed with costs.

Waller, J.:—I agree. I would only add that in my opinion the question whether the testatrix had power to dispose of the property does not arise in a proceeding of this kind.

Appeal dismissed.

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* * 1924 Madras 607.

PHILLIPS AND VENKATASUBBA RAO, JJ.

Kanna Panikkar and others—Appellants

v.

Nanchan and others—Respondents.

F. A. No. 133 of 1922, decided on 5th December, 1923, from the decree of Sub-Judge, South Malabar, dated the 31st December, 1921.

Limitation Act, Art. 144—Suit by other members to recover tarwad property alienated by Karnavan not only as Karnavan but also as guardian of minor members is governed by Art. 144 and not by Arts 91 or 44—Limitation Act, Art. 44—Limitation Act, Art. 91.

A suit by the junior members of a Malabar tarwad to recover possession of immoveable property alienated by the Karnavathi is governed by Art. 144 and not by Art. 91. The fact that the Karnavathi purported to execute the document not only as Karnavathi, but also as guardian of the minor plaintiffs, will not make either Art 91 or Art. 44 applicable to the suit.

C. V. Ananthakrishna Aiyar and *C. V. Mahadeva Aiyar*—for Appellants.

T. R. Ramachandra Aiyar and *N. R. Lakshmana Aiyar*—for Respondents.

Phillips, J.:—It has been held in *Chandu* v. *Kambi* (1), *Unni* v. *Kunchiamba* (2) and followed in *Chappan* v. *Ramu* (3) that the members of a tarwad need not sue to set aside an alienation by the Karnavan but can sue to recover possession on the strength of title. In the latter case one ground for the decision was that the alienation though not binding on the tarwad might be binding on the karnavan. In this view article 91 of the Indian Limitation Act would not be applicable to the present case, but it is argued that inasmuch as the karnavathi, purported to execute the document not only as Karnavathi but also as guardian of the minor plaintiffs, consequently the minors are parties to the document, and as such are bound to set it aside before recovering the property. But can it be said that minors are parties in that sense? It has been held in the case of Hindu Mitakshara families that sons when minors are represented in a document through their guardian they need not set it aside. [*Kovvuri Thirupathi Raju* v. *Kovvuri Venkataraju* (4) and *Ganesha Iyer* v. *Amirthaswami Odayar* (5)]. The principle that underlies the construction put forward by Mr. T. R. Ramachandra Aiyar is that parties are bound by their own acts until they are set aside or cancelled, but minors cannot act and therefore the mere addition of their names in the document cannot make the document their act which must be set aside. In this connection we may refer to *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (6). Article 44 does not apply here as the alienation does not purport to be one by a guardian alone, but also by a karnavathi, who under certain circumstances has authority to alienate apart altogether from her guardianship of minors. As neither article 91 nor article 44 is applicable, article 144 must be applied and the suit is within time. The suit will, therefore, be remanded to the lower Court for disposal, after allowing plaintiffs time to amend the plaint and pay additional Court-fee if necessary. Costs will abide the result. The Court-fee in appeal will be refunded.

Suit remanded.

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(1) (1885) 9 Mad. 208.
(2) (1890) 14 Mad. 26.
(3) (1912) 37 Mad. 420.
(4) (1917) 40 I. C. 418.
(5) (1918) M.W.N. 892.
(6) (1905) 30 Mad. 18.

* * 1924 Madras 608.

KRISHNAN AND WALLER, JJ.

Y. Mallayya—Appellant

v.

T. Punnamma—Respondent.

S. A. Nos. 836 and 850 of 1922, decided on 22nd November, 1923, from the decree of District Court, Guntur, in A. S. No. 157 of 1921.

(a) *Civ. Pro. Code, O. 32, r. 4—Consent need not be in writing and may be inferred.*

There is nothing in the rule which requires that that consent should be expressed in writing. The consent may be inferred from circumstantial evidence. (43 All. 104, *Foll.*) [P. 609, C. 1.]

(b) *Minor—Without fraud or negligence of guardian or prejudice, decree binds minor.*

No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. If it is not proved on the minor's side that minor has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian the minor is bound by the decree. [P. 609, Cs. 1 and 2.]

(c) *Civ. Pro. Code, S. 11—Plea that minor was not properly represented in a previous suit though not taken by guardian is* res judicata *where it might and ought to have been taken.*

The minor's next friend had brought a suit to set aside the sale that was held in execution of decree against the minor and where it would certainly have been a proper ground to take in that suit that the decree was itself null and void so that the sale would also be null and void ; but no such plea was put forward. *Held* the ground that the minor was not properly represented in the suit in which the decree was passed was a ground that might and ought to have been put forward in the previous suit and that not having been done the decision in the previous suit constitutes the question *res judicata* under explanation 4 of S. 11. (21 Mad. 91 ; 46 Mad. 135, *Foll.*) [P. 609, C. 2.]

B. Somayya—for Appellant.

B. Satyanarayana and *Ch. Ragava Rao*—for Respondent.

Judgment :—These are second appeals which arise in a suit brought on behalf of a minor by his next friend for setting aside the decree in O.S. No. 187 of 1917 obtained against that minor with the present second defendant as his guardian for a certain sum of money due on a promissory note, and also for the setting aside of a sale in execution of that decree, in which the third defendant became the purchaser of certain properties belonging to the minor. The learned District Judge has declared the decree to be invalid but he has upheld the sale in execution of that decree, and in consequence, the plaintiff has appealed in S. A. No. 850 of 1922 and the decree-holder in O. S. No. 187 of 1917 has appealed in S. A. No. 836 of 1922. Both the second appeals have been heard together.

Now, the first question we have to consider is whether the decree in O. S. No. 187 of 1917 should be treated as null and void and not binding against the minor. The only reason urged before us for holding so is that the consent of the second defendant, who was appointed as guardian *ad litem* of the minor, was not obtained beforehand and that therefore his appointment should be treated as a nullity and the suit should be looked upon as having been decreed against the minor without his being properly represented on record. The learned District Judge has no doubt found in the minor's favour on this point, but after considering the point carefully we are unable to agree with him.

The second defendant was appointed in 1913 as the guardian of the person of the minor under the Guardians and Wards Act. The suit No. 187 was brought in 1917, that is, at a time when the second defendant was the certificated guardian of the minor. Notice was issued to the second defendant before he was appointed guardian and the notice was in these terms : "Take notice hereby that Yezzu Mallaya, the plaintiff in the above mentioned suit (O. S. No. 187 of 1917) has presented an application to this Court praying that a guardian *ad litem* for the minor may be appointed and that after receipt by you of the notice of application in the matter of the said minor, you or any friend of the minor be appointed as such before 14-3-1917, the date fixed ; and that in default, the Court shall appoint a separate person as guardian of the minor for purposes of the suit." That notice was served on the defendant personally and it bears an endorsement in these terms : "On 27th February, 1917, the Court peon having come to the village of Thadikonda and given me, the *guardian defendant* mentioned in this order, a copy of notice of application for appointment of a guardian for the minor, herewith attached, I have received the same. (Signed) Konagalla Venkatasubbaraydu (that is, the second defendant)." It is not disputed that this notice was served on the second defendant personally. On the date fixed for the appointment of the guardian the second defendant no doubt did not

appear, and the learned District Munsif, evidently holding that the second defendant was willing to act as guardian, appointed him as guardian of the minor for the suit. He notes "served absent, appointed." Now, it is contended that, unless there is an express consent on record by the person proposed as guardian that he would act as guardian his appointment as guardian is illegal and the case should be treated as if no guardian had been appointed for the minor. We are unable to accept this argument. All that Order 32, rule 4 (iii), says is that no person without his consent shall be appointed guardian for the suit. No doubt the consent of the person is wanted, but there is nothing in the rule which requires that that consent should be expressed in writing. The consent may be inferred from circumstantial evidence, and in this case, we think the circumstances are such that we are justified in holding that the second defendant did in fact consent to be the guardian of the minor for the suit. He was, as already pointed out, appointed guardian of the person of the minor under the Guardians and Wards Act, and, under clause (iii) of rule 4 of Order 32 he was the person who ought to be appointed as guardian for the suit, unless the Court considered, for reasons which have to be recorded, that it was for the minors' welfare that another person should be appointed. There is nothing here to show that there was any reason for thinking that another person should be appointed for the minor's welfare. That consent can be inferred from circumstances is clear from the ruling in *Chatter Singh* v. *Tej Singh* (1), which we respectfully follow. In these circumstances we must reject the argument that the minor was not properly represented in the previous suit.

It is also suggested that, as the second defendent was the person who executed the promissory note, he had an interest that was adverse to the minor; but, in the particular case he was not a party himself, he not having been sued but only the minor, and there is no reason to suppose that the maternal uncle of the minor would not have put forward a proper defence for the minor if there was one. No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. The conclusion we have therefore come to is that the decree itself cannot be set aside. It is not proved on the minor's side that she has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian. This finding is sufficient to dispose of S. A. No. 836: but there is still another ground why the minor is bound by this decree and that is the ground of *res judicata*. The minor's present next friend had brought a suit, O. S. No. 79 of 1920, to set aside the sale that was held in execution of this very decree and it would certainly have been a proper ground to take in that suit that the decree was itself null and void, so that the sale would also be null and void: but no such plea was put forward. The suit was dismissed against the minor both in the first Court and in appeal. We think the ground that is put forward at present, *viz.*, that the minor was not properly represented in the suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constitutes the question *res judicata* under explanation 4 of section 11 of the Civil Procedure Code. As authority for this proposition we may refer to the case in *Arunachalam* v. *Meyappa* (2) and *Muhammad Rowther* v. *Abdul Rahiman Rowther* (3). On this second ground also the plaintiff's claim to set aside the decree fails.

We must therefore allow S.A. No. 836 of 1922, with costs throughout, and set aside the decree of the lower appellate Court in so far as it holds that the decree in O. S. No. 187 of 1917 is invalid.

S. A. No. 850 of 1922 will fail in this vew. We have already held that there was nothing illegal and invalid in the decree under which the sale took place, and therefore there is no ground for holding that the sale in pursuance of that decree was in any way affected by illegality or was void. We agree with the District Judge in his view that the plaintiff's claim is affected by *res judicata* as regards the sale also. S. A. No. 850 of 1922 must therefore be dismissed with costs.

Appeals dismissed.

(1) (1920) 43 All. 104.

(2) (1897) 21 Mad. 91.

(3) 1923 Mad. 257.

* * **1924 Madras 610.**

SPENCER, OFFG. C.J.

S. Sitaya—Appellant

v.

Mudargaddi Sanyasi and another—Respondents.

S. A. No. 1591 of 1922, decided on 11th January, 1924, from the decree of District Court of Vizagapatam, in A.S. No. 140 of 1922.

Civ. Pro. Code, S. 64—Prior agreement to sell perfected when prevails over attachment—Transfer of Property Act, S. 54.

An agreement to purchase an immoveable property creates an interest in the same sufficient for putting in a claim to raise an attachment thereon. The title of such a vendee when he perfects his title to the land by obtaining a decree for specific performance and getting a transfer of the property to himself under the decree prevails against that of the attaching decree-holder. (8 L.W. 582 : 14 L.W. 524, *Foll.*) [P. 610, C. 2.]

C. Rama Rao—for Appellant.

Y. Suryanarayana—for Respondents.

Judgment :—The plaintiff in execution of a money decree against the first defendant attached certain lands and house and house site as belonging to his judgment-debtor. That was on the 15th December, 1918. Previous to this, on the 15th May, 1916, there was a contract between the 1st defendant and the 2nd defendant to sell the same property to the 2nd defendant. After the attachment, the 2nd defendant put in a claim petition which was allowed. The plaintiff thereupon brought this suit to set aside the order upon the claim petition, and it has been decreed by the first Court and confirmed in appeal by the District Judge. After the attachment had been made, the 2nd defendant brought a suit for specific performance and got an order for sale from the Court and delivery of possession. The question raised in the second issue is whether the 1st defendant had any subsisting interest in the property which was attached, in other words, whether the attachment can prevail against the 2nd defendant's decree by which he got possession of the land in pursuance of the contract for sale. The Courts below held that the contract for sale did not create any title in the 2nd defendant and following the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (1), they set aside the order on the claim petition and declared that the properties were liable for attachment. The decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) is based on the last sentence of section 54, Transfer of Property Act: "It (a contract for the sale of immoveable property) does not of itself create any interest in or charge on such property." These words are capable of being understood in more senses than one. One implication therefrom is that such contracts do not require registration. This decision has recently been overruled by a decision of the Full Bench in *Vizagapatam Sugar Development Co.* v. *Muthurama Reddy* (2). The principle governing the present case has been stated in *Venkata Reddy* v. *Yellappa Chetty* (3), where the learned Judges point out that in English law a judgment-creditor has no right as against a transferee of property in pursuance of a contract entered into before the attachment. They say that it does not seem to be sound sense that when a creditor attaches property which is subject to a particular obligation, he should be able to override it. This case has been referred to with approval in *Chamiyappa Tharagan* v. *Rama Aiyar* (4). It is obvious that the plaintiff could by no manner of means attach a greater interest than what his judgment-debtor possessed at the date of attachment. The plaintiff cannot even lay claim to the rights of a *bona fide* purchaser without notice of prior obligations attached to the land purchased (section 53, Transfer of Property Act) as in this case there has been no sale in open market. Section 64 of the Civil Procedure Code lays down that where an attachment has been made, any private transfer or delivery of the property attached is void, as against all claims enforceable under the attachment. The 2nd defendant's title does not rest upon a private transfer but upon a decree of Court based on the contract to sell and is comparable to the case of a decree based upon an award which we held in *Kasi Viswanatham Chettiar* v. *Ramaswami Athitha Nadar* (5) which was followed in *Narayana Aiyar* v. *Biyari Bibi* (6), should prevail over a purchase under an attachment prior to the award.

(1) (1906) 29 Mad. 336 (F.B.).

(2) 1924 Mad. 271 (F.B.).
(3) (1917) 5 L.W. 234.
(4) (1921) 44 Mad. 232.
(5) (1918) 8 L.W. 582.
(6) (1921) 14 L.W. 524.

The plaintiff in the suit was not a party to the suit for specific performance and it is open to him to impugn that decree as being based on fraud or collusion. His proper course would be to file a suit under section 53 of the Transfer of Property Act to have the transfer avoided as being intended to defeat or delay creditors. In his plaint he has not put his case quite on that ground. But he has alleged that the contract of sale was invalid as being executed with the evil intention of avoiding the plaintiff's debts, and the first issue in the suit raises the question whether the decree for specific performance was obtained fraudulently. As the Courts below have not decided this issue and have disposed of the question erroneously upon the preliminary point arising out of the second issue, their decrees must be set aside and suit remanded to the District Munsif's Court for disposal upon the first and other issues as yet undecided. Costs of the Second Appeal and costs in the Courts below will be costs in the cause and abide the result. The court-fee in Second Appeal may be refunded.

Suit remanded.

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* * **1924 Madras 611** (1).

(SPENCER AND DEVADOSS, JJ.

Arunachala Goundan—Appellant

v.

Swaminatha Aiyar—Respondent.

F. A. No. 1 of 1923, decided on 22nd August, 1923, from the order of District Court, Coimbatore, in A. S. 232 of 1922.

Civ. Pro. Code, S. 47—Agreement prior to decree may be set up in bar of execution.

An agreement made prior to the decree as to the manner in which the decree should be executed after it was passed could be pleaded as a bar to the enforcement of the decree as it stood. [P. 611, C. 2.]

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar*—for Appellant.

K. P. Mahadeva Aiyar—for Respondent.

Judgment :—The finding of the lower appellate Court that Swaminatha Aiyar is the legal representative of his mother Seethalakshmi, the deceased decree-holder, is not and cannot now be challenged.

The District Judge's refusal to allow the appellant to set up in these execution proceedings, any agreement prior to decree, and his direction to the appellant to seek his remedy in a separate suit cannot however be supported. Section 47 of the Code of Civil Procedure is wide enough to permit any valid objection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or the decree-holder's legal representative. It was held in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1), by a Full Bench of this Court, that even an agreement made prior to the decree as to the manner in which the decree should be executed after it was passed could be pleaded as a bar to the enforcement of the decree as it stood. Here the judgment-debtor can raise, in bar of Swaminatha Ayyar's application to execute the decree obtained by his mother, any defence such as that of estoppel which is personal to Swaminatha Ayyar, because the latter now combines in his own person not only those rights to which he has succeeded in consequence of his mother's death, but also those obligations to which he has rendered himself liable in consequence of his separate agreement with the judgment-debtor. The appeal is allowed on this point and the District Munsif is directed to hear and determine the execution petition after allowing the judgment-debtor to put forward any valid defence that he may see fit to raise in the execution proceedings. The Civil Miscellaneous Second Appeal is allowed with costs in this Court.

Appeal allowed.

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(1) (1917) 40 Mad. 233 (F.B.)

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* * **1924 Madras 611** (2).

PHILLIPS AND VENKATASURBA RAO, JJ.

Vellora Karuppan Veetil Chiyancherji Chathu Kutty Nair—Appellant

v.

Kallur Venkayil Chathu Kutty Nair and others—Respondents.

F. A. No. 74 of 1923, decided on 18th October, 1923, from the decree of Sub-Judge, Tellicherry, in O. S. No. 33 of 1922, dated 5th January, 1923.

(a) *Court Fees Act, S. 7 (v) (c)—Plaintiff's own valuation must be accepted but he must value for jurisdiction at the same value as for Court-fees.*

A suit to have it declared that a document to which plaintiff was not a party is not binding on the Devaswam of which he alleges he is one of the trustees and for injunction and accounts, consequential on the declaration, can be valued at plaintiff's choice on the reliefs under S. 7 (v) (c)

but plaintiff must not put one value for purposes of jurisdiction and another for purposes of Court-fee. [P. 612, C. 1.]

(b) *Court Fees Act, Sch. II, Art. 17 (b)—Removal of trustees on same ground is one relief and can't be valued.*

A suit for the removal of many trustees on the same ground is for a single relief falling under Art. 17 (*b*) of Sch. II as amended by Madras Act V of 1922 and a single fee of Rs. 100 is all that need be paid in a suit therefor filed in a Subordinate Judge's Court. A prayer that a particular defendant is unfit to succeed his Karnavan as trustee and that the appointment of the plaintiff as trustee in his place should be upheld also falls under Art. 17 (*b*) of Sch. II of the Court Fees Act, 1870 as amended by Madras Act V of 1922 and if the suit is filed in a Subordinate Judge's Court a fee of Rs. 100 should be paid. [P. 612, C. 2.]

The Advocate General (C. Madhavan Nair) and *T. S. Vaidyanatha Aiyar*—for Appellant.

A. Sivarama Menon, C. V. Anantha-krishna Aiyar and *V. P. Karunakaran Nambiar*—for Respondents.

Judgment :—This appeal relates to a question of Court-fees on the plaint. The Subordinate Judge has found that the first relief prayed for is the cancellation of the plaint Samudayam deed; but in this he is clearly wrong; for plaintiff is not a party to the deed, and merely wants a declaration that the deed is not binding on the Devaswam. For authority, we may refer to *Unni* v. *Kunchi Amma* (1), *Ramaswamy Naidu* v. *Subramania Naidu* (2), and *Chappan* v. *Raru* (3); and respondent's Vakil does not seriously dispute this conclusion.

Plaintiff also asks for an injunction and accounts, as reliefs consequential on this declaration.

His suit in respect of these reliefs comes under section 7 iv (*c*)—The Court-Fees Act, 1870—and the recently added proviso to the section does not affect the case; for we are satisfied that the Samudayam deed does not create any charge on immoveable property. Plaintiff is entitled to place his own valuation on these reliefs which he has done; but he has made the mistake of giving one value for purposes of jurisdiction and another value for Court-fee valuation and this must be corrected. Further reliefs asked in the plaint are the removal of 8 trustees and a declaration that 13th defendant is unfit to succeed his Karnavan as trustee. Article 17 (*b*) of Sch. II (of the Court-Fees Act as amended by Act V of 1922,) is applicable to the former relief; but we think that the Subordinate Judge was wrong in asking for a separate fee of Rs. 100 for each of the 8 trustees; for the ground for removal is the same in the case of each (*i. e.*,) the execution of the Samudayam deed; and we do not think that the removal of each trustee can be treated as a separate relief. The declaration in respect to the 13th defendant and appointment of the plaintiff comes under article 17 (*b*) also and the fee is Rs. 100. Plaintiff is therefore liable to pay two separate fees of Rs. 100 each and an *ad valorem* fee on the value of the first declaration above mentioned and the consequential reliefs. Plaintiff's valuation of Rs. 185 may be accepted.

As regards the valuation of the relief in regard to the trustees, we think that plaintiff should retain the original value of his suit for purposes of jurisdiction and therefore the value of the two reliefs combined must be taken as Rs. 9,815.

The costs of this appeal will be the costs in the suit. Plaintiff will therefore be allowed to amend his valuation in the plaint as ordered above, and the suit will be remanded for disposal according to law. The stamp on this memorandum of appeal will be refunded.

The balance of fee due on the plaint must be paid within one week of receipt of records in the lower Court.

Appeal allowed : Case remanded.

(1) (1891) 14 Mad. 26
(2) (1917) 32 M.L.J. 447.
(3) (1914) 37 Mad. 420.

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* * **1924 Madras 612.**

SCHWABE, C.J., AND RAMESAM, J.

K. V. Periyamiyana Marakayar & Sons—Appellants

v.

P. K. Subramania Aiyar and others—Respondents.

O. S. A. No. 79 of 1923, decided on 5th November, 1923, from the order of Kumaraswami Sastri, J. dated 28th August, 1923.

Civ. Pro Code, O. 37, r. 3 Triable issue means a plea which is at least plausible—Where there is a triable issue even security should not be demanded.

The question to be considered on application under O. 37, r 3 is whether or not, a triable issue in disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must say what the

defence is and as a rule bring something before the Court to show that it is a *bona fide* defence and not a mere attempt to gain time by getting leave to defend. Where there is a triable issue it will not be right to say that as condition of being heard at all the defendants should find money or security; because if they are not able to do so it will be depriving them altogether of a right that they have got of having their case tried. It is only in exceptional cases that the exceptional provisions of O. 37 come into operation to the extent of depriving a man of this right. In cases of this sort the Court has to find if there is any plausible defence and where there is one effect must be given to that fact and leave to defend should be granted and it should be made conditional only in cases where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time. [P. 613, C. 2.]

V. V. Srinivasa Aiyangar and *A. Narasimhachariar*—for Appellants.

N. Chandrasekara Aiyar—for Respondents.

Schwabe, C.J.:—This is an appeal from an order made by Kumaraswami Sastri, J., under Order 37 of the Civil Procedure Code, the suit being a suit on hundis given by the defendants to the plaintiffs or their predecessors. Long affidavits were put in on both sides, and a large body of correspondence, by no means complete, is exhibited to those affidavits.

The question to be considered on application under Order 37, rule 3 is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. It is not enough for instance to say: 'I have got a good defence,' but the defendant must say what the defence is, and as a rule, bring something before the Court, to show that it is a *bona fide* defence and not a mere attempt to gain time, by getting leave to defend. There is not a great difference between those cases, where it is right to give judgment and those where it is right to give leave to defend, on paying the amount into Court, or on giving security; but there are cases in which the defendants set up some sort of defence, which does not bear the stamp of truth; as for instance, when it is contradicted by documents, when the Court may well say that he should only be allowed to come and put that defence before the Court, if he is prepared to give security for the amount claimed. I think the principle applicable here has been laid down clearly in similar applications, under Order 14, rule 1 of the Rules of the Supreme Court in England by the House of Lords in *Jacobs* v. *Booth's Distillery Company* (1), *Codd* v. *Delap* (2) and *Jones* v. *Stone* (3).

In this case, I do not think that the learned Judge turned his mind to the consideration of the question whether or not there is a triable issue in this case. He seems to have taken the view that here are hundis, on the face of which *prima facie* the defendants would be liable, and therefore they must, as a condition of leave to defend, pay the money into Court or give security. We have before us the same materials as he had, and on a study of the correspondence, which in these matters, is always the most important thing to look at, explained as it is by affidavits on both sides, it seems to me that the relationship between the parties had been so complicated that there may well have been transactions, which are referred to in certain of the letters, in which the plaintiffs' predecessors and the defendants were signing bills and hundis for each other's accommodation. There is an absence of books on the part of the plaintiffs. There is on the other hand a statement on oath that the defendants' books which of course could have been made available by the plaintiffs, if they had so chosen, show that the amounts sued for in this suit were not, as between the plaintiffs and the defendants, due from the defendants to the plaintiffs. I think it is quite impossible on the facts of this case to say that there is not a triable issue. We express no sort of view as to whether the defence is good or bad: that will be a matter for the trial Judge. But having come to the conclusion that there is a triable issue in this case, it will not be right to say that, as condition of being heard at all, these defendants should find money or security; because, if they are not able to do so, it will be depriving them altogether of a right that they have got of having their case tried. It is only in exceptional cases that the exceptional provisions of Order 37 come into operation, to the extent of depriving a man of this right. In cases of this sort, the Court has to find if there is any plausible defence and where there is one, effect must be given to that fact and leave to defend should be granted and it should be made conditional, only in cases,

(1) (1901) 85 L.T. 262.
(2) (1905) 92 L.T. 510.
(3) (1894) A.C. 122 (P. C.).

where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in, only in order to obtain further time.

In these circumstances, this appeal must be allowed and leave to defend the suit must be granted. I think the proper order in this case is that the costs of the Original Application and of this appeal shall be costs in the cause. Written statement in 14 days.

Ramesam, J.:—I agree.

Appeal allowed.

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* * **1924 Madras 614.**

KRISHNAN AND WALLER, JJ.

Ramaswami Naidu and others—Appellants

v.

Ayyalu Naidu—Respondent.

F.A. No. 205 of 1923, decided on 13th November, 1923, from the order of Court of Additional Sub-Judge, East Tanjore at Mayavaram, dated 9th February, 1923.

(a) *Civ. Pro. Code, O. 43, r. 1 (s)--Refusing to remove.*

Refusing to remove a receiver already appointed is quite different from refusing to appoint a new receiver. (33 I.C. 735 (*Dist.*) [P. 614, C. 2.]

(b) *Civ. Pro. Code, O. 40 r. 1 (b)—Person is other than receiver.*

The word "person" in Cl. (b) refers to a person other than a "receiver" for cl. (c) shows that the property removed from the possession or custody of the person referred to in Cl. (*b*) is to be committed to the possession, custody or management of the "receiver" by Cl. (*c*). (20 C.W.N. 789 and 24 I.C. 862, *Foll.*) [P. 614, C. 2.]

(c) *Civ. Pro. Code, O. 40, r. 1—Manager is but a receiver.*

There is no provision for appointing a manager under the Code. When a manager is appointed it is really another name for the appointment of a receiver under O. 40. [P. 614, C. 2.]

P. R. Ganapathi Aiyar—for Appellants.

S. Varadachari—for Respondent.

Krishnan, J.:—This is an appeal against an order refusing to remove the 1st defendant from his position of receiver in a partition suit brought against him and another.

A preliminary objection is taken to the maintainability of this appeal on the ground that no appeal lies under Order 43, rule 1 (s) of the Civil Procedure Code. The clause gives a right of appeal only against orders passed under rr. 1 and 4 of Order 40. It is contended first by the appellant's vakil that this is a case which would fall under Order 40, rule 1 (*a*) itself on the ground that they wanted not only to get the present receiver removed but another man appointed in his place and he, therefore, contends that this a case where the Court has refused to appoint a receiver. We are unable to accept this contention, for, till the present receiver is removed, there will be no scope for appointing another receiver in his place and, therefore, the authority cited by him *Munilal* v. *Jagannath* (1), which deal with a case of refusal to appoint a receiver does not apply. Refusing to remove a receiver already appointed is quite different from refusing to appoint a new receiver.

It was then contended that this application should be treated as one falling under Order 40, rule 1 (*b*). That clause says: "Remove any person from the possession or custody of any property," and it is argued that, when the present receiver is removed," it would necessarily result in his being removed from the possession or custody of the property in suit. That argument also we are unable to support as we think that the word "person" in clause (*b*) refers to a person other than a "receiver," for clause (*c*) shows that the property removed from the possession or custody of the person referred to in clause (*b*) is to be committed to the possession, custody or management of the "receiver" by clause (*c*). We think that it is impossible to bring this case under Order 40, rule 1; and, of course, it does not fall under Order 40, rule 4. Therefore, we must hold that no appeal lies. We are fortified in this view by the rulings of the Calcutta High Court in 20 C.W.N. 789 and 24 I.C. 862. The appeal, therefore, fails and is dismissed with costs.

It was then contended that we should interfere in revision with the order of the lower Court as the lower Court fell into a mistake in thinking that the 1st defendant was not appointed a receiver but only a manager. There is no provision for appointing a manager under the Code. When a manager is appointed, it is really another name for the appointment of a receiver under Order 40; and in this case the appointment was actually made under Order 40, C. P. Code. We do not think

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(1) (1915) 33 I. C. 735.

that the lower Court fell into any error in thinking that the 1st defendant was not, in fact, a receiver appointed under the Code. There is no question of jurisdiction or of any acting with material irregularity in the exercise of jurisdiction arising in this petition. This petition is, therefore, incompetent and must also be dismissed.

Appeal and Petition dismissed.

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* * 1924 Madras 615 (1).

WALLER, J.

Ratnam Pillai and another—Petitioners

v.

Nataraja Desikar—Respondent.

Civ. Rev. Nos. 311 and 312 of 1923, decided on 16th November, 1923, from the Order of Court of Sub-Judge, Vellore, in C. M. P. Nos. 37 and 599 of 1922.

(a) *Civ. Pro. Code, O. 22, rr. 3 and 10—In suit by de facto Matadhipathi after finding of trial courts that he was a trespasser if another Matadhipathi is rightfully appointed he can be brought on record and can continue the suit.*

Where the *de facto* head of a Mutt though found by the Courts to be a trespasser had instituted a suit and pending the suit another had been appointed head of the Mutt and subsequently the former died and the latter was on his own application under O. 22, r. 3 brought on record as the legal representative. *Held* (1) that though O. 22, r. 3 did not apply and O. 22, r 10 alone applied the person added as the legal representative could continue the suit, (2) that though the original plaintiff was found not to be the duly elected head of the Mutt and was allowed to sue only as *de facto* trustee the real plaintiff was the Mutt and a suit brought on its behalf even by a wrongly appointed head could be continued by a properly appointed successor or other person on whom the representation of the institution had devolved.

(b) *Civ. Pro. Code, O. 22 r. 6—Substitution under wrong rule does not affect its validity if right rule applies to the case.*

The fact that an application to continue a suit on behalf of a dead plaintiff has been made and granted under a wrong rule does not prevent the retaining of the person so brought on record under the proper rule if any rule is applicable to his case. [P. 615, C. 2.]

C. A. Seshagiri Sastri—for Petitioners.

A. C. Sampath Aiyangar—for Respdt.

Judgment:—The facts appear to be thus. Nataraja was in 1914 declared by the High Court to be trespasser. He appealed and the High Court's decision was upheld by the Privy Council in 1920. In that interval in 1919 he had filed this suit as head of the Mutt. After the Privy Council's judgment Annamalai, who has now been brought on to the record as the plaintiff was elected head of the Mutt. Sometime afterwards Nataraja died and in 1921 Annamalai applied to be brought on record as his legal representative. This application was granted and the order granting it has been brought up in revision.

It is now argued that Order 22, rule 3 does not apply. It does not follow, however, that because an application has been made, and granted under a wrong rule, respondent cannot be brought on record under the proper rule if any rule is applicable to his case.

2. On the whole I see no reason why Annamalai should not be allowed to continue the suit under Order 22, rule 10. Nataraja sued on behalf of and as head of the Mutt. No doubt he was found not to be the duly elected head of the Mutt but as *de facto* trustee is allowed to sue. Vide *Kasi Chetty* v. *Srimathu Devasikamony Nataraja Dikshitar* (1).

If Nataraja had a right to sue as representing the Mutt, it seems to me that on the appointment of a properly elected head, the right to sue devolved on the latter. It would have been a very different matter, had Nataraja sued in his personal capacity. Here the real plaintiff is the Mutt and a suit brought on its behalf even by a wrongly appointed head, can I think, be continued by a properly appointed successor or on whom the representation of the institution has devolved:

3. Respondent will be allowed to continue the suit. The petitions are dismissed with costs. (One set.)

Petition dismissed.

(1) (1913) M.W.N. 181.

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* * 1924 Madras 615 (2).

RAMESAM AND WALLACE, JJ.

Muthiah Goundan and others—Petitioners

v.

Chinna Nallappa Goundan and another—Counter-Petitioners-Respondents.

Civ. Mis. Pet. No. 2852 of 1923, decided on 2nd October 1923.

(a) *Crim. Pro. Code, S. 195—Sanction granted and acted upon by filing a complaint prior to the new Criminal Procedure Code is not infructuous.*

Where a complaint had been instituted pending an application to the High Court for revocation of sanction on the basis of which the complaint was filed and during the pendency of this application

the new Amending Act of 1923 came into force *held*, that the sanction was quite effective and not infructuous.

Penal Code, S. 186—District Munsif cannot dispense with an enquiry in granting sanction under S. 186, I.P.C.

A District Munsif cannot dispense with an enquiry on the ground that he is acting not as Court but as an executive officer in sanctioning prosecution under S. 186 Penal Code for obstructing an Amin in giving delivery in execution. In the circumstances of the case however it was held that sufficient enquiry was made and the discretion was exercised judicially. [P. 616, C. 1.]

FACTS.—The District Munsiff on the report of the Amin that he was obstructed in giving delivery granted sanction to prosecute the petitioners for an offence under S. 186, I. P. C. The Village Munsif who was present at the time also reported similarly. The District Judge holding that no enquiry was necessary on the ground that the District Munsif was an executive officer confirmed the sanction, on the basis of which criminal proceedings were taken but were stayed by the High Court pending the application for revocation of the sanction. Hence this application for revision.

K. V. Sesha Aiyangar—for Petitioners.

T. M. Ramaswamy Aiyar for *Mr. A. V. Visvanatha Sastiar*—for Respondents.

Order:—We think there has been an enquiry before the District Munsif on the application for sanction. Even if Ex. B is not proved, Ex. A is evidence and is enough to make out a *prima facie* case. It may be that the District Judge is not altogether correct in saying that no enquiry is necessary but his error is immaterial. There has been an enquiry in this case, sufficient in our opinion, having regard to the nature of the statements in the counter-petition and we are also of opinion that the Courts below have exercised their judicial discretion as to whether the sanction is necessary in the public interest.

We do not think that it can be inferred from *The Public Prosecutor* v. *Raver Unithiri* (1), that the sanction of the first Court and a complaint based on it lapse. We are unable to hold that the new Criminal Procedure Code Amending Act affects the sanction, or the complaint filed under it under the Act before the amendment.

The petition is dismissed.

Petition dismissed.

(1) (1913) 26 M.L.J. 511.

* * 1924 Madras 616.

SCHWABE, C.J., AND RAMESAM, J.

Anantalal Damani—Petitioner

v.

Surjimull Murlidhar Chandick and another—Respondents.

Civ. Mis. Petition No. 3470 of 1923, decided on 15th November, 1923, from the Order of High Court, dated 23rd April, 1923.

Civ. Pro. Code, S. 109 (c)—Question of unstamped acknowledgment being inadmissible is not covered by clause (c).

The question whether an acknowledgment was given in order to supply evidence of the debt itself within the meaning of Art. 1, Sch. I of the Stamp Act and being not stamped is not admissible in evidence, is not a question of public importance or of great private importance nor a precedent which would govern numerous other cases. [P. 617, C. 1.]

V. V. Srinivasa Aiyangar and *R. Purushothama Aiyangar*—for Petitioner.

K V. Sesha Aiyangar—for Respondents.

Schwabe, C.J.:—This is an application for leave to appeal to the Privy Council, in a case which is under Rs. 10,000. The question, therefore is whether, under section 109 (*c*) of the Code of Civil Procedure, we can certify it, to be a fit case for appeal to His Majesty in Council.

To quote my own words in *Rajah of Ramnad* v. *Tiruneelakantam Servai* (1):

"what is contemplated is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance."

The point in dispute in this case is whether a certain acknowledgment, which was given of a debt, was given in order to supply evidence of such debt, within the meaning of Article 1 of Sch. I of the Stamp Act; because, if so, not having been properly stamped, it would not be admissible in evidence at all. We held, following the other cases, that the question for determination was whether the dominant intention of giving that acknowledgment was to supply evidence of the debt or something else; and we held that, under the circumstances of this particular case, it was not the dominant intention and, therefore, the acknowledgment was admissible. This may be right or may be wrong in law, or it may the right or the wrong view of the

(1) 1923 Mad. 232 (F B).

facts of the case. But I cannot think that it is a case of public importance or of great private importance; nor do I think that it is an important precedent, which would govern numerous other cases. The point has been decided before, and most of the cases on the subject are on the same lines as this judgment. I do not think that this is a case within the meaning of the section. If it is desired to litigate this point before the Privy Council, we still have to wait until a case of sufficient magnitude and importance to make it appealable has arisen.

This application must be dismissed with costs.

Ramesam J.:—I agree.

Petition dismissed.

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* 1924 Madras 617(1).

WALLACE, J.

Suppai Goundan—Defendant-Appellant

v.

Kandaswamy Goundan—Plaintiff-Respondent.

S. A. No. 602 of 1921, decided on 23rd January, 1924, from the decree of Sub-Judge, Coimbatore, in A. S. No. 9 of 1920.

(a) *Negotiable Instruments Act, S. 9—Endorsement by guardian.*

Endorsement of a promissory note by the guardian without an indication that the guardian has endorsed it in his capacity as a guardian does not pass title to the endorsee who therefore is not a holder and has no *locus standi* to sue on the pronote. [P. 617, C. 1.]

(b) *Civ. Pro. Code, S. 100—No evidence.*

A finding of fact on no evidence is liable to be upset by High Court in second appeal. [P. 617, C. 1.]

W. S. Subrahmania Aiyar—for Applt.

S. Muthiah Mudaliar—for Respondent.

Judgment:—This appeal may be disposed of on the short ground that there is no evidence that the plaintiff is the holder of the promissory note. The allegation in the plaint was that the guardian of the minor son of the payee transferred the promissory note to plaintiff in her capacity as guardian. In the written statement, defendants challenged this allegation and put plaintiff to strict proof of it. Plaintiff has made no attempt to prove it. The endorsement of transfer is signed by the lady in her personal capacity, and there is nothing either in the body of the note or appended to the signature to show that she signed as guardian. Both the lower Courts have merely inferred, on no evidence, that she signed as guardian. The cases relied on by the District Munsif are of very little assistance, since, in each case, it has to be decided on its own facts whether the endorser endorsed as guardian or not.

2. When the plaintiff was put to proof of this point and called no evidence, his suit must fail. It is not a case where evidence was not available. The widow signatory could have been called and attestors could have been examined on the point.

3. I find that the plaintiff has no *locus standi* to maintain this suit and that the lower Courts have erred in law in coming to a finding of fact on no evidence. I reverse the judgment and decree of the lower appellate Court and dismiss plaintiff's suit with costs to defendants throughout.

Appeal allowed.

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* 1924 Madras 617 (2).

SPENCER, O.C.J.

Poochammal—Plaintiff-Appellant

v

Sundarammal and others—Respondents.

S. A. No 877 of 1921, decided on 1st February, 1923, against the decree of the District Court of Trichinopoly, in A. S. No. 203 of 1920.

Hindu Law — Widow—Reversioner — Suit by reversioner to set aside, collusive mortgage and sale is governed by Art. 125—Limitation Act, Art. 125.

A suit by a reversioner on the allegation that the widow executed a sham mortgage to defeat the reversioner's rights and got the property sold in a collusive suit is governed by Art. 125 of the Limitation Act and the reversioner need not sue to set aside the mortgage. [P. 618. C. 2.]

M. S. Vaidyanatha Aiyar—for Appellant.

N. S. Rangaswamy Aiyangar—for Respondents.

Judgment:—This is a suit by a reversioner to obtain a declaration that the Court sale in favour of the 2nd defendant of certain properties which belonged to the reversioner's father and the subsequent sale by the 2nd defendant to the 3rd defendant are not for purposes binding on the estate and are not valid after the death of the 1st defendant her stepmother who is alleged in the plaint to have got a suit instituted by the 2nd defendant her maternal uncle who is also husband of her sister. The District Munsi

dismissed the suit on the issue as to limitation without trying the other issues, and the District Judge confirmed his decree. The grounds given by the District Judge for holding that the suit is barred by limitation under article 125 is that the decree and sale sought to be declared invalid were preceded in 1905 by a mortgage and that the sale in execution cannot be taken as the starting point for limitation when there is a previous mortgage upon which the decree was obtained. There are observations to this effect in Rustomjee's commentary on the Law of Limitation in which reference is made to *Jaggi* v. *Prithi Lal* (1). The learned Judges in that suit held that reversioners could not maintain a suit under article 125 to declare that a Court sale was not valid against the reversion unless they were entitled to a declaration that the antecedent mortgage also was void except for the life of the mortgagor. There is no discussion in that decision of the questions whether the mortgage itself was binding or not on the reversion and whether the decree obtained on that mortgage was a fresh act of alienation or whether it bound the reversioners as being a decree obtained by the widow representing the estate of her late husband. The present case however is distinguishable. In the plaint it is alleged that the mortgage of 1905 was a sham hypothecation executed in order to defeat the reversionary rights of the plaintiff and without any justifying necessity. The Courts below have not investigated the nature of that transaction. No relief is asked for in respect of it. If the mortgage was binding upon the reversion it would be open to the reversioners on the widow's death to redeem it if they applied in time for redemption. If it was an act of the widow not binding upon the reversion it would operate only for the lifetime of the widow. If it was a sham transaction the reversioners could ignore it and were not bound to sue to set it aside. A sham transaction means a transaction which has no legal effect either upon the parties who enter into it or upon the estate which they represent. As regards the subsequent decree and sale the allegation in the plaint is that the 1st defendant got her uncle to institute the suit O. S. No. 379 of 1909, and got up a decree in collusion with him and had the properties purchased for a price much below their value. Whether the action of the 1st defendant in colluding with her relative to defraud the estate by a collusive decree and sale amounted to an alienation has not been decided by the Courts below. It is undisputable that in some cases decrees of Court to which a limited owner is a party may amount to alienations. This appears from the Privy Council decision in *Khunni Lal* v. *Gobind Krishna Narain* (2), and has been followed in *Kanhaiya Lal* v. *Kishori Lal* (3), and considered by this Court in *Gadiraju Somaraju* v. *Dandu Venkiah* (4), and *Ranga Rao* v. *Ranganayaki Ammah* (5). The test applied by the Privy Council to decide whether the widow's action amounted to an alienation was to see whether she materially contributed by her action to the transfer and a similar principle has been applied in the other decisions which followed the Privy Council judgment. If the plaint allegation is true that the first defendant was a party to a collusive suit followed by a decree and a sale and if she materially contributed to the property belonging to the estate being alienated by that means, the plaintiffs are within time in this suit of 1919 in bringing an action under article 125 to have that alienation declared to be void and the suit should not have been dismissed on the issue as to limitation without deciding the other issues which arise out of the plaint allegations. I am not aware of any other authority for holding that a reversioner who complains of a greater invasion of his reversionary rights, as did an outright sale, should be compelled to first sue to have a lesser infringement of his rights, such as a redeemable mortgage declared invalid before he can obtain relief in respect of the greater injury.

In the result, the appeal is allowed, the lower Courts' decrees are set aside and the suit is remanded for disposal upon its merits. Costs in the lower Courts will abide and be provided for in the final decree. Third respondent will pay the appellant's costs in this Court and bear his own. The appellant is entitled to have the Court-fee on the second appeal refunded.

Appeal allowed.

(1) (1894) A.W.N. 134.

(2) (1911) 33 All. 356 (P.C.).
(3) (1916) 38 All. 679.
(4) (1917) 26 M.L.T. 180.
(5) (1918) 35 M.L.J. 364.

* 1924 Madras 619 (1).

WALLACE, J.

B. R. Kumaraswamy—Defendant-Appellant

v.

Maddekkara Narayana Rao—Plaintiff-Respondent.

S.A. No. 899 of 1921, decided on 6th February, 1924, against the decree of Additional Sub-Judge, Guntur, in A. S. No. 46 of 1920.

Limitation Act, S. 19—Acknowledgment.

In a suit for balance due on taking accounts an admission that accounts must be taken and settled is a pertinent acknowledgment though the suit as framed was for definite sum where really the suit is for an amount due on accounts. [P. 619, C. 1.]

A. Venkatarayaliah and *L. Venkatanarasiah*—for Appellant.

T. Ananda Rao and *Ch. Raghava Rao*—for Respondent.

Judgment :—The only point argued in this appeal is the question of limitation *viz.*, whether defendant's letter, Ex. D. 1, is an acknowledgment saving the bar. It seems to me quite clear from the terms of that letter that the work as per the agreement to be done by defendant had not then been completed and that the accounts had therefore not been finally settled. This is supported by the finding of the District Munsif that the work was not finished till August, 1915. This was a case therefore where the final liability could not be fixed by final accounts until August, 1915. Plaintiff's suit was within 3 years of that date.

As remarked in *Audiappa Chetty* v. *Devarajulu Naidu* (1) "in a suit for the balance due on taking accounts an admission that accounts must be taken and settled would be a pertinent acknowledgment. Plaintiff no doubt sues for a definite sum considered by him as due on his accounts but the suit was, in substance, one for accounts as both parties themselves confessed, when they agreed to have it settled by the railway accounts (see judgment of the lower appellate Court).

I find no substance in this appeal and it is dismissed with costs.

Appeal dismissed.

(1) (1913) 36 Mad. 68.

* 1924 Madras 619 (2).

KRISHNAN, J.

S. Sundararamiah and others—Defendants-Appellants

v.

T. Venkatasubbiah and others—Plaintiffs-Respondents.

S. A. No. 1163 of 1921, decided on 9th January, 1924, against the decree of Sub-Judge, Nellore, in A. S. No. 63 of 1923.

(a) *Madras Estates Land Act, S. 125 and S. 5.*

A purchaser in execution of a mortgage executed after the Act but for a portion of the amount due under the mortgage prior to the Act has a better title than an auction-purchaser in execution of a decree for rent by the landlord. [P. 620, C. 2.]

(b) *Transfer of Property Act, S. 101—Further mortgage.*

The taking of a new mortgage for a portion of a debt on the earlier mortgage does not extinguish the earlier mortgage. [P. 620, C. 2.]

(c) *Transfer of Property Act, Ss. 74 and 75—Scope.*

Subrogation rights can only arise when persons pay off debts charged upon the land in favour of third parties. [P. 620, C. 2.]

A. Krishnaswamy Aiyar and *K. Balasubrahmania Aiyar*—for Appellants.

M. Patanjali Sastry—for Respondents.

Judgment :—In this suit the competition is between the purchasers of the plaint property in execution of a mortgage decree obtained by the plaintiffs and the purchasers in a rent sale in execution of a rent decree which the Zamindar had obtained against the pattadar of the lands in question. The father of the plaintiffs had obtained on this property a mortgage in 1897 evidenced by Ex. A. In 1909 the amount due under that mortgage came to about Rs. 508 and a new mortgage was then taken for a part of it Rs. 300 which was the principal of the old mortgage, and that deed is Ex. B. That deed was executed, as is evidenced by its date, after the passing of the Estates Land Act. That deed says that it is taken for Rs. 300 due under the previous deed, and there is a statement that Rs. 208 are still due under the old deed. The plaintiffs brought a suit on the second of these deeds, Ex. B, and obtained a decree and brought the property to sale and purchased it themselves. But before they did that, the Zamindar, as already stated, obtained a decree in the Revenue Court (the judgment in which case is Ex. K) and had the properties brought to sale and purchased some

of the properties himself, and the other properties were purchased by the other defendants.

The question that has been argued in this case is as to whether the plaintiffs' purchase prevails, or whether it is the purchase of the defendants that prevail. Under section 5 of the Estates Land Act, the landholder gets for his rent a first charge on the holding, but this is subject to section 125 of that Act, which says, "When a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall take, subject to any right or interest which the ryot has created therein with the landholder's permission in writing registered and subject also to any encumbrance created before the passing of this Act." The contention of the respondents before me is that the encumbrance under Ex. A having been created before the passing of the Act, although they brought the suit on Ex. B, they must be allowed to fall back upon their rights under Ex A and use those rights as against the defendants, whose charge should, therefore, be treated as subject to the rights of the plaintiffs. On the other hand, it is contended that the plaintiffs having taken Ex. B in 1909, which was after the passing of the Act, any rights which they had under Ex. A, except as regards Rs. 208 still reserved under it, had become extinguished, and that, as the suit was for the enforcement of the Rs. 300 included in Ex. B, it must be held that their sale was not for any encumbrance created before the Act, but, it was for an encumbrance created after the Act and as there was no permission of the landholder to create such encumbrance, their (defendants') first charge should prevail. This, I think, overlooks the principle that a man by taking a further security for his money that is charged upon land, does not, and cannot be taken thereby to have intended to give up his rights under earlier deed which he had. A case very similar to this case was considered by the Privy Council in *Shankar Sarup* v. *Mejo Mal* (1). There was a first mortgage in May, 1883, to the plaintiffs for Rs. 15,000 and odd. Then in June, 1883, there was another mortgage in favour of the defendant. Then again in November, 1883, the plaintiffs took a third deed over the same properties including a further sum of money for a total of Rs. 20,000. The property was sold in Court auction and the question arose as between the defendant and the plaintiffs as to who had priority for payment out of the sale-proceeds: It was held by the Privy Council that, although the mortgage on which the suit was brought was the mortgage of November 1883, that is, the third mortgage, still the plaintiffs could not be taken to have abandoned their rights under the first mortgage and that they were entitled to use those rights as against the second mortgage and claim priority and to have their amounts paid in the first instance. It seems to me that that case really covers this case.

Some confusion was introduced into this case by reference to rights of subrogation. I do not think any question of subrogation arises in this case at all, because the second document, Ex. B, was taken by the same person who had the rights under the first document, Ex. A. Subrogation rights can only arise when persons pay off debts charged upon the land in favour of third parties. It is difficult to understand how such a question can arise except in a case where a person claims to stand in the shoes of the person who had the original right as against any mesne encumbrancers. Here no such question arises, because the document Ex. B was for a sum of money which was due under Ex. A and only created a further security of making one more person liable under it than was originally liable. No new properties have been added, or new debts created either. In these circumstances, I think that the principle clearly applies and that the plaintiffs, who were the persons entitled to the rights under Ex. A, are entitled to rely upon those rights as against the defendants, whose rights must, under section 125 be treated as subject to their rights. Taking this view, I do not think it necessary to consider the other points in the case.

I would, therefore, dismiss the second appeal with costs.

Appeal dismissed.

(1) (1901) 23 All. 313.

1924 Madras 621.

KRISHNAN AND WALLER, JJ.

K. Rayrappan Kutti Nambiar—Plaintiff-Appellant:

v.

Kalliyat Thazhathveetil Chathathut Kutti Nambiyar—Defendant-Respondent.

A.A.O. No. 9 of 1922, decided on 5th December, 1923, against Order of Sub-Judge, Tellicherry, in O.S. No. 44 of 1920.

Court Fees Act, S. 7. cl. (1)—Suit for declara[illegible] of plaintiff's liability to make a smaller periodical payment than that claimed by defendant does not fall within S. 7, cl. (1) or 4 (e) or 11 (f)—Court Fees Act, S. 7, IV (e) or XI (f).

A suit for a declaration that plaintiff is liable to pay *Achu palisha* (a kind of royalty payable to a hill owner, at a rate lower than that claimed by the defendant does not fall within S. 7, cl. (1) or cl. (4) (e) or cl. (11) (f). It is a pure suit for a declaratory decree without any consequential relief and plaintiff cannot be allowed to put for jurisdictional value anything more than the value of the subject matter in dispute which is the capitalised value of the difference between plaintiff and defendant's claims. [P. 622, C. 1.]

K. Govinda Marar—for Appellant.

V. P. Karunakaran Nambiar—for Respondent.

Krishnan, J. :—This is an appeal against an order of the Subordinate Judge of Tellicherry returning the plaint filed in his Court in O. S. No. 44 of 1920 for presentation to the proper Court. The Subordinate Judge held that the suit was designedly over-valued in order to bring it within his jurisdiction and that, if properly valued, it fell within the jurisdiction of District Munsif. The suit was for a declaration that the plaintiff was liable to pay *Achu palisha*, only at the rate of 150 seers of paddy per annum in respect of the plaint-mentioned 5½ hills, and that he was not liable to pay 359⅜ seers of paddy which the defendant was claiming. What the origin of this liability to pay *Achu palisha* is not stated but the liability itself is admitted. It would seem from the plaint that the total 509⅜ seers of paddy is charged upon 16 hills of which the plaintiff has become the owner of 5½ hills, the defendant apparently being now the owner of some of the other hills. The defendant's right to this *Achu palisha* is not based upon his ownership of any property, but it is conceded that the defendant in his capacity as the head of his Kalliatt Thazhatha Veedu tarwad and as Uralan of Kalliatt Vayathur Kalias Devaswam is entitled to be paid *Achu palisha* by everyone who is the owner or jenmi of the hills in question. The Subordinate Judge treated the suit as one falling under section 7, clause 11, sub-clause (*f*) of the Court Fees Act as a suit for abatement of rent, and applying the Suits Valuation Act he estimated the jurisdiction value at the value of the amount of the rent payable for a year. Thus valued he held the suit was for a sum far below the maximum amount fixed for the jurisdiction of the District Munsif and directed the plaint to be returned. This view of the Subordinate Judge can hardly be, and has not been attempted to be, supported, as clause 11 applies only to suits between the landlord and tenant. It is impossible to say that there is any such relationship between the plaintiff and the defendant in this case. The plaintiff is the full owner or jenmi of the 5½ hills he claims, and whatever the exact nature of *Achu palisha* may be, it is not rent. It seems to be some kind of royalty that is payable to the defendant's family from these hills.

It was attempted by the plaintiff to bring the case under section 7, clause 4 (*e*) as a suit for a right to some benefit which will arise out of land. We do not think that the suit can well be considered as falling under that clause either, for there is no benefit involved in this case arising out of land in favour of the plaintiff. If there is any benefit at all it is one that goes to the defendant and the clause refers to a suit for *a right to some benefit*. The Subordinate Judge was, therefore, right in overruling that contention.

It was further contended before us by the defendant-respondent that the suit may be held to fall under section 7, clause (1) as one for money or other sums payable periodically. Here again the argument fails. The suit by the plaintiff does not claim any sum of money at all. *Shazadi Begum* v. *Mahbub Ali Shah* (1), cited by the defendant is thus clearly distinguishable as that was for a sum of money payble to the plaintiff. After careful consideration we have come to the conclusion that this is a suit for a declaratory decree without any consequential relief. What the plaintiff really prays for is that the Court should declare that he is liable to pay only 150 seers of paddy as

(1) (1920) 42 All. 353.

Achu palisha on a proper apportionment of the total amount payable on all the hills. The question thus is how is such a suit as that to be valued for purposes of jurisdiction ? The Suits Valuation Act does not help us to settle this question. But we have come to the conclusion that in a suit for a declaratory decree the jurisdiction value cannot be held to be higher than the value of the subject-matter in dispute between the parties. This was the view taken in *Ganapati* v. *Chathu* (2) and we adopt that view and hold that the jurisdiction value of this suit must be determined by the value to be put upon the subject-matter in dispute in this suit. The subject-matter in dispute here is the difference between what the plaintiff admits is a proper charge on his property and the amount he says the defendant is insisting upon being paid, namely, the difference between 150 seers and 359⅜ seers. That comes to 209⅜ seers of paddy a year. The declaration which the plaintiff seeks, if allowed to him, will relieve him from the liability to pay the difference between these two sums for all time, and, therefore, in estimating the value of the subject-matter in dispute we think we must take the capitalised value of that right. Assuming that 5 seers of paddy is worth a rupee, which is itself a high commutation rate, and assuming that 20 years' purchase or even 25 years' purchase is the capitalised value of the yearly payment, the total value of the subject-matter would not come to more than about Rs. 1,000. In this view the case would clearly fall within the jurisdiction of the District Munsif. It was not open to the plaintiff to put the jurisdiction value at Rs. 5,000 so as to bring it within the cognizance of the Subordinate Judge apparently with the object of defeating the plea of *res judicata* by the defendant. In the result, we uphold the order of the Subordinate Judge, though not for the reasons given by him and dismiss the Civil Miscellaneous Appeal with costs.

Waller, J.:—I agree.

Appeal dismissed.

(2) (1889) 12 Mad. 223.

1924 Madras 622.

SPENCER AND KUMARASWAMI SASTRI, JJ.

K. Venkata Seshamma—Appellant

v.

K. Guneswara Rao—Respondent.

F. A. Nos. 31, 32 and 33 of 1923, decided on 5th September, 1923, from the order of Court of Sub-Judge, Narasapur, in I.A. Nos. 586 and 587.

Civ. Pro. Code, O. 43, r. 1 (k), O. 22, rr. 3 and 9 and S. 96—Appeal.

Applications by rival claimants for coming on record as legal representatives of plaintiff were made ; one application was allowed and the other was dismissed as being out of time. *Held*, no appeal lies under O. 43, r. 1 (*k*) or S. 96 against order of dismissal. [P. 623, C. 1.]

G. Lakshmana and *V. Vijjanna*—for Appellant.

B. Satyanarayana—for Respondent.

Judgment:—These appeals arise out of the order of the Subordinate Judge, dismissing an application to be brought on record, as the deceased plaintiff's legal representative. The appellant and others filed separate petitions to be brought on record and the Subordinate Judge directed that the person claiming to be the adopted son of the deceased be brought on record. The appellant's application was dismissed as out of time. It is admitted that the suits have been withdrawn by the adopted son, with leave to file fresh suits. A preliminary objection is taken that no appeals lie from the orders.

We think that the contention should be upheld. Order 43, rule 1 *(k)* of the Code of Civil Procedure provides for an appeal against an order under rule 9 of Order 22, refusing to set aside the abatement, or dismissal of a suit. In the present case, there has been no abatement. The application of one of several persons, who applied to be brought on record, as the legal representative, was granted, and it is difficult to see how there can be any abatement. None of the cases cited by the appellant's Vakil has any application. *Ayya Mudali Velan* v. *Veerayee* (1) is a case, where it was held that the cause of action did not survive to the appellant. It was not a case of contest between rival claimants and one of them succeeding. *Rama Rao* v. *The Raja of*

(1) (1920) 43 Mad. 812.

Pittapur (2) was a case, where a defendant was struck out as an unnecessary party and the suit dismissed as against him. Where a legal representative is brought on record, there is no abatement, within the meaning of Order 43, rule 1 (*k*). Nor is there any decree, within the definition of section 2, clause 2.

In *Lakshmi Achi* v. *Subbarama Aiyar* (3) it was held that no appeal lies from an order refusing to bring on record a person as legal representative, on an application under Order 22, rule 3, and we think the present case is covered by that decision.

We think the Subordinate Judge was wrong in having expressed any opinion on the genuineness of the will, under which petitioner claims. As he held that the petitioner was out of time and that the delay was not satisfactorily explained, it was unnecessary to go into the merits of the claim. We express no opinion as to the genuineness or validity of the will, or as to the appellant's rights thereunder.

The appeals fail and are dismissed with costs.

Appeals dismissed.

(2) (1919) 42 Mad. 219.
(3) (1916) 39 Mad. 488.

* 1924 Madras 623.

PHILLIPS AND ODGERS, JJ.

S. P. Chinna Thambiar—Petitioner-Appellant

v.

Veerappa Naidu and others—Respdts.

C. R. P. Nos. 45 to 49, 51 to 67 and 69 to 75, etc., of 1923, decided on 29th January, 1924.

Court Fees Act, S. 7 (1) (iv) (c)—Appeal in commutation suit — Court Fees Act, Sch. II, Art. 17.

A memo of appeal from a decree in a suit by the landlord for commutation of grain rents into money rents on the ground that the rate fixed by the lower Court was too low falls either under Sch. II, Art. 17, cl. (III) or cl. (vi), Neither S 7, cl. (1) nor cl. (iv) (c) has any application. [P. 624, C. 1.]

A. Krishnaswamy Aiyar and *A. S. Visvanatha Aiyar*—for Appellants.

C. V. Anantakrishna Aiyar—for Respondents.

Phillips, J.:—All these petitions relate to suits filed by tenants against the landlord for commutation of grain rents into money rents. The Deputy Collector allowed this commutation and fixed the rate at which it was to be made. The landlord appealed to the District Judge on the ground that the rate fixed was too low and he calculated the value of the relief sought at the difference between the amount fixed by the Deputy Collector and the amount which he alleged to be correct and paid *ad valorem* fees on the amount. The District Judge has held that this is not correct but that a fee of Rs. 10 should be paid on each appeal under Sch. II of the Court Fees Act, clause 17 (6) holding that it is a suit where it is not possible to estimate the money value of the subject-matter in dispute and which is not otherwise provided for by this Act. Now the petitioner applies to have the order of the District Judge set aside.

A preliminary objection is taken by the learned Government Pleader that no revision can be had in a case of this sort, and he relies on two reported cases from the Patna High Court, *Chandramani Koer* v. *Basdeo Narain Singh* (1) and Mt. *Lachmibate Kumari* v. *Nana Kumar Singh* (2). It has, however, been held in *Lachmi Amma* v. *Janani Jayan Nambiyar* (3) that an order under section 12 of the Court Fees Act is only final as regards the valuation of the suit and not when it relates to the category into which that suit falls and in consequence of this it has been held in two cases in this Court that a revision petition will lie—*Muthu Pillai* v. *Muthu Pillai* (4) and *Dodda Sankappa* v. *Sakravva* (5). These are decisions of single Judges, but in other cases also revision has been granted without any discussion of the question of whether it is proper to do so. There is a definite conflict of opinion and we do not feel called upon now to decide the point in view of our decision on the merits.

This suit is in effect a suit for a declaration that the grain rent shall be commuted into money rent at a certain rate and the appeal is to the same effect, namely, that the commutation shall be at a certain rate higher than that fixed by the first Court. It is argued first of all that the case comes under the Court Fees Act, section 7 (*i*), which relates to suits for money, but in this case there is no claim for

(1) (1918) 4 Pat. L.J. 57.
(2) (1920) 5 Pat. L.J. 400.
(3) (1893) 4 M.L.J. 183.
(4) 1922 Mad. 270.
(5) (1916) 36 I.C. 831.

money and certainly the landlord is not entitled to a decree for any amount whatever in this suit.

It is then suggested that section 7, clause (*iv*) (*c*) is applicable, that is, a suit to obtain a declaratory decree or order, where consequential relief is prayed. Here there is no consequential relief. It might be argued that in the Original Suit the prayer to enter the amount of rent in the pattah was a consequential relief but that is very doubtful, for the mere fact that the rent is determined *ipso facto* carried with it the necessity to enter it in the pattah that is issued, and there is no need for a prayer for the grant of pattah. At any rate, in appeal that question is not raised at all and no consequential relief is asked for.

Section 7 (*iv*) (*c*) is also suggested as governing this case, *i.e.*, a suit " for a right to some benefit (not herein otherwise provided for, to arise out of land " In the margin we find the words " for easements " and it is quite clear that it must be some such benefit that is contemplated by this section; it cannot mean pecuniary benefit, because pecuniary benefits are otherwise provided for under other clauses.

Finally the argument is put forward that section 7 (*xi*) (*b*), namely, to enhance the rent of a tenant having right of occupancy, must be applied. The prior rent in this case was a grain rent. The new rent asked for is a money rent, and it is not suggested that the money rent is any greater than the grain rent, but what is asked for is money rent equivalent to the prior grain rent and in that view it certainly is not a prayer to enhance the prior rent. It is merely a prayer to increase the rate fixed by the lower Court which has never actually been the rent levied prior to suit nor prior to the appeal.

These clauses all being inapplicable, we are left with Sch. II, article 17 (iii), suits for declaration, or article 17 (vi), the provision which has been applied by the District Judge. In both these cases, the fee payable is the same and, whether it comes under one or the other, the fee ordered to be paid by the District Judge is the correct fee.

The petitions are therefore, dismissed. There will be no order as to costs. Time for the payment of the proper fee will be extended by one month from this date.

Petition dismissed.

1924 Madras 624.

KRISHNAN, J.

Kambu Ammal—Complainant-Petitioner

v.

J. Ranganathan — Accused-Counter-Petitioner.

Cr. Rev. C. No. 128 of 1923 and Cr. Rev. Pet. No. 91 of 1923, decided on 13th August, 1923.

Crim. Pro. Code, S. 488—Neglect and refusal by father justifies order—Offer at trial to maintain is of no avail.

Neglect on the part of the father entitles the children to get an order against their father for their maintenance. A mere offer by the father at the trial to maintain the children does not justify rejection of the petition of the children.

K. U. Shama Rao and *A. S. Natarjan*—for-Petitioner.

N. Rajagopalan—for the Accused.

Order:—I think the order of the Magistrate regarding the children cannot be supported. What entitles the children to get maintenance is not merely a formal refusal of the children's father to maintain, but also his neglect to do so. That gives the Magistrate jurisdiction under section 488 of the Criminal Procedure Code, to give maintenance to the children. A mere offer to maintain the children, at the time of trial, is not a justification to reject the petition of the children. In this case, the father took no steps to see that his son was looked after, when the head of the boarding house, where he was, reported that he could not be looked after any longer in that institution. It was the mother who received the son and looked after him. The girl has always been with the mother, ever since the father and mother ceased to live together. The father has taken no steps up to this date to get the children into his custody and look after them himself.

In these circumstances, I consider that the maintenance should have been given to the children as well. I vary the order of the Magistrate on this point and direct that the counter-petitioner do give maintenance at the rate of Rs. 10 (ten) for the boy and Rs. 7 (seven) for the girl; this order will have effect from the date of application. Parties will bear costs both here and in the lower Court.

Order varied.

✱ ✱ 1924 MADRAS 625

SPENCER, OG. C. J. AND KUMARASWAMY SASTRY, J.

Sengoda Goundan—Defendant—Appellant.

v.

Muthu Goundan and others—Plaintiff & Defendants—Respondents.

S. A. No. 767 of 1922, Decided on 26th January 1924, against the decree of Dt. Court of Salem in A.S.No. 45 of 1921.

✱ ✱ *Hindu Law—Partition separation of one does not cause separation of all or keep in tact the joint status—Partition made by decree is subject to the same rule.*

Where partition takes place under the decree of Court the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or by the scope of the uit. 33 M. L. J. 759 foll. Where two members of a joint family sue for partition it does not necessarily divide them *inter se.* When one co-parcener separates from others there is no presumption that the latter remained united or became divided. Either allegation must be proved like any other fact. 45 M. L. J. 255 and 30 Cal. 231 expl. [P 625 C 2]

T. M. Krishnaswamy Aiyar—for Appellant.

V. N. Venkatavaradachari—for Respondents.

Spencer, Og. C. J.—This suit is for partition and the question argued before us relates to the plaintiff's claim to succeed to the share of his deceased minor brother by right of survivorship. There was a previous suit by the plaintiff and his brother, both being minors represented by a next friend, for partition, which ended in a compromise decree, Ex. A, dated 24th November 1915 It has been argued before us that, when two persons ask for a partition, it should be implied that they intend to get devided from each other as well as from the joint family to which they belong. Nothing can be gathered from the fact that in the former suit, the two minor plaintiffs combined to ask for a partition as to their intention to become divided *inter se.* The right to obtain a partition, though, personal, happened to be common to both the plaintiffs, and common question of law and fact arose out of their suing. The mere fact that there was one trial and one decree in the former suit was a consequence of procedure applicable to persons suing under the same cause of action rather than conduct showing an intention to become separated *inter se.*

In *Mt. Jatti* v. *Banware Lal* (1), the Privy Council quoted a former decision by that body, *Balabux* v. *Rukhmabai* (2), in which Lord Davey remarked that there was no presumption when a co-parcener separates from others that the latter remained united. The agreement to remain united must be proved like any other fact. The Privy Council did not say that there was no presumption in such a case that the other co-parceners became divided, as it was not necessary to do so for that decision. But it seems to me that such is the case. In *Rangasami Naidu* v. *Sundararajulu Naidu* (3), it was held that the separation of one member of a co-parcenary was not necessarily a separation of the remaining members and in *Palaniammal* v. *Muthuvenkatachala Maniagaran* (4). Sir John Wallis, C. J., and my learned brother held that, if a partition takes place under a decree of Court, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or by the scope of the suit. I think that Sadasiva Aiyar, J. went too far in *Mangal Sen* v. *Muhammad Hussain* (5), in observing that there was a presumption that, when one of several co-parceners has become divided, the others also have become divided in status. The Privy Council decisions to which he referred do not support such a proposition.

If the effect of the former decree is to be determined by the terms of it, we find from Ex. A that in the former suit both the plaintiff and his brother had the same next friend to represent them and the decree speaks of their two-thirds share, not of their properties as two shares each representing one-third of the whole. There was no

(1) 1923 P. C. 136.
(2) [1902] 30 Cal. 725.
(3) [1916] 31 M.L.J. 472.
(4) [1917] 33 M.L.J. 759.
(5) [1915] 16 M.L.T. 610—27 I.C. 736.

order that their two-thirds share should be divided into separate shares, and no authority has been shown for a guardian of two undivided minors dividing their status so as to make them lose their rights of survivorship to each other. The District Judge observes that the plaintiff and his brother did not sue for division *inter se* and that the decree does not divide their shares, and he formed a conclusion from their conduct that they remained undivided, agreeing with the first Court on that point. I see no reason to interfere with that finding on any point of law. I would, therefore, confirm the decree of the lower appellate Court, and, as the other grounds of Second Appeal are untenable and have not been seriously pressed, this Second appeal must be dismissed with costs.

The Memorandum of Objections, which relates to mesne profits anterior to the date of the suit is dismissed with costs.

Kumaraswami Sastri, J.—I agree with my Lord. I think there is no authority for holding that, where two members of a joint family sue for partition, it necessarily divides them *inter se*. The observations of the Privy Council in *Balabux* v. *Rukhmabai* (2) and the decisions of this Court in *Rangaswami Naidu* v. *Sundararajulu Naidu* (3) and *Palaniammal* v. *Muthuvenkatachala Maniagaram* (4) are clearly against that contention.

Appeal dismissed.

✱✱ 1924 MADRAS 626

NAPIER AND ODGERS, JJ.
THEN
AYLING AND ODGERS, JJ.
AFTERWARDS
KRISHNAN AND VENKATASUBBA RAO, JJ.

Veeraswamy Mudali — Plaintiff—Appellant.

v.

Palaniyappan and others — Defendants—Respondents.

S. A. No. 319 of 1919, Decided on 23rd November 1923, from the Decree of Dist. Court of Trichinopoly in A. S. No. 205 of 1917.

(*a*) *Landlord and Tenant.*

Per Odgers and Napier, JJ.—Where the holder of a service Inam is found to be entitled to Kudivaram, tenants are bound to prove that they are not tenants from year to year, otherwise they are liable to be ejected on proper notice to quit, (Case law reviewed.) A service tenure is not incompatible with a permanent right of occupancy as such a right does not amount to an alienation. [P. 631 C. 1, 2]

✱✱ (*b*) *Civil P. C., S. 11—Favourable decree with an adverse finding may amount to res judicata, under certain circumstances.*

Per Ayling and Odgers, JJ.—Where a suit by the Inamdar was dismissed for want of notice to quit on a finding that the Inamdar was entitled to land and not merely assessment but that no notice was given and the order as to costs which were awarded to the plaintiff was based on the ground that the plaintiff had succeeded on the main contention and that decision remained unappealed against.

Held: that decision about the extent of the Inam operated as *res judicata* in a suit for ejectment between the same parties. 13 Cal. 17 and 48 Cal. 460 dist. [P. 632 C. 2]

L. A. Govindaraghava Aiyar — for Appellant.

V. Rama Doss and *N. Rajagopalachariar*—for Respondents.

Napier, J.—The suit from which this second appeal arises was brought in the District Munsif's Court of Karur, by the plaintiff to recover possession of certain lands in the possession of tenants He had previously brought two suits in respect of the same property. The first suit had been dismissed for want of a notice to quit, the second suit had been dismissed for failure to give a proper notice to quit. It is admitted that in the second suit the Court found that the defendants had no permanent right of occupancy. In the present suit, the plaintiff relied on this finding as *res judicata* in his favour and an issue was framed on that contention; but both the lower Courts have paid very little attention to this question and seem hardly to have dealt with it; but the plaintiff is undoubtedly entitled to argue this question.

The two principal findings of the Lower Appellate Court were that the plaintiff had not proved that kudivaram was in him, and secondly, that even if he had so proved it, he had not proved that he had a right to evict. I fail to understand why, in view of

the finding of the Lower Appellate Court as to the kudivaram, the District Judge did not order the plaint to be returned for presentation to a Revenue Court.

The question of *res judicata* has been argued at great length by Mr. Govindaraghava Aiyar for the plaintiff, but we eventually intimated our intention not to deal with this matter at the present stage. So I will leave that question for future decision, if necessary.

The question as to the kudivaram is dealt with by the District Judge in paragraph 3 of his judgment. He states that the previous judgment relied on, by the plaintiff did express opinions in his favour and that these opinions were formed on the basis that the burden of proof was on the defendants. He then states the law as follows: "It is for the inamdar to show either that at the time of the grant he already was in occupation or that the land was *waste*, when the grant to him was made." and he concludes by saying, "I think that the District Munsif was right in holding that the plaintiff has not succeeded in establishing that the land itself forms the inam, attached to the office which he holds." There was undoubtedly abundant authority for this view at the time, that the District Judge pronounced his judgment. He has set out the cases on which he relies, the latest being *Suryanarayana* v. *Patanna* (1). It is not disputed before us that the decisions of the Privy Council reported in *Suryanarayana* v. *Patanna* (1) and *Venkata Sastrulu* v. *Seetharamudu* (2), as explained by the Full Bench in the reference in S. A. No. 1878 of 1919 have laid down, that the burden of proof is on the tenant and not on the plaintiff. The District Judge is, no doubt familiar with these later decisions. Mr. Ramadoss for the respondents somewhat faintly contended that the old presumption still remained in the case of a service inam. The service inam in this case was admittedly granted by a person styling himself a Chakravarthi or Emperor. The foundation of the doctrine as laid down by the Privy Council is that inams must be presumed to be of the land, as well as of a share in the revenue, and Mr. Ramadoss admitted that S. A. No. 1878 of 1919, to which the Full Bench applied this doctrine was a service inam. In that case it was a poojari service of a temple, whereas in this case it is drummer service. There is, therefore, nothing in this distinction, and we must, therefore, call on the District Judge to submit a revised finding on the first issue in the light of the above rulings and on the documentary evidence in the case, he having already found that the oral evidence on both sides is entitled to little weight. Mr. Govindaraghava Aiyar has asked us to allow him to prove certain documents, which he did not tender in this suit, as they had been rejected in the previous suit, his contention being that these documents are admissible to prove the nature of the possession. As, however, they were tendered as evidence of a specific lease and rightly rejected as such, I do not think, that they are admissible and see no reason to allow him to tender them in this suit.

Coming to the second point, Mr. Ramadoss has contended that, even assuming the kudivaram to have been in the plaintiff, he must still prove his right to eject and has relied on certain decisions of this Court. I desire to express my opinion definitely that, where this defence is sought to be used to compel the landlord to prove affirmatively the nature of the tenant's holding, it is no longer open to the defendant since the two decisions of the the Privy Council and that of the Full Bench above referred to. It is true that in none of these cases was the point specifically decided, the reason being, in my opinion, that, where the kudivaram interest has been shown to be in the landlord, it is no longer open to the defendant to call upon the plaintiff to prove that the tenant had not at the date of suit a permanent right of occupancy. The cases relied on by the learned District Judge on this point were those quoted by the District Munsif in paragraph 28 of his Judgment. They are

(1) [1918] 41 Mad. 1012 (P. C.)
(2) [1920] 43 Mad. 166 (P. C.)

Venkatacharlu v. *Kandappa* (3), *Veeranan Ambalam* v. *Annasami Aiyar* (4) and *Venkata Mahalakshmamma* v. *Ramajogi* (5). In addition to these, Mr. Ramadas has relied on *Krishnasami* v. *Varadaraja* (6), *Varadaraja* v. *Dorasami* (7), *Velappa Goundan* v. *Doraisami Iyer*, (S. A. No. 469 of 1917,) *Veeranan Ambalam* v. *Annasami Aiyar* (2) and *Muthusawmi Aiyar* v. *Nainar Ammal* (8).

I will deal with these in order. *Krishnasawmy* v. *Varadaraja* (6) has in my opinion, been much misunderstood. It was not a decision of a Full Bench on a reference but was a decision in an appeal on the facts of the particular case. The plaintiff's claim rested on an alleged *muchilika* executed by the tenants to Government as trustee for the temple. The defendants contended that they had previously owned the *mirasi* right to the land but had resigned that to the temple, retaining in themselves the permanent right of cultivation, which they had enjoyed from the beginning. Kindersley. J, decided that they had never relinquished the permanent right in themselves and that the evidence tendered to support that contention was, that the tenure was permanent. Turner, C. J., and Muthusami Aiyar, J. say as follows —

"Without attempting to define what period of occupation should confer the right of occupancy—a matter which can now only be dealt with by legislation—we consider ourselves at liberty to say that an occupation of upwards of 70 years is sufficient, under the circumstances of this case, to throw, upon those who seek to disturb it, the burden of showing that the tenancy was not accompanied with a right of occupancy, and that the plaintiff has not succeeded in doing so."

The words "under the circumstances of the case" have reference to an earlier passage in the judgment which is as follows :—

"When there is so much evidence to show that, by the custom of the country and of the district in which the lands in suit are situated, permanent cultivators are entitled to permanent occupancy we do not see how this privilege can be refused to the defendants, whose ancestors have cultivated the lands they now hold, for at least 70 years,"

This is obviously a decision on the particular facts of the case, one of the important features of which is the contention of the defendants, that the whole right in the lands was at one time vested in them and was only acquired by the temple by relinquishment from them. It is of no use to the defendants in a case where the *kudivaram* right is in the landlord.

The next case is *Venkatacharlu* v. *Kandappa* (3). In that case the plaintiff, an inamdar, sued to eject the defendant from certain lands. The judgment is very short and is as follows :—

"On the findings of both Courts it must be taken that the only facts proved are, that the plaintiff is the Inamdar of the village, that Defendant and his father have been in occupation of the lands for 40 or 50 years as tenants."

It is clear, therefore, that there was no evidence let in to show that the *kudivaram* was in the plaintiff and the decision is, therefore, of no value whatsoever.

Varadaraja v. *Dorasami* (7), was a suit in ejectment, the land in question being the property of the temple of which the plaintiff was the trustee. The whole question turned on the terms, on which the defendants had been let into possession in 1832, by *takids* and a *muchilika* executed by the defendants' ancestor. The judgment states the question in the following words, "was that *muchilika* of a permanent character?" and concludes as follows :

"We are of opinion that there is evidence from which it can be legally inferred that the lease of 1832 was a permanent lease, and, that being so, the plaintiff's suit must fail."

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(3) [1892] 15 Mad. 95.
(4) [1911] 21 M.L.J. 845.
(5) [1893] 16 Mad. 271.
(6) [1882] 5 Mad. 345 (F. B.)
(7) [1893] 16 Mad. 131.
(8) [1918] 7 L. W. 194.

This again is a decision on the construction of the particular document and is of no assistance to us in the disposal of this case.

The next case is *Vencata Mahalakshmamma* v. *Ramajogi* (5.) which was referred to by the District Munsif and relied on by the District Judge. This was not an inam case at all, but a suit by a zamindarini in ejectment against a ryot. The judgment contains the following passage :

"The District Judge held that, as between the zamindar and the ryot the former was merely the assignee of land-revenue, whilst the latter was *prima facie* the owner of the soil. * * * For the appellant it is contended, that it was for the ryot to establish his occupancy right."

The Court then proceeded to consider the facts of the case and held that there was nothing to show that the zamindar had let the ryot into possession. The Court then decided as follows .

"It may be that the ryot was in possession when the zamindary itself was created, or that the zamindar, as pointed out by the Judge. was a mere farmer of the revenue. In such cases, it is not unreasonable to hold that the *onus* of showing that the tenancy commenced under the plaintiff or his ancestors rests on the zamindar, and that until he shows it, the zamindar may be fairly presumed to have been the assignee of Government revenue."

This proposition has repeatedly been laid down by this Court with regard to zamindary tenants, but has no bearing at all on cases where the kudivaram interest is in the landlord.

Veeranan Ambalam v. *Annasami Iyer* (4), also relied on, by the District Judge was a suit by a Government ryotwari holder to eject his tenants who had been in possession for over 100 years. The Court held, that it lay upon him to show that the tenancy was one from year to year. This decision is, however, directly opposed to the recent ruling of the Privy Council in *Seturatnam Aiyar* v. *Venkatachala Goundan* (9), in which their Lordships held that, in a suit brought by a Government pattadar against the respondents after due service of notice to quit, the *onus* was on the tenants to prove the existence of their right of permanent, occupancy. Assuming that the position of a ryotwari pattadar is analogous to that of an inamdar owning the kudivaram interest, this decision of their Lordships directly negatives the view held by the District Judge.

There remain the cases in *Muthusawmi Aiyar* v. *Nainar Ammal* (8) and *Velappa Goundan* v. *Doraisami Iyer* (10). In the former case the plaintiff, the trustee of a temple, under an inam granted by Government in 1865, sued to eject the defendant from certain temple lands. The case was remanded by the High Court on two findings, one was that what was granted was the land itself, and the other was that the lands were unoccupied at the time of the grant, and occupancy rights if any, must have been acquired *since* the grant. The Bench decided that, on the facts of the case, there was no ground for holding that the primary burden of proof, which was on the landholder, to prove the tenancy alleged by him and his right to eject had been discharged. Their Lordships were obviously influenced by the decision in *Suryanarayana* v. *Patanna* (11), to which they referred which has been reversed by the Privy Council. In my opinion, the decision can no longer be said to be good law, unless it is to be supported entirely by the facts of the case. In *Velappa Goundan* v. *Doraisami Iyer* (10), the same view was taken and the same observations apply. Against the view that burden lies on the plaintiff, there is first the presumption of a tenancy from year to year in leases governed by the Transfer of Property Act. Admittedly, the Transfer of Property Act does not apply, and I myself have always objected to analogies drawn from this chapter, preferring to follow English law where applicable, but other Judges of this Court have laid down that it is proper to apply such analogies.

(9) [1920] 43 Mad. 567 (P.C.)

(10) [1917] S. A. No. 469 of 1917.
(11) [1915] 38 Mad. 608.

Mr. Govindaraghava Aiyar has, however, drawn our attention to a case, prior to the Transfer of Property Act, in *Endar Lalla* v. *Lallu Hari* (12). In that case, the plaintiffs instituted a suit to recover possession of certain lands. The defendants, relying on long possession, at an invariable rent, contended that the burden of proof lay on the plaintiffs to establish their right to eject. The Bench laid down the proposition:

"In all ordinary cases the presumption of law is that a tenant is a tenant from year to year, unless a larger right can be shown, by the evidence of a lease or agreement to that effect. * * * The presumption being, that a tenant is a tenant from year to year, no length of possession by itself can confer a perpetual lease. Once a tenant, always a tenant, is the rule; and, unless there is evidence of a lease, the proprietor can oust after due notice."

Thiagaraja v. *Giyana Sambandha Pandara Sannadhi* (13), was a suit by the trustee of a temple to eject the defendants from the lands in the village. The defendants had admittedly been in possession of the lands in question since 1827, which was 50 years before the date of the suit. In 1830, they had executed a muchilika for the lands to Government, as trustee of the temple describing themselves as *puracudis* and agreeing to cultivate the lands, no term being fixed for the holding. The Bench decided that it lay upon the defendants to show that they had any higher right than that of cultivating tenants from year to year. According to English law, where the ownership of the lands is found to be in the landlord, a presumption arises that tenants in possession are tenants from year to year, and it rests upon them to prove that the lease is either for a term, or otherwise inconsistent with the plaintiff's right to eject. It is, of course, conceded that with regard to zamindars, the presumption being that they are only farmers of revenue, it rests on them to show that they let the tenant into possession. But in the case of an inam of the land, as in the case of the ryotwari pattadars, I am clear that the burden of proof, that the tenancy was a permanent one, rests on the tenant, and, if he is unable satisfactorily to discharge that proof, he can be ejected on proper notice to quit. Mr. Govindaraghava Aiyar has urged that a permanent right of occupancy is akin to an alienation and, as such, incompatible with a service tenure. He points out that cl. 16 of S. 3 of the Madras Estates Land Act removes lands held on service tenure from the category of ryoti lands, but this is done for the purpose of preventing a service-holder from claiming to be a ryot within cl. 15. He relies on *Upendra Nath Hazra* v. *Ram Nath Chowdry* (14), in which the Bench held, following an earlier decision of the same Court, that tenants of *ghatwali* service lands could not acquire permanent right of occupancy, the foundation of the doctrine being that it is inconsistent with the incidents of such tenure. Speaking for myself, whatever may be the case of *ghatwali* service, I can see nothing inconsistent. Admittedly the acquisition of such permanent rights would not prevent the resumption of the inams, if the services were not rendered, and I cannot see why the payment of a fixed rent on a perpetual tenure to a service-holder has a more serious effect on the discharge of his duties as a drummer in a temple. *Midnapore Zamindari Company Ltd.* v. *Appayasami Naicker* (15), laid down what is undisputed law that lands held on service tenure cannot be alienated, beyond the lifetime of the holder for the time being, the principle being to allow such alienation would divert the lands or their proceeds from the intended purpose; but a permanent lease no more diverts the land than does an ordinary tenancy from year to year, and there is no authority in this Court for such a proposition. I am not, therefore, prepared to hold that permanent rights of occupancy can-

(12) 7 B. H. C. A. C. 111.
(13) [1888] 11 Mad. 77.
(14) [1906] 33 Cal. 630.
(15) [1918] 41 Mad. 749 (P. C.)

not be acquired in a temple service inam.

In the result, I would hold that, where the kudivaram is found to be in the holder of a service inam, the burden lies on the tenant to prove that his holding is other than that of a tenant from year to year, and, if he is not able to establish this, he is liable to ejectment on proof of a proper notice to quit. In this view, we must call upon the District Judge for a revised finding on the second issue in the light of the above observations. Time for submission of findings one month after re-opening of the District Court and 14 days for objections.

Odgers, J.—The questions arising in this appeal have been dealt with at length by my learned brother and I shall content myself with adding only a few words. As to the question of kudivaram, since the Privy Council decisions in *Suryanarayana* v. *Patanna* (1) and *Venkata Sastrulu* v. *Seetharamudu* (2) and the explanation of them contained in the Full Bench judgment of this Court in S. A. No. 1878 of 1919, there is no room for doubt that the onus of proving a permanent occupancy right is on the tenant. The present case cannot in this respect be distinguished from the case before the Full Bench, and in my opinion that is conclusive of this matter.

It was, however, contended that in spite of this, the onus was still on the plaintiff to establish his right to eject the tenant: in other words, it was contended that in spite of the decisions above referred to, the plaintiff was still to prove the nature of his tenant's holding. The cases relied on by the respondents have been elaborately reviewed by my learned brother, and I do not propose to examine them again. I agree with the conclusions he has drawn as the result of his examination. There is a clear presumption in the Full Bench ruling in favour of the inamdar's right to both *varams*. It may be weak or strong, but whichever it is, it must be displaced by evidence on the part of the tenant. It is therefore clear that while this presumption exists, in favour of the inamdar, it is no concern of his, to give evidence as to the nature of his tenant's holding, unless and until the presumption in his favour has been displaced by evidence offered by the tenant, and the onus consequently shifted on the landlord by reason of his tenant's evidence. It therefore seems to me, that the cases quoted for the respondents to the effect that there is still an onus on the plaintiff-landlord are no longer law.

I will deal with only one other point, namely, as to the allegation that a permanent right of occupancy, practically amounts to an alienation and therefore in the case of an inam grant would be illegal. We were referred to two cases, *Vencateswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren* (16) and *Kshetrabaro Bissoyi* v. *Sobhanapuram Harikristna Naidu* (17). In *Vencateswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren* (16) it was held that a perpetual lease was not within the mischief of the provisions of Madras Regulation 25 of 1802 as it was not, "a sale, gift, or transfer" of the whole or any portion of the Zamindari in question. In *Kshetrabaro Bissoyi* v. *Sobhanapuram Harikrishna Naidu* (17), it was held that a grant of a permanent lease was not a transfer of ownership and was not therefore an alienation. The estate in that case was a service-inam. The case in *Midnapore Zamindari Company Ltd.* v. *Appayasami Naicker* (15) simply lays down, that lands held on service tenure are inalienable, beyond the life-time of the holder, *i.e.*, that he cannot make a valid transfer of the ownership to last beyond that time. The case in *Upendra Nath Hazra* v. *Ram Nath Chowdry* (14) held that tenants of *ghatwali* service lands could not acquire permanent rights of occupancy, as the latter were inconsistent with such a tenure. I am not prepared to say that this ruling is, in fact inconsistent with the cases in *Vencateswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren* (16) and in *Kshetrabaro Bissoyi* v. *Sobhanapuram Harikristna Naidu* (17) quoted above,

(16) [1859-61] 8 M. I. A. 327 (P.C.).
(17) [1910] 33 Mad. 340.

as it is clear that whatever may be the incidents of *ghatwali* tenure, the inam could undoubtedly be resumed, if the services were not performed. If this case is in fact inconsistent with the Madras case, then I am bound to say that I prefer to abide by the latter ruling.

I agree with the conclusions at which my learned brother has arrived and I also agree with him, as to the findings to be returned by the District Judge.

[This Second Appeal came on for hearing on receipt of findings before their Lordships, Ayling and Odgers, JJ.].

Judgment

Ayling, J.—In my opinion no good ground is shown for refusing to accept the District Judge's finding on the first issue referred to him, "that the *tharam theerva* and not the land itself belongs to the plaintiff as inam.'

This would be a good defence to the present suit, but we have still to consider the third issue which runs thus :—

3. Is the defence barred as *res judicata* by the dicision in O.S. No. 994 of 1907 and the appeal thereon ?

O.S. No. 994 of 1907 and the suit out of which the present appeal arises were admittedly between the same parties, or their represantatives in interest, and were brought to obtain exactly the same relief in respect of the same land. In each, the present plaintiff-appellant sued to recover possession of the suit-land from the defendants, as forming the inam to which he was entitled, and in each the same defence was raised that the inam comprised not the land, but the assessment on it. In O.S. No. 994 of 1907, the District Munsif decided this point embodied in issue 1, as well as others, with which we are now not concerned, in plaintiff's favour, and gave him a decree as sued for. The District Judge in A.S. No. 90 of 1910 confirmed this finding, but allowed the defendants to raise a fresh defence that the suit was premature, for want of notice to quit. This he decided in defendants' favour and accordingly directed that the suit should be dismissed. But he added: "As the plaintiff succeeded on the main contention and failed on a point taken only in appeal, it will be equitable to direct each party to bear part of the costs. The appeal is allowed. The lower Court's order that defendants should bear all the costs in that Court will stand." In so far as the District Judge's finding on issue 1 was liable to appeal (*i.e.*, in so far as it involved any question of law), it was open to appeal to this Court: for, although plaintiff's suit had been dismissed, this finding was made explicitly the ground for directing defendants to bear all the costs in the first Court. No appeal however was filed by defendants.

The district Judge's determination of the issue must therefore be regarded as final: and it seems to me that every word of S. 11 of the Code of Civil Procedure applies, and that the decision operates as *res judicata*. It is argued that the de ermination of the issue was unnecessary. But the order awarding plaintiff his costs in the first Court, which is expressly based upon it, is as much a part of the decree as the order dismissing plaintiff's prayer for possession. The District Judge, in effect, decided all the points in dispute, and found that the plaintiff was entitled to recover possession of the land, conditionally on his giving defendants a proper notice to quit. Defendants are not entitled to re-agitate the points then decided against them.

I hold therefore that the decision in the appeal from O.S. No, 994 of 1907 operates as *res judicata*.

In this view, plaintiff would be entitled to a decree as sued for, but before passing such a decree we must call for a finding from the Lower Appellate Court on issue 4 Finding will be submitted within a month from this date ; and 7 days will be allowed for filing objections.

Odgers, J.—I would accept the findings of the District Judge that the *tharam theerva* and not the land itself belongs to the plaintiff.

The question (which was not decided when the second appeal was before Napier, J. and myself) remains as to

whether the matter is *res judicata*, by reason of the decree in O.S. No No 994 of 1907, whereby it was declared that plaintiff as inamdar was entitled to the plaint land together with costs of the suit, but that plaintiff's suit was dismissed, inasmuch as the notice to quit given by him was irregular (*cf.* District Munsif's Judgment Ex. O, paragraph 30, confirmed by the District Judge, Ex. O 1, paragraph 5). It is to be noted that the question of notice to quit did not find a place in the issues and was only raised before the District Judge. The point is whether this issue as to plaintiff's title has been heard and finally decided under the provisions of S. 11, Civil Procedure Code. The defendants got a decree in their favour on the question of notice and it is contended that no adverse finding in the suit could operate as *res judicata* against them. In *Muthu Pillai* v. *Veda Viyasa Chariar* (18), a somewhat similar case, it was held (1) the questionof title was directly and substantially in issue in the prior suit, (2) that in order to constitute *res judicata* the finding in the prior suit need not form the basis of the decree in that suit, and (3) that the finding in the previous suit did operate as *res judicata* in the present suit. It was also held in *Ramakrishna Naidu* v. *Krishnasami Naidu* (19), that it was not necessary that the decision of the issue should have been the basis of the decree. On the other hand, it is contended that the decision is not final and was not necessary for the disposal of the suit, as held in *Kelu Nambiar* v. *Chathu Nambiar* (20), to which my learned brother was a party There, the decision was not the basis of the decree, which was given in spite of it, and it was held that in such cases, the matter cannot be said to have been substantially in issue. Here, the plaintiff's title was the first issue in the case and a decision was given upon it, by both Courts. It was not until the appeal that the point of the notice to quit was taken and decided against the plaintiff. Moreover the defendants might have appealed against the decree, in so far as costs were awarded against them, which award was expressly made on the ground that the finding as to title was against them. This is as much a part of the decree as anything else.

It is further contended that the latest ajudication should be taken as superseding the notice and therefore the District Munsif's Judgment in O S. No. 331 of 1912 (Ex. P), dated 5th June 1913, in which he dismissed the suit for want of a valid notice to quit should be taken as the final decision. There, the question of notice to quit, was directly raised by the issues and it was the only issue decided by the District Munsif. The plaintiff's title did not therefore come up for decision and it cannot be said to be a later adjudication on that point at all.

In *Nundo Lall Bhuttacharjee* v. *Bilhoo Mookhy Debee* (21), relied on for respondents, a landlord had brought a suit in ejectment against his tenant, who pleaded no notice to quit and permanent tenure. The suit was dismissed on the first ground, the Court also holding that the tenure was not permanent. In a subsequent suit for ejectment, between the same parties, in respect of the same holding the tenant pleaded the tenure was permanent and plaintiff was estopped by conduct from pleading that it was not. The lower Court held in defendant's favour on the second point and dismissed the suit. The High Court in appeal held, that previous decision was not *res judicata*, on the ground that the decree dismissing the suit was not based on the finding adverse to the defendant. The Court however held "that if they came to an opposite conclusion, the issue then decided was not an issue regarding esto pel by conduct." It is to be noted that defendant appealed against the decree in the former suit to High Court but that appeal was dismissed on the ground that he could have no appeal as the only decree passed was one dismissing the suit. That seems to me to differ-

(18) [1920] 12 L. W. 277.
(19) [1919] 9 L. W. 180.
(20) [1919] 9 L. W. 84.

(21) [1886] 13 Cal. 17.

entiate the case,and also the fact that the view of the High Court on this point is put forward somewhat tentatively, with practically no reasons assigned and the learned Judges support their decision by an alternative.

A case in the Privy Council, *Mianapur Zamindari Company Ltd.* v. *Naresh Narayan Roy* (22) is also cited by Mr. Ramadas for respondent. There in 1877, a zamindar sued for possession and the tenants pleaded occupancy-rights and prematurity, as no attempts had been made to settle a fresh rent. The Court dismissed the suit holding that there was no occupancy right but the suit was premature. The zamindar appealed to the High Court and the tenants filed a cross-appeal to the finding that they had no occupancy-right. The High Court affirmed the decree on the ground that the suit was premature and also on the cross appeal affirmed the finding that there was no occupancy-right. Their Lordships found that this would not support an actual plea of *res judicata*, as the defendants having succeeded on the plea of prematurity had no occasion to go further as to the finding against them, a finding which it was their duty to displace and which duty they had not been able to perform. This appears to me to be distinguishable from the case before us

As already observed, the point of notice was not taken before the District Munsif at all. The question of title was raised as the first issue before the District Munsif, and the learned District Judge begins his Judgment by saying that the decision turns mainly on the question whether the defendants who occupy it possess occupancy-right in the land. This is discussed through three pages of print. On the question of notice, the District Judge called for a finding, on the return of which he dismissed plaintiff's suit for prematurity but ordered that the District Munsif's order, giving plaintiff all the costs in his Court, should stand ,and that as regards the District Court the plaintiff was to bear his own and defendants costs, where he had failed. No appeal was filed to the High Court; the decree of the District Judge therefore became final.

This order as to costs against the defendants appears to me to effect a radical distinction between this case and those cited above for the respondents ; and the costs were awarded on the ground that the question of title had been found in plaintiff's favour. I therefore agree that the matter is covered by S. 11, Civil Procedure Code, and the respondents are not entitled to have the matter reopened. I also agree with the order proposed as to issue 4.

[In compliance with the order contained in the above judgment the District Judge of Trichinopoly submitted the finding that the plaintiff was entitled to mesne-profits at the rate of Rs. 136 a year, from April, 1914, up to the date of delivery of possession, as claimed in the plaint.]

[This Second Appeal came on for hearing before their Lordships Krishanan and Venkatasubba Rao, JJ.]

JUDGMENT

We are unable to understand the reasoning of the learned District Judge, in arriving at his finding, and we are therefore unable to accept it, even though it is one of fact. We would call upon him to submit a revised finding on the issue in question. We think the parties may be allowed an opportunity to adduce fresh evidence on the point, as the evidence on the record seems to be too meagre to arrive at a satisfactory finding. Finding will be submitted in two months, and 7 days will be allowed for filing objections.

[In compliance with the order, contained in the above judgment, the District Judge of Trichinopoly submitted the finding that for the 12 years for which mesne profits were claimed in the suit, the defendants had to pay plaintiff Rs. 1,380.]

[This Second Appeal came on for hearing on the 22nd day of March, 1923, before their Lordships,Krishnan and Venkatasubba Rao, JJ.]

JUDGMENT

We regret we are again unable to accept the finding as to the mesne profits, by the learned District Judge.

(22) [1921] 48 Cal. 460 (P. C.)

All the documentary evidence which the Judge himself has set out would make out the mesne profits to be much smallar than what has been found. The learned Judge has relied on the evidence of P. W. 2, but the evidence as set out by him, is that of P. W. 1. The learned Judge has not indicated why he rejects the inference from the documents, which are usually more reliable than the oral evidence. We must request the Lower Court to submit a further revised finding on the point; this time it will be on the evidence already on the record. Finding will be submitted in eight weeks. Ten days are allowed for filing objections to the finding.

[In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following revised finding that Rs. 23 a year was the amount awardable as mesne profits.]

[This Second Appeal came for final hearing after the return of the revised finding before their Lordships Krishnan and Venkatasubba Rao, JJ.]

JUDGMENT

We accept the finding that the mesne profits should be awarded at Rs. 23 a year. The result is that the Second Appeal is allowed, and the plaintiff's suit for possession is decreed with mesne profits, at the rate above-stated for three years before suit and till the delivery of possession, or for three years, whichever is earlier, from the date of this decree.

The parties will pay and receive proportionate costs throughout.

Appeal allowed.

✱✱ 1924 MADRAS 635

KRISHNAN AND WALLER, JJ.

Arunagiri Mudaliar—Petitioner and Creditor—Appellant.

v

Kandaswamy Mudaliar and another—Debtor and Receiver—Respondents.

A. A. O. No. 345 of 1922, Decided on 8th November 1923, from the Order of D. J. of North Arcot in C. M. P. No. 353 of 1921.

✱✱ *(a) Provincial Insolvency Act (1920) S. 43—An unsecured creditor and a creditor whose claim to an order of annulment is dismissed, is a person aggrieved.*

Though S. 43 (1) does not specify by whom the application should be made, a creditor who is affected by the adjudication is certainly a person aggrieved if his claim is dismissed without proper reason. [P 636 C 2]

An order of adjudication prevents an unsecured creditor from realising his debt except by receiving the dividend ; he is therefore certainly affected by the proceedings in insolvency, *viz.*, by the refusal to annul the order of adjudication. [P 635 C 2]

✱✱ *(b) Provincial Insolvency Act (1920) S. 27—Fixing of time and extension of time by Official Receiver is legal.*

Under S. 27 the Official Receiver to whom a petition of the insolvent is transferred for disposal has power to fix a time for arplying for discharge. An application for extention of time nearly two years after the expiry of the period prescribed and only after the creditor applied for annulment of adjudication was not granted where the insolvent failed to carry out the things directed by law, such as handing over properties to the Official Receiver. [P 637 C 2].

Per Krishnan. J.—After the period fixed. Court can extend time. [P 638 C 2].

Contra Waller J—Court cannot extend time after the period expires. [P 638 C 2]

C. Padmanabha Aiyangar and *T.D. Srinivasachari*—for Appellant.

T. Kumaraswamiah — for Respondents.

Krishnan, J.—This is an appeal arising from an insolvency proceeding, before the District Judge of North Arcot. The first respondent before us had applied, to be adjudicated an insolvent, to that Court in October, 1919. The appellant before us was one of his creditors, who had a simple mortgage over a good portion of the insolvent's properties for a part of his debts. He was partly a secured and partly an unsecured creditor of the insolvent.

The petition was referred, by the District Judge, to the Official Receiver for disposal, and the Official Receiver acting under his powers under S. 80 (a) of the Act, heard the petition and passed an order of adjudication in August 1920. In that order, he gave the insolvent time for 5 months to file his application for discharge under S. 27 (1) of the Provincial Insolvency Act. It was suggested

in this case that the Official Receiver had no power to fix the time within which the debtor should apply for his discharge as S. 27 (1) applied only to the Court. That argument does not seem to be valid, as the period has to be specified in the order of adjudication itself, which the Official Receiver has power to pass and he has therefore to be taken to have the power also to fix the period for applying for discharge, as it should be a part of the order of adjudication, under S. 27. The insolvent took no steps to apply for his discharge, or to help the Receiver, to get his assets realised, or his debts examined and paid *pro rata* from his assets. Some months thereafter, in July 1921, the creditor (the appellant before us) applied to the Court under S. 43 of the Insolvency Act, to have the order of adjudication annulled, on the ground that the debtor had not applied for an order of discharge, within the period specified. As soon as this was done, the insolvent put in a petition to the Official Receiver, for extending time, for applying for his discharge and the Official Receiver granted time till 9th February 1922. It is said that the application for his discharge was put in, by the respondent before that date. However that may be, the creditor appealed to the District Court, contending that the Receiver had no power to extend the period, within which the debtor was to apply, for his discharge and that the order of adjudication should be annulled and the insolvency petition dismissed. The learned Judge, instead of complying with this request himself, granted an extention for a period of 6 months for the debtor to apply for his discharge, acting under S. 27 (2) of the Act and dismissed the appellant's application. It is against that order that the appellant has appealed to us and leave was granted for the appeal.

A preliminary objection has been raised to the hearing of the appeal, on the ground that the appeal is not a competent one, under the Insolvency Act. It is contended that under S. 75, the creditor, cannot be treated as a person aggrieved by the order of the District Judge and the argument is put in two ways. First of all, it is said that the creditor being a secured creditor is unaffected by any proceeding in insolvency and therefore he is not aggrieved. It is not necessary to consider this argument; for, the appellant is also an unsecured creditor and an unsecured creditor is certainly affected by proceedings in insolvency taken by his debtor. The order of adjudication prevents him from realising his debt except by receiving a dividend under the Act. An unsecured creditor would undoubtedly be a person aggrieved, by the refusal to annul the order of adjudication. Next, it is argued that a creditor has no right to apply under S. 43 and therefore any order passed under that section cannot be treated, as in any way causing a grievance to a creditor. S. 43 (1) does not say by whom the application has to be made. But it is clear to my mind that a creditor who is affected by the adjudication is certainly a person, entitled to apply to the Court, under S 43, and if his claim is dismissed without proper reason for it, he will certainly be a person aggrieved under S. 75, adopting the definition of the expression 'person aggrieved,' given in *Ex parte Sidebotham In re Sidebotham* (1) that is :

" A person who has suffered a legal grievance, or has been wrongfully refused something."

A person in the position of the appellant, who says that he has been wrongfully refused the order of annulment, which he was entitled to, is thus a person aggrieved. Both the arguments falling, the preliminary objection must be overruled.

On the merits, it was first argued by the appellant that under S. 43 (1) 'the District Court had no right whatsoever to grant an extension of time, after the period originally fixed for the filing of the application for discharge had expired and that under the peremptory words of that section the order of adjudication must be annulled.' The words no doubt are " shall be annulled." But S. 27 (2) gives the Court, if sufficient cause is shown, power to extend the period. It is argued that this clause can be availed

(1) [1880] 14 Ch. D. 458.

of, only within the period fixed by the original order for applying for discharge and that once original period has expired, the Court has no jurisdiction whatever to grant an extension I regret I am unable to agree with my learned brother, in upholding this argument. I am inclined to think that the power given under S. 27 (2) is not exhausted by the period originally fixed, the order of discharge having expired. There is nothing in S. 27, which indicates that. Language quite as peremptory as that in S. 43, has been construed by the Privy Council in *Badri Narain* v. *Sheo Koer* (2), as not preventing the Court from extending the period, even after the period fixed originally had expired with reference to S. 549 of the Code of Civil Procedure, which said :

" If such security be not furnished within such time as the Court orders, the Court shall reject the application."

The use of the word 'shall' in the clause was considered by the Privy Council as quite consistent with the power in the Court to extend the time for furnishing security, even after the time originally fixed had expired. The principle of the case, it seems to me, applies equally to the present case. S. 10 (2) of the Insolvency Act applies to a case, where the order of adjudicatian had been already annulled and does not deal with cases where the order of adjudication is still in force. It is S. 27 (2) that deals with the latter class of cases. Of course, if the order of adjudication had already been annulled, there is no proceeding before the Court, in which it could extend time and therefore S. 10 (2) had to be enacted to enable the Insolvent to put in a fresh application. I do not think we can draw any inference from S. 10 (2), against the power of the Court to extend time, in a pending insolvency petition, after the expiry of the period originally fixed for applying for discharge. The case, *Badri Narain* v. *Sheo Koer* (2), has been applied by the Bombay High Court, in *Bhugwandas Bagla* v. *Haji Abu Ahmed* (2) to a case which was one of failure to amend a plaint, within the time allowed. The learned Judge of the Bombay High Court held that it was competent to him, in spite of the peremptory language of the section relating to amendments that " the plaint shall be rejected," to allow extention of time, even after the period. Applying this principle, I think there is nothing in the Insolvency Act, to prevent the District Court from extending the time, after the period fixed originally had expired, under S. 43. That being my view, it seems to me that S. 148, Civil Procedure Code, which now expressly enacts that time may be extended, even after the expiry of the original period fixed, can be applied to these proceedings, by virtue of S. 5 (1) of the Insolvency Act. I would therefore overrule the first objection of the appellant.

But on the merits, I agree with my learned brother that this is a case, in which there is no ground for granting the extension of time which the Official Receiver and the District Judge have granted. It will be difficult, as he puts it, to find a case less deserving of indulgence. The Insolvent absolutely failed to do anything at all for nearly a year to help the Official Receiver, or to apply for his discharge. It is only after the creditor put in his application for annulment that he did anything in the matter. The only ground suggested, for granting extension, is that the Act being new, the insolvent probably did not know what he had to do. This can hardly be accepted as a proper reason : for, the insolvent was expressly told in the order of adjudication that he was to apply for discharge within five months. Any plea of ignorance of law can hardly be accepted as a sufficient one in mitigation of the gross negligence that is apparent in this case. Therefore, even though the extention of time is a matter of discretion for the lower Court, as that discretion has to be exercised judicially, I think it is open to us to interfere in appeal and to hold that there was no sufficient ground for granting extension, in this case. Taking that view, it follows that under S. 43, the lower Court should have annulled the

(2) [1890] 17 Cal. 512. (P.C.)
(3) [1893] 16 Bom. 263.

order of adjudication of the Insolvent in this case on the merits and not granted him any extension. I would therefore allow the appeal of the creditor and annul the Insolvency of the first respondent. As regards costs, I think the appellant is entitled to his costs in this Court and in the District Court, from the first respondent. The second respondent must bear his own costs.

Waller, J.—This is an appeal from an order of the District Judge of North Arcot, dismissing an application under S. 43 of the Provincial Insolvency Act. A preliminary objection is taken that no appeal lies. I am clearly of opinion that the appellant is entitled to appeal.

2. The facts are these. One Kandaswami Mudaly was adjudicated insolvent on 9th August 1920, and was directed to apply for discharge in five months, which he failed to do. In July 1921. appellant, who was one of the creditors, petitioned the District Judge to annul the adjudication, under S. 43 of the Provincial Insolvency Act. In January 1922, the insolvent, who had become aware of appellant's petition, requested the Official Receiver to extend the period of application for discharge, an extention was granted till 9th February 1922. Insolvent, however, continued to refrain from applying for his discharge and appellant's petition came on for hearing in April 922. In the result, it was dismissed and the insolvent was given time to apply till 22nd October 1922. It would be difficult, to find a case less deserving of indulgence.

3. Objection is taken to the District Judge's order on two grounds.

(*a*) That, under S. 43, he had no option but to annul the adjudication.

(*b*) That, he had no power under S. 27 (2), to extend the period, after it had expired.

I think that both grounds are good S. 43 is absolutely peremptory in its terms and I am of opinion that directly the Court was informed of the insolvent's omission to apply within the time fixed. The only course open to it was to annul the adjudication. That being so, it follows that, no application for extension of the period can lie, after it has expired. No doubt S. 148, Civil Procedure Code, allows extensions of this description: but the Code is applicable, only so for as it does not conflict, with the provisions of the Provincial Insolvency Act and they are opposed to such an extention.

On both points, I find in favour of appellant. I think that the District Judge should have annulled the adjudication, leaving it to the insolvent to apply under S. 10 (2) of the Act, if he had good cause for his delay. Had the latter even put in an application for discharge in February 1922, accompanied by a petition under S. 5 of the Limitation Act, the case would have been somewhat different. As it was, the District Judge had before him nothing but gross and unexplained delay on one side and an application under S. 43 on the other.

4. On the merits, also, I consider that appellant should succeed The insolvent made no attempt to do any of the things that the law directed him to do. He was ordered to apply for discharge in five months, but omitted to do so, for nearly two years, and did not hand over the properties to the Receiver.

5. I agree that the adjudication should be annulled I concur in my learned brother's order as to costs.

Appeal allowed.

✱ ✱ 1924 MADRAS 638

KUMARASWAMY SASTRY, J.

M. Sabapathy Chetty—Plaintiff.

v

A. Shanmugappa Chetty and others—Defendants.

Appn. in C. S. No. 188 of 1903, Decided on 30th August 1923.

✱ ✱ *Limitation Act, Art, 183—Even payment by Court out of auction proceeds gives a fresh starting point.*

No doubt a person cannot by his own volition defer receiving payment and thus keep the decree alive for his benefit. But Art. 183 refers to payment only and where the Court orders payment to the decree-holder out of the auction proceeds, a fresh starting point is given to the decree-holder for execution from the actual date of payment. [P 640 C 1]

M. Sundaram Aiyar—for Plaintiff.

Judgment.—This is an application to execute the decree in C. S. No. 188 of 1903 by the transferee-plaintiff, and the only question is whether the application is barred by limitation. The decree is dated 14th December 1904. An appeal was filed against that decree which was also dismissed on 27th February 1906. On the 9th May 1908, execution was applied for and sale was ordered on 21st July 1908. The property was sold on 1st May 1909. The 1st defendant applied to set aside the sale and that application was dismissed on 29th September 1909. An order was passed on the 6th October 1909 giving leave to execute the decree as regards the balance. The plaintiff decree-holder died shortly afterwards and his estate vested in the Administrator-General of Madras He applied for payment out of the net sale proceeds and an order was passed on 9th January 1912 ordering payment to be made. The present application was filed on 1st February 1923.

The order of the 6th October 1909 as regards payment runs as follow: "That the Registrar of this Court do from and out of the sum of Rs 26,250 standing in his hands to the credit of this suit pay to Messrs. Madras Sales and Agency Co., the auctioneers herein the sum of Rs. 289-14-6 as and for their commission as auctioneers and expenses of sale; and he do pay to the plaintiff herein the sum of Rs. 24,710-1-6." The plaintiff died without receiving this money. An application was made by the Administrator-General of Madras, who was appointed administrator *pendente lite* in respect of the Testamentary Suit No. 1 of 1910 relating to the estate of the plaintiff, for the payment of the sum of Rs. 25,932-7-6 and an order was made on the 9th January 1912 directing the Registrar to pay this sum to Administrator-General. The question is whether this order of the 9th January 1912 saves the period of limitation.

The article applicable to cases of this kind is Art. 183 of the Limitation Act. It provides a period of 12 years to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction the period to run from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right. The proviso however provides that the period of twelve years should be computed from the date of payment or acknowledgment in cases where some part of the principal money secured thereby or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent." Article 182 of the Limitation Act refers to execution of decrees or orders of any Civil Court not provided for by Art. 183. The period is three years and varying periods are given in the third column as the date from which the period is to run. The first question is whether when a payment has been ordered by a Court that Court can be said to be acting as the agent of the judgment-debtor. This question has been decided in *Thangishettithi* v. *Daja Shetti* (1) and *Govinda Pillai* v. *Dasai Goundan* (2). The ground of the decision is thus put by Coutts Trotter, J, in his judgment, "If a debtor's assets are so placed either by his own act or by operation of law that if some one other than he alone can realise them for the purpose of making payment due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words 'his agent duly authorised in that behalf' in S. 20 of the Limitation Act are satisfied by the act of the Judge of the Court which authorises the payment; and that his handwriting is rightly described as that of the person making the payment." The payment ordered can therefore save limitation as the payment made by an authorised agent of the defendant. Art. 183 also refers

(1) [1918] 35 M. L. J. 575.
(2) [1921] 44 Mad. 971.

to the actual fact of payment and not to any order directing payment.

The main contention of the defendant is that as the order of 6th October 1909 directs payment to the decree-holder of this identical sum he could have obtained payment at once and the fact that he delayed to obtain payment could not operate to extend the period of limitation, that he should have executed the order of 6th October 1909 and that as that was the only order which could be enforced period began to run from the date of that order and not from the date of subsequent payment made in pursuance of it. There is a great deal of force in the contention that a person cannot by his own volition defer receiving payment and thus keep the decree alive for his benefit. But what I have to see is the actual language of the article and not any sequence that may arise on the application of that language. Art, 183 applies only to payment and where the Court orders payment, and the authorities are that the Court so acting is the agent of the defendant, the requisites of Art., 183 are satisfied. As regards Art. 182 the cases in *Venkatroyalu* v. *Narsimha* (3), *Kerala Varma Valiya Rajah* v. *Shangaram* (4), *Kormayya* v. *Krishnanna Naidu* (5), *Bapu Chand* v. *Mogat Rao* (6), and *Thangi Shettithi* v. *Duja Setti* (1) take the view that payment out of a sum from Court is a step-in-aid of execution under Art. 182 cl. 5. But *Hem Chander Choudhry* v. *Brojo Sundree Debee* (7), *Fazal Imam* v. *Metta Singh* (8) and other cases take a contrary view. If the payment out of Court irrespective of the date of order on which payment is ordered is a step-in-aid of execution. I think that it can be held with equal force that the actual payment under Art. 183 would be the starting point of limitation. I confess there is a great deal to be said in favour of the Calcutta view; but I am bound by the Madras decisions. I am therefore of opinion on the authorities of the Madras High Court that this application is not barred by limitation. I stay execution for one month to enable the defendant if so advised to appeal and get stay of execution.

Execution stayed.

(3) [1880] 2 Mad. 174.
(4) [1892] 16 Mad. 452.
(5) [1893] 17 Mad. 165.
(6) [1896] 22 Bom. 340.
(7) [1881] 8 Cal 89.
(8) [1884] 10 Cal. 549.

** 1924 MADRAS 640

ODGERS AND WALLACE, JJ.

T. Somu Naidu and another, In re-Cri. Rev. C. No. 208 of 1923, Decided on 17th December 1923.

** *Criminal P. C., S. 369—Order enhancing sentence without notice to accused is void and Court can rehear the case. (Case Law discussed).—Criminal P. Code, S. 439*

A reasonable oppurtunity for the accused to be heard is an essential condition precedent to the exercise of jurisdiction under S. 439, whon the Court is considering the question of enhancing the punishment inflicted on him.

Where the conditions laid down by law as precedent and requisite to the hearing of a case are not observed, the Court acts without jurisdiction, and its order is, therefore, void *ab initio* and the case can be rehea d.

(P 644 C 2)

The Public Prosecutor—for the Crown.

V. L. Ethiraj and *T. S. Anantarama Aiyar*—for Accused.

Odgers, J.—In this case accused 1 and 3 were convicted by the 1st class Magistrate of Yellamanchilli of forgery for the purpose of cheating (S. 468 Indian Penal Code), and sentenced to imprisonment till the rising of the Court; also 1st accused was ordered to pay a fine of Rs. 300 with 3 months' rigorous imprisonment in default, and 3rd accused was fined Rs. 150 with two months' rigorous imprisonment in default. On appeal, the Sessions Judge of Vizagapatam confirmed the conviction and sentences. The case was taken up in revision by Devadoss, J., on the ground that the Magistrate had no jurisdiction to try the case. The case came on for hearing on 27—9—1923 before Krishnan, J., who held that the conviction was correct but enhanced the sentences on each accused to six months' rigorous imprisonment

retaining the sentence of fine. Mr. T. S. Anantaraman, Vakil for 1st accused, stated he had no instructions and 1st accused did not appear in person. 3rd accused appeared neither in person nor by pleader. On 25-10-1923 Krishnan, J. vacated his previous order, no doubt, because he found it had been passed without jurisdiction, and directed the case to be posted later, on the question of enhancement. The case, therefore, came on before Waller, J., on 8-11-1923, who referred it to a Bench as the Public Prosecutor proposed to argue that Krishnan, J., had no power to vacate his order, and the question has accordingly been argued before us on that point, and also on S. 439 Cr. P. C. It is clear that under S. 369 Cr. P. C. the judgment of this Court in a Criminal matter as soon as it is signed, is final, and the Court is *functus officio* as soon as that is done. Thereafter there is no power to revise or alter that decision: *In the matter of Gibbons* (1) and *Queen Emperess* v. *C. P. Fox* (2) *and Ranga Rao* v. *Emperor* (3) where it was held that the High Court has no power to review an order made in the exercise of its revisional jurisdiction. The old section ran as follows.

'No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Ss. 395 and 484 or to correct a clerical error.' Petheram, C. J., in 14 Cal. 42 at page 47, said: "In as much as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power."

The new section runs as follows:—

'Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its Judgment, shall alter or review the same, except to correct a clerical error.'

It has not been argued that the amendment has changed the scope or effect of the section, and it is not shown that any such power is reserved to this High Court by its Letters Patent. In *Rajjab Ali* v. *Emperor* (4), in which the Full Bench in *in the matter of Gibbons* (1) was followed, there occurs the remark: (at p. 63)

"The result of the decisions of this Court subsequent to the Full Bench case seems to be this: that where a case is disposed of merely for default of appearance or where an order is passed to the prejudice of an accused person and by mistake or inadvertance no opportunity has been given to him to be heard in his defence such an order is not one to which the ruling in the Full Bench case applies." In *In re. Kunhamad Haji* (5), it was held that neither S. 364 nor S. 439 of the Code of Criminal Procedure empowers the High Court to revise or review the Judgment of one or more of its Judges in a criminal appeal or revision. The learned Judges (Oldfield and Devadoss, JJ.) in a very careful Judgment examined all the case-law on the point and held as above set out. It appears to me, therefore, that Krishnan, J., had no power to revise his order of 27-9-1923 and that his order of 25-10-1923 must be treated as a nullity.

We have therefore to consider the next question under S. 439. Mr. Ethiraj for the accused contends that the order of enhancement of 27-9-1923 was passed without jurisdiction as his clients had no opportunity of being heard as required by sub-S. (2) of S. 439. The question is whether we have power to come to any conclusion with regard to the order of enhancement or whether we should there be falling into the very error, I have just pointed out, as we have no power to revise the same. As pointed out, the accused did not appear, Mr. Anantaraman for 1st accused asked for an adjournment which was refused. He thereupon reported no instructions, as he was

(1) [1887] 14 Cal. 42 (F. B.)
(2) [1886] 10 Bom. 176 (F. B.)
(3) [1912] 23 M. L. J. 371.
(4) [1919] 46 Cal. 60.
(5) 1923 Mad. 426.

only retained on the question taken up by Devadoss, J. It does not appear from the order of Krishnan, J., of 25-10-1923, that the learned Judge purported to vacate his order on this ground, that is, the non-appearance of the accused. But we are informed that,that was so, and there is no reason to doubt that this consideration induced the learned Judge to make the order of 25-10-1923. The question is not as to our power to revise the order of Krishnan, J., but whether we have power to take any action as to the order of enhancement; if Krishnan, J.'s order is one,he had power to make, we cannot do so; if on the other hand it is an order he had no power to make by reason of the language of S. 439 (2), Cr. P. Code then it seems to me that we are authorised to deal with the question. We are not revising Krishnan, J.'s Judgment but considering our own powers of acting on the petition before us. The language of the subsection is mandatory and is clearly enacted as an exception to S. 440. It appears to me therefore that if the accused had no opportunity of being heard, this being clearly an order to his prejudice, more than an irregularity occurred, and that there is authority for holding that an order so passed was passed without jurisdiction. The facts appear as follows:—

On 14-9-1923 the accused received notice to show cause against enhancement on 17-9-1923. The case did not come on, on that day, but on 27-9-1923.On 28-9-1923,accused received a second notice dated 20-9-1923 fixing 8-10-1923 for the hearing of the case. A day or two after 28-9-1923 the accuseds' Vakil at Vizagapatam received a letter from Mr. T. S. Anantarama Aiyar informing him that the case had been disposed of on 27-9-1923. The office posted the case apparently as soon as a return to the first notice was made, but while the second notice was outstanding. I have no hesitation in saying that the accused must have been embarrassed by this procedure and I hold that they had no reasonable opportunity under these circumstances of being heard The authority for the proposition that an order passed in such circumstances is without jurisdiction is to be found in the passage from *Rajjab Ali* v. *Emperor* (4), already quoted. Further, the learned Judges in *Rangha Rao* v. *Emperor* (3), say, following 7 M. H. C. R., Appendix 29, that where a criminal appeal has been rejected, and accused's pleader had not a reasonable opportunity of being heard, the Court could restore a case to its file. They continue: "We have no doubt that this is correct, for the language of S. 421 required a reasonable opportunity to be given and if such reasonable opportunity is not given, the Court has no jurisdiction to dismiss the appeal." In *In re, Kunhammad Haji* (5), Oldfield, J., assumes that reasonable notice under. S. 420 is a condition precedent to the exercise of the Court's jurisdiction, and that that condition not being fulfilled, there was no previous valid adjudication to bar a hearing on the merits,—which is exactly the case here. Devadoss, J., in the same case doubts the validity of *Ranga Rao* v. *Emperor* (3), on the ground that the Court is not entitled to dismiss a criminal revision petition for default but should dispose of it on the merits. The High Court in that case dismissed the petition to restore a criminal revision petition dismissed for default. Neither of the learned Judges in *In re. Kunhammal Haji* (5) says that the passage quoted from above, *Ranga Rao* v. *Emperor* (3), is a misstatement of the law. I must therefore hold that there is no bar to this matter of enhancement being heard on the merits. I would, however, add one thing. The learned Public Prosecutor has pressed upon us that if we come to this conclusion, it will open a wide door to revision in criminal matters and that it may be applied to any manner of error. I think there is no such danger. This case is exceptional in its circumstances, and has been brought about by the practice of the office in posting a case in the list, in accordance with one notice, while there is another and subsequent notice for a different date outstanding. As stated above, we are in no way reviewing or revising any order of Krishnan, J., but simply deciding that

there was no previous valid adjudication to bar a hearing on the merits. There must be fresh notice to the accused and the case will come up afresh for disposal on the question of enhancement of sentences.

Wallace, J.—The question before us, as I conceive it, is, whether this criminal revision case, taken up *suo motu* by this Court calling on the accused to show cause, against enhancement of punishment has already been disposed of, finally, by this Court by the order of Krishnan, J., dated 27-9-1923, or whether it is *res integra*. It is not a question of whether the present Bench can sit in revision over either of the orders of Krishnan, J., but whether either or both of these orders is *ab initio* null and void as being made without jurisdiction, and for the purpose of deciding that question, and for no other purpose, it is necessary for us here to consider the legal effect, if any, of these two orders.

To take the first order of 27-9-1923, it was admittedly passed without hearing the accused, and I think we must take it that the accused had no reasonable opportunity of being heard since Krishnan, J., thought it necessary later in the interests of justice by means of a second order dated 25-10-1923 to vacate his order imposing enhanced punishment. It appears that the accused were served with a notice of the revision case first on 14-9-1923 in the Vizagapatam District for a hearing at Madras on 17-9-1923, and that a fresh notice was sent to them fixing 8-10-1923 for hearing which was served on them there again on 28-9-1923, and that in the meantime the case was posted for hearing in this Court on 27-9-1923 and heard. A pleader, who had appeared for them earlier in the case before the question of enhancing the punishment was taken up *suo motu*, appeared on 27-9-1923 on seeing the case posted on the notice-board. He was not instructed to argue the question of enhanced punishment on behalf of the accused and he therefore only prayed for an adjournment which was refused In these cirumstances. I think it clear that the provision in S. 439 (2) of the Criminal Procedure Code that "no order under this section shall be made to the prejudice of the accused unless he had an opportunity of being heard either personally or by pleader in his own defence" had not been followed in this case.

The next point is whether such failure *ipso facto* rendered the order passed on 27-9-1923 null and void. We have been referred by the accused's counsel to several rulings. In *Shanmugam Chettiar* v. *Alagia Nambiya Pillai* (6), this High Court set aside an order of a lower appellate Court disposing of an appeal on the date previous to the date fixed for hearing on the ground that such a proceeding was a material error in procedure. It is not stated, however, that the order of the lower appellate Court was *ab initio* null and void. In *King Emperor* v. *Romesh Chandra Gupta* (7). a case of 1917, the High Court of Calcutta, having first held that S. 439 (2) had been sufficiently complied with, when the District Magistrate, before referring the question of enhanced punishment to the High Court, had heard the accused, and after itself enhancing the punishment accordingly, subsequently reviewed its own order and set it aside on changing its mind and holding that the accused had a right of being heard before the High Court itself. The Court also did not treat its first order as null and void but "reviewed" it, as it says. With respect I doubt very much the correctness of this decision since it appears to me that S. 369 of the Criminal Procedure Code, as interpreted by that and other High Courts does not confer on a High Court any power of review on the ground that its former view was wrong. See for example *Queen Empress* v. *Durga Charan* (8); *Queen Empress* v. *C. P. Fox* (2). *In the matter of Gibbons* (1) and *In re Kunhammad Haji* (5). Nor does any other statute or Letters Patent give it such a power. The Judges in the C. W. N. case seem to me clearly to have overlooked or brushed aside the fact that they had no power to review their first

(6) [1882] 2 Weir 475.
(7) [1917] 22 C.W.N. 168.
(8) [1885] 7 All. 672.

order. In *re Ranga Rao* (3) a Bench of this Court was asked to review its order dismissing for default a Criminal Revision Petition by a party against an order of the Sessions Judge ordering his re-trial, and it was held that no party coming up in revision can claim such a right. It is pointed out to us that in that case the Bench approved of an earlier ruling of this Court in which it was held that, where an appeal had been rejected under S. 421 of the Criminal Procedure Code without the appellant's pleader being heard, (or more correctly without the appellant or his pleader having had an opportunity of being heard) the Court could restore it to file, and this was explained to be a right inherent in S. 421 itself, because that section implies that such reasonable opportunity must be given before the Court has jurisdiction to dispose of the appeal. In spite of some looseness of language, if I may use that expression with respect, in the concluding portion of that judgment implying that in British India, Courts have no power whatever, to restore criminal cases to file, since there is no statutory provision for such a course. I think the *ratio decidendi* of that decision is, that a High Court has as a rule no power to review its order in revision, because the power to revise, is purely a discretionary power regarding the exercise of which no party has a right to be heard at all; but that where a party has a legal right to be heard and yet has not been given the opportunity of being heard the Court can and could restore the case to file. Under what statutory power it so restored it is by no means made clear in that judgment. Obviously S. 439 (2) gives to an accused person a right of audience similar to that given by the proviso to S. 421 (1) and it would seem reasonable that, if the failure by the Court to observe the latter provision some how creates a right in the Court to restore the case to file, so ought a similar failure to observe the former provision. The only difficulty is where is that to be found? It is clearly, as already indicated, not a right of review of judgment. Can it then reasonably be held that disregard of such a nature of the provisions of the Code deprives the Court of its jurisdiction, so that its order is null and void. That is I think the view underlying the 23 M. L. J. case. It is also the view taken, *obiter* no doubt, by Oldfield, J., in 46 Mad. 782 and I think with respect that it is a sound judicial view, and that a reasonable opportunity for the accused to be heard is an essential condition-precedent to the exercise of jurisdiction under S. 439, when the Court is considering the question of enhancing the punishment inflicted on him.

I am of opinion then, that the conditions laid down by law as precedent and requisite to the hearing of this case, not having been observed, the Court acted without jurisdiction, and its order is therefore void *ab initio* and on this ground and on this alone I would base my decision. I would therefore hold that the first order of Krishnan, J., was without jurisdiction and therefore void. The question of the second order is therefore immaterial and the passing of it was unnecessary. It follows that this High Court has not yet pronounced a valid legal judgment in this Criminal Revision case and it is therefore open to this Court to hear the case on the merits.

✱✱ 1924 MADRAS 644

SPENCER AND DEVADOSS, JJ.

C. K. Subramania Mudaliar and others—Petitioners.

v

Parasuramier and others—Respondents.

Civil. Rev. No. 389 of 1921 Decided on 16th August 1923, from the order of District Court, Coimbatore D/-12th April 1921.

✱ *Religious Endowments Act, (XX of 1863), S. 18—Application for leave to sue must specify charges—Leave to sue all or any of the respondents is not proper.*

In an application for leave to sue under S. 18 the applicant must give definite particulars of the charges he makes, and the order giving leave ought to refer clearly and specifically in those charges. A sanction, in general terms

giving leave to sue any or all the respondents, leaving the petitioner to choose which of them they will proceed against, is improper as it supplies the petitioner with an instrument for extortion and makes it possible for him to let off the persons most responsible and get other members who are less guilty made to account severally for the trust property. [P 645, C 1]

S. Muthiah Mudaliar—for Petitioners.

A. V. Viswanatha Sastri—for Respondents.

Judgment.—We feel constrained to interfere with the District Judge's order granting leave for the institution of a suit in the form in which that leave has been given as it appears that he has not exercised the power conferred on him by section 18 of Act XX of 1863 in the manner contemplated by that provision of law. The allegations are extremely vague and indefinite, and the charges 2 to 10 as to breach of trust are no more specific than the respondent's accusations. The sums of money kept uninvested in 1st counter-petitioner's hands, or lent to strangers, other sums said to be unaccounted for, the items of temple property dealt with contrary to the interests of the trust are not specified, with the consequence that the suit may be based on charges which have not been clearly made the subject of the order. The giving of sanction against any or all of the respondents leaving the petitioners to choose which of them they will proceed against, is also improper as it supplies the petitioners with an instrument for extortion and makes it possible for them to let off the persons most responsible and get other members who are less guilty made to account severally for the trust property. The Judge's order is therefore set aside and he is directed to make a fresh enquiry after calling upon the petitioners to give definite particulars of the charges made by them, and after affording the counter-petitioners an opportunity to explain them.

He may then grant leave to the petitioners to proceed upon any charges which he finds to be *prima facie* established against such of the counter-petitioners who in the opinion of the judge are to be held responsible.

In making the above enquiry it will be open to the Judge under his powers given by S. 19 to have the accounts of the Committee produced and inspected in Court by the parties or their vakils.

But the report of the two High Court Vakils who were asked to enquire into the allegations is not evidence as the judge is not entitled to delegate to others the duty of forming an opinion upon the facts before him and the Vakils in question were not appointed as Commissioners to make a local investigation upon any matter which could not have been enquired into, in open Court with equal convenience. The petition is remanded for fresh enquiry.

The Respondents are directed to pay the costs of the petitioners in this Court and to bear their own.

Case remanded.

✱✱ 1924 MADRAS 645

SCHWABE, C. J. AND WALLER, J.

(*Siva*) *Subramania Pillai* — Petitioner—Appellant.

v

Rakkumuthu Mooppan and another Petitioner and Counter Petitioner—Respondents.

A. A. A. O. No. 44 of 1922, Decided an 27th September 1923, against the Order of Addl Sub. J, Ramnad at Madura in A. S. No. 84 of 1921.

✱✱ *Decree—Consent decree in a mortgage suit fixing time for payment is not a preliminary decree and is excusable.*

Where a compromise decree was passed by which in default of payment by defendants of a certain amount plaintiff was to execute the decree after the fixed date personally against defendant No. 1 and also by sale of the mortgaged property and also out of the other properties of the other defendants.

Held: that the decree was a consent decree and was executable being not a preliminary decree. [P 646, C 1 & 2]

Minor—Untenable plea by guardian.

Failure to take wholly untenable objection is no negligence of the guardian. [P 646 C 2]

N. Srinivasa Aiyangar for *K. S. Champakesa Aiyangar*—for Appellant.

K. V. Sesha Aiyangar—for 1st Respondent.

Waller, J.—The facts are these. Plaintiff brought a suit on a mortgage executed to him by defendant 1 for himself and as guardian of defendant 2. The suit was compromised and a decree was passed which provided :

(*a*) that the amount due to plaintiff was Rs. 200, out of which he was to give up Rs. 30 ;

(*b*) that Rs. 170 were to be paid by defendant by a certain date ;

(*c*) that in default plaintiff was to recover Rs. 200 and interest by executing the decree, (1) personally against defendant 1, (2) by selling the mortgaged-property and (3) out of the other property of defendants.

Defendants defaulted, after which four attempts were made to execute the decree. Defendants had notice of the applications and on one occasion, they actually appeared. On that occasion, they did not contend that the decree was unexecutable, but merely asked for the adjournment of the sale. This is the fifth attempt at execution. Before the Munsif both the defendants appeared. Defendant 1 pleaded that he had made certain payments to plaintiff. These the Court refused to recognise.

Defendant 2 contended : (A) that he was not bound by the decree and (B) that the decree was unexecutable, as it was merely a preliminary decree.

The Munsif found against him on both points and he appealed. His appeal was unsuccessful before the Subordinate Judge, against whose order he has again appealed.

On the first question, that is to say, whether the decree is binding on defendent 2, it is clear that he was properly represented in the suit and that the Court granted permission for the compromise as far as he was concerned. The decree against him is valid and binding and he cannot now question it. On the 2nd, we think that the Ccurts below were right. What was passed was not a preliminary mortgage-decree but a decree by consent. In a case not unlike this, *Hemendralal Singh* v. *Fakir Chand* (1) it was decided that a compromise-decree could not be treated as a preliminary decree, the intention of the parties being that in default, the decree-holder should be entitled at once to realise the amount due to him by the sale of the properties covered by the decree. In another case of a consent- decree, passed on a mortgage suit, *Arumbati* v. *Ram Niranjan* (2), a similar conclusion was arrived at. We find in this case that the decree that was passed by consent was not a preliminary decree and was executable.

A third question was raised and found against defendant 2. Defendants had had notice of the four previous attempts to execute the decree and never appeared to contend that the decree was unexecutable. The lower Courts found that it was not now open to them to raise such a contention. It is not necessary for us to decide the appeal on this ground. Defendant 2 argues that he cannot be bound by his guardian's negligence, in not appearing to oppose execution. It is not apparent how the failure to take a wholly untenable objection can be described as negligence.

Appeal dismissed with costs.

Appeal dismissed.

(1) 1923 Cal. 627.

(2) [1920] 58 I. C. 299.

✱✱ 1924 MADRAS 646

KRISHNAN, J.

Kandasami Goundan and another—Petitioners.

v.

Subbai Goundan and another—Respondents.

C. R. P. No. 822 of 1922, Decided on 6th December 1923, from the order of the District Court of Coimbatore in C. M.A. No. 34 of 1922.

✱✱ (*a*) *Court Fees Act, S.* (*V*) (a) *and* (d)—*Specific plot falls within V* (d).

A suit for the recovery of a specific plot of land situated within a permanently settled estate but not constituting a definite share thereof or separately assessed to revenue falls within Cl. (*v*) (*d*) and not under Cl. (*v*) (*a*) or (*b*) of S. 7. Court-fee should therefore be paid on the market value of the property in suit. 33 A. 630, foll. [P 647 C 1, 2]

** (b) *Civil P. C., O. 7 Rr. 10, 11—A court should reject plaint on refusal of plaintiff to pay court fee though for claim exceeding court's jurisdiction.*

Where the court directed plaintiff to pay court-fee on market value but the plaintiff did not pay and the court held that the subject-matter of the suit exceeded its jurisdiction and directed the return of the plaint for presentation to a superior Court.

***Held*:that the procedure of the court was illegal. The court should have first called upon the plaintiff to state the market value and then directed him to pay the proper court-fee on his plaint and on his failure to do so rejected the plaint. If the plaintiff paid the requisite court-fee and it was then found that the valuation of the suit went beyond the jurisdiction of the court the plaint should have been returned for presentation to the proper court. [P.647, C.2]**

S. Subramania Aiyar—for Petitioners.

C. S. Venkata Chariar—for Respondents.

Judgment.—The question that has been raised in this Civil Revision Petition is one of jurisdiction. The suit is brought for possession of a plot of land which forms part of a zamindari estate, by one ryot against another and the question which arose and which was tried as a preliminary point by the first Court was, "Is the suit properly valued for purposes of Court-fee and jurisdiction?" The District Munsif held that S. 7 (*v*) (*d*) of the Court Fees Act applied as the land formed part of an estate paying revenue to Government but was not a definite share of such an estate and was not separately assessed as mentioned in cls. (*a*) to (*c*), and that therefore court-fee should be paid on the market value of the land. But, without fixing the market value, he directed the plaint to be amended, and the *ad valorem* court-fee to be paid on such value. That order was not obeyed and, instead of rejecting the plaint, what he did was this. He considered that the market value of the land *plus* the value of the other reliefs claimed made the subject-matter of the suit exceed his jurisdiction and directed the return of the plaint to be presented to the proper Court. On appeal, the District Judge held that the suit fell within cl. 7 (*v*) (*a*) of the Court Fees Act as the land was in his opinion a definite share of an estate paying annual revenue to Government under clause (*a*).

The construction of S. 7, cl. V (*a*) to (*d*) has been the subject of consideration both in this Court and in the Allahabad High Court. In *Godavarty Sundaramma* v. *Godavarty Mangamma* (1) it was held that sub-clause (a) referred only to a definite fraction or share of an estate, and not to any piece of land which formed a plot defined by metes and bounds included in an estate: in other words, that the clause would apply only when the suit was for a half, one-third or any other fractional share of the entire estate. That view was followed in two unreported cases of this Court, S. A. Nos. 886 of 17 and 711 of 1915. and also in *Chandan* v. *Bishan Singh* (2). It seems to me that that view is correct and I respectfully follow it. If that is correct, this suit should have been valued under sub-clause (*d*) and not under sub-clause (*a*) of S. 7 of the Court Fees Act. It is clearly excluded from the second part of sub-clause (*a*) because it is not recorded in the Collector's register as separately assessed with annual revenue, the paimash register being not such a register as the collector's register referred to. In these circumstances the suit should have been valued, as held by the District Munsif, under sub-clause (*d*) of S. 7 (*v*) of the Court Fees Act.

But the District Munsif should not have returned the plaint to be presented to the proper Court at the stage he did, as that was not a proper order there. He should have first called upon the plaintiff to state what the market value of the land was and after taking evidence as to that value, if disputed, which may be adduced on either side, he should have himself determined what the market value was. and then he should have called upon the plaintiff to pay the proper Court Fee on that valuation, giving him a reasonable time to make the payment; and, if he then failed to make the payment, he should have rejected the plaint, but if he made the payment and if it was found that the valuation of the suit went beyond his jurisdiction, then return the plaint

(1) [1918] 34 M. L J. 558.
(2) [1910] 33 All. 630.

for presentation to the proper Court. The Munsif was not justified in returning a plaint which was not properly stamped.

I must therefore set aside the order of both the lower Courts and remand the case to the Court of first instance, and direct that Court to decide what the market value of the land is, and then dispose of the case in the light of the observations above made.

As regards costs, if the District Munsif rejects the plaint or finds finally that he has no jurisdiction to try the suit, the petitioner will have his costs of this revision-petition and of the appeal in the lower Court: and the costs before the District Munsif will be disposed of by the District Munsif himself. If, on the other hand, the District Munsif finds that he has jurisdiction to try the suit and tries it, all costs here and below will abide and follow the final result of the suit.

Order set aside
Case remanded.

✱ ✱ 1924 MADRAS 648

PHILLIPS AND ODGERS, JJ.

Krishna Aiyar—Plaintiff—Petitioner.

v.

Subrahmania Aiyar and another—Respondents.

A. A. O. No. 69 of 1923 and C. R. P. No. 211 of 1923, Decided on 24th January 1924, from the order of Sub. J. Mayavaram in I. A. No. 187 of 1923.

Civil P. C., O. 22 R. 10—Refusing to make party—C. P. C., O. 1 R. 10.

Where circumstances render it necessary, the Court may add a person interested in the equity of redemption as a party even after the preliminary decree and can re-open the decree so far as the added party is concerned. An order in a mortgage-suit refusing to make party a purchaser at an auction held before, but confirmed after the suit is not an order within R. 10 of O. 22 and is not appealable. [P. 649 C. 1]

K. V. Krishnaswamy Aiyar and K. Narasimha Aiyangar—for Petitioner.

P. R. Ganapathi Aiyar, T. R. Ramachandra Aiyar and S. Panchapagesa Aiyar—for Respondents.

Phillips, J.—This appeal is against the order of the Subordinate Judge of Mayavaram refusing to add the two respondents as parties after the preliminary decree in a mortgage suit brought by the plaintiff had been passed and before the final decree. A portion of the mortgaged property had been attached by the 2nd respondent and was brought to sale by him on the 18th of July 1921. A portion of the properties was purchased on that date, by the 1st respondent, but the sale was not confirmed until December 1921. In the meanwhile, in November 1921 the plaintiff brought his suit. Some other properties which had been sold in July had been purchased by a third party but that sale was set aside because the balance of purchase-money was not paid and they were again brought to sale in March 1922, when they were purchased by the 2nd respondent. As those persons are interested in the mortgaged property, the plaintiff sought to add them as party defendants to his suit before he obtained the final decree. So far as the 2nd respondent is concerned, it is perfectly clear that he purchased the property during the pendency of the plaintiff's suit and, consequently the provisions of O. 22, R 10 are applicable in his case. Under that rule he can be added as a party at any time during the pendency of the suit and inasmuch as he has purchased the mortgagor's interest in a portion of the property, it is certainly desirable that he should be added, for having purchased *pendente lite* he has become subject to all the liabilties of the mortgagor and consequently can raise no defence to this suit which the mortgagor could not raise.

The case is somewhat different as regards the 1st respondent. He undoubtedly purchased the property before the suit was filed; but inasmuch as his sale was not confirmed until after the filing of the suit the plaintiff could not make him a party, because he would have been met with the objection that this respondent had not at that time any interest in the land; but inasmuch as the creation of the interest dated back to July, and the only action taken by the respondent in order to create that interest

was the making of his bid in July 1921, his interest must be deemed to have been created before the suit was filed. O. 22, R. 10 is, therefore, not applicable in his case. We are then asked by the appellant to apply the provisions of O. I. R. 10 and in the exercise of our discretion to add him as a party defendant in order to avoid the necessity of filing a fresh suit against him. The learned Subordinate Judge declined to make him a party relying on a decision of the Additional Judicial Commissioner of Nagpur *Raghunath* v. *Sheolal* (1), in which it was held that it was not competent to add parties after a preliminary decree. We have, however, the authority of *Keith* v. *Butcher* (2) for holding that even after a judgment had been pronounced in an action for foreclosure. a party was allowed to be added before the judgment had actually been drawn up and entered. That would appear to be a somewhat stronger case than the present one. No doubt in the present case as the 1st respondent had no opportunity of meeting the plaintiff's case in its earlier stages, it would not be fair to implead him as a party and make him liable to the preliminary decree already passed without giving him an opportunity of meeting it. On the other hand, it is open to the Court to add a party and allow the prior proceedings to be re-opened so far as he is concerned and we are now asked to allow this to be done rather than drive the plaintiff to another suit. There are circumstances in this case which seem to render the former course desirable. The 1st respondent has purchased this property subject to the mortgage and in the sale-proclamation the mortgage was practically admitted by the decree-holder. This statement by the decree holder is not binding on the 1st respondent, but he may be given an opportunity now of proving that the mortgage was not valid so far as his property is concerned. On this condition we direct that he also be added as a defendant

As the appellant has succeeded entirely so far as the 2nd respondent is concerned, the 2nd respondent will pay half the plaintiff's costs in the appeal. The 1st respondent will bear his own costs.

A preliminary objection was raised that no appeal would lie against the Subordinate Judge's order, but so far as the order relates to the 2nd respondent, the appeal would lie under O. 22, R. 10; but inasmuch as that rule is not applicable to the 1st respondent, the appeal would not lie under O. I. R. 10 but as the order is one and the same, we will deal with the case so far as the 1st respondent is concerned in the Revision Petition, which has also been filed. There will be no costs in the Revision Petition.

Appeal allowed.

(1) [1917] 13 N. L. R. 69.
(2) [1884] 25 Ch. D. 750.

✱ 1924 MADRAS 649

KRISHNAN AND WALLER, JJ.

Akkamma Shetti—Appellant.

v.

Chandro Shetti—Respondent.

S. A. No. 73 of 1922, Decided on 15th October 1923, from the order of District Court of South Kanara, D/- 9th March 1922.

✱ *Landlord and Tenant—Condition in decree must be clear to justify forfeiture.*

Where the Court said in its appellate judgment "time for payment one month from this date" and did not say anything about non-payment leading to forfeiture being enforced.

Held: where forfeiture is sought to be enforced by a landlord under the terms of a decree, he should prove conclusively that the decree which he is executing has given him that right. The Court ought to lean in favour of the tenant against forfeiture rather than in the landlord's favour. [P. 650, C. 1 & 2]

B. Sitarama Rao and *K. Srinivasa Rao*—for Appellant.

K. Y. Adiga—for Respondent.

Judgment.—This appeal raises the question whether the respondent the tenant has lost his right to hold possession of the property by forfeiture. The suit was brought by the landlord, the appellant before us, for recovery of rent and also for enforcing the right of forfeiture which he had

under the lease-deed for non-payment of rent. The first Court decreed a certain sum of money for rent and directed that if that amount was paid within one month from the date of the decree, the forfeiture would be relieved against: accordingly the tenant paid a sum of over Rs. 200 into Court in time: but unfortunately for him, there was an appeal to the Sub-Court and that Court increased the amount of rent payable by about Rs. 21. The question we have to consider in this case is whether by the decree of that Court, the payment of the Rs. 21 within one month from the date of that Court's decree was a condition precedent to the forfeiture being relieved against or not. The Munsif held that it was, and the money not having been paid in time, he enforced the forfeiture and directed possession to be given to the landlord of the lands in suit. On appeal, the District Judge had held that the decree of the appellate Court is not so clear as to make it necessary to construe it as leading to forfeiture if the extra money that was ordered to be paid by that Court was not paid within one month from the date of its decree. The matter is not very clear on the wording of the appellate Court's decree or of its judgment. What the Court said in its appellate judgment after deciding that Rs. 21 more should be paid was "time for payment one month from this date." That is the last sentence in that judgment but it did not say anything about non-payment leading to forfeiture being enforced. In the decree that was drawn up, the language used, is not any the clearer. It says "that the defendants do pay to the second plaintiff within one month from this date Rs. 21 for sundries claimed in the plaint in addition to the money already decreed by the lower Court." Then it says lower down after making order as to costs "that in other respects the lower Court's decree is confirmed." The matter, we think, is left in ambiguity as to whether the non-payment of the extra Rs. 21 would lead to forfeiture or not. In cases of this sort where forfeiture is sought to be enforced by a landlord under the terms of a decree we think it right that he should prove conclusively that the decree which he is executing has given him that right. The Court ought to lean in favour of the tenant against forfeiture rather than in the landlord's favour in such cases. We are not prepared to say that the District Judge is wrong in holding in this case that the decree does not make it clear that forfeiture will be involved if the extra Rs. 21 is not paid within one month. What exactly was meant by a month's time being given is not very clear.

In these circumstances, we are not prepared to differ from the District Judge in his construction of the decree. We must therefore dismiss the appeal, but in the circumstances of the case as neither of the parties can be said to be free from fault, we direct that each party do bear his costs throughout.

Appeal dismissed.

✱ 1924 MADRAS 650

KUMARASWAMY SASTRY AND WALLER, JJ.

Venkat Reddy—Defendant—Appellant.

v

Kunjappa Gounlan and others—Plaintiffs and Defendants—Respondents.

* S. A. No. 1046 of 1922, Decided on 25th October 1923, from the Decree of the Sub. J., Vellore in A. S. No. 72 of 1921.

✱ (a) *Civil P. C., O. 34 R. 5—On order absolute rights of strangers are not affected.*

The effect of omission of the words "and thereupon the defendant's right to redeem and the security shall both be extinguished" is that the mortgage itself is alive for all purposes as regards persons having an interest who are not made parties to the mortgage suit. [P 653 C 1]

✱ (b) *Transfer of Property Act, Ss. 74 and 75—Second suit for sale against persons entitled to redemption but who were not made parties is tenable even by an auction purchaser, and the defendant is bound to pay the amount of the decree resulting in the purchase without additional interest if the mortgagee was at fault and auction purchaser was enjoying the proceeds of the property.*

The first defendant the father of defendants 2 and 3 mortgaged certain properties to the 5th defendant. Plaintiff purchased the mortgaged property in execution of a decree on the mortgage. The amount of the purchase money was more than sufficient to discharge the mortgage debt. Subsequent to the above mortgage in favour of the 5th defendant but prior to the sale at which the plaintiff became the purchaser, the 4th defendant became a purchaser under auction of one half of the mortgaged property, the auction being in execution of a money decree obtained against the father of defendants 2 and 3. The 4th defendant was not made a party to the suit by the 5th defendant though the 5th defendant had notice of the 4th defendant's right. Plaintiff sued defendants 1 to 5 for recovery from the 4th defendant of the balance of the 5th defendant's mortgage-debt, and interest from the date of the mortgage up to the date of the plaintiff's sale together with future interest and for sale of the properties in his possession in default of payment.

***Held*: that plaintiff being assignee in law of the original mortgagee's right owing to his purchase at the Court sale, could file a second suit for sale on the mortgage as against persons who were not parties to the prior suit, that the 4th defendant was only entitled to redeem the mortgage on payment of the amount of the decree in execution of which the property was purchased by the plaintiff and that the plaintiff had no right to future interest since he had been in possession of one half of the properties purchased by him and the whole difficulty was due to the omission to make the 4th defendant a party to the original mortgage suit.** [P 651 C 1 & 2; P 655 C 2 & P 656 C 2]

B. Somayya—for Appellant.

M. Patanjali Sastri—for Respondents.

Judgment.—The 4th defendant is the appellant. The suit as originally framed was one for foreclosing a mortgage executed by the 1st defendant and the father of the 2nd and 3rd defendants on the 3rd of April, 1914 in favour of the 5th defendant. The 4th defendant was the auction-purchaser of one half of the properties mortgaged in execution of a money-decree obtained against the father of the 2nd and 3rd defendants. He was not made a party to the suit on the mortgage. A decree was passed in the mortgage suit (O. S. No. 156 of 1917 filed by the 5th defendant) on the 5th of October 1917, for Rs. 723-7-9 with costs and future interest. The plaintiff became the purchaser of the properties in execution of the mortgage decree for Rs. 757 on the 3rd of July 1918. When he attempted to take possession of the properties, the 4th defendant resisted the claim in so far as the half-share of defendants 2 and 3 was concerned and the plaintiff was referred to a suit. He then filed the present suit out of which this second appeal arises.

The prayers in the plaint are that the plaintiff's rights as auction purchaser may be declared; that the 4th defendant may be directed to pay the plaintiff the balance of the mortgage debt and interest from the date of the mortgage up to the date of the plaintiff's sale which he says amounts to Rs. 867-8-0 with future interest and then to redeem the plaint properties, that in the event of the properties not being redeemed, the 4th defendant should be deemed to have lost his equity ofredemption, and that on the happening of such an event the 4th defendant should be directed to deliver possession of the properties to the plaintiff. A prayer was subsequently added asking for a sale of the properties if they are not redeemed and possession given and for the recovery of any balance from the defendants.

The 1st defendant filed a written statement pleading that he is not in possession of the plaint properties, that he never obstructed the plaintiff from taking possession and that there is no cause of action against him. Defendant 2 and 3 filed no written statements. The 4th defendant filed a written statement pleading *inter alia* that his father bought one-half share in the plaint properties in Court sale and was put in possession, that his father was and after his death he, the 4th defendant, is in lawful possession, that the plaintiff and his mother-in-law (the mortgagee) had notice, that although they had notice, the plaintiff in O. S. No. 156 of 1917 when she sued on the mortgage did not implead the 4th defendant as a party, that the decree in that suit does not bind the 4th defendant, that when a final decree was passed in the mortgage suit the mortgage became extinguished and no cause of action exists as on the mortgage, that he never obstructed the plaintiff from taking possession of the properties, that a suit for fore-

closure would not lie as the mortgage was a simple mortgage, that the plaintiff does not derive any rights under the mortgage, he being simply an auction-purchaser in a Court and not a party to the original mortgage, that even assuming that the 4th defendant has to redeem. he is not bound to redeem the whole mortgage, that the persons whose share he bought were divided from the 1st defendant and they received only Rs. 100 out of the mortgage-money and that he is only bound to pay Rs. 100 and not the whole amount due on the mortgage if he should be directed to redeem the property. On the amendment of the plaint by adding a prayer for sale an additional written statement was filed by the 4th defendant pleading that the plaintiff has no right to bring the properties to sale, that his claim for such a relief is barred by limitation, that the mortgage was discharged before the date of the suit and that there was no mortgage on which any decree could be passed.

The District Munsif passed the usual mortgage decree for sale in favour of the plaintiff for Rs. 1,041-1 -7 with costs and further interest. An appeal was filed by the 4th defendant against this decree which was dismissed by the Subordinate Judge.

The two questions arising for determination in the Second Appeal are whether the plaintiff who is only an auction—purchaser in execution of a mortgage decree can sue on the original mortgage either for foreclosure or sale and if so whether he can recover the whole amount due on the mortgage or only the difference between the amount for which he purchased the properties and the value of the property which is in the possession of the 4th defendant, he having admittedly got possession of the other half of the properties.

There can be little doubt on the facts that the original mortgagee not having made the 4th defendant a party to the mortgage suit, the right of the 4th defendant to redeem would not be extinguished and the 4th defendant would have all the remedies open to him which he would have had if he had been made a party. It is contended by the appellant that the plaintiff in the mortgage suit who had notice of the 5th defendant's rights not having joined him but having elected to proceed to sell the properties in his absence and to obtain a final decree against the original mortgagors for any balance cannot now proceed as regards the property in the possession of the 4th defendant who claims as the son of the auction-purchaser in execution of a money decree against defendants 1 and 2 who admittedly were entitled to a half share in the properties. We do not think that this contention is sound. Order 34, R. 1 of the Civil Procedure Code enacts that subject to the provisions of the Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. It does not give the consequences of the failure to join and we think that in such cases the only effect would be that the person not joined, would not be affected by any decree that may be passed and would be entitled to enforce such rights as he might have had against the original mortgagor and the mortgagee or the auction-purchaser in execution of a decree obtained by the mortgagee without joining the other encumbrancers or persons entitled to the property.

In dealing with this question it should be remembered that S. 85 of the Transfer of Property Act contained a *proviso* that the plaintiff should have notice of the interest of the persons whom the section says he ought to join. But Ss. 85 to 90 were repealed by and incorporated in O. 34, of the Civil Procedure Code. Order 34, R. 1 which corresponds to S. 85 does not contain any *proviso* but simply states that subject to the provisions of the Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. S. 89 of the Act which prescribed the procedure to be followed when the defendant fails to pay the amount due into Court enacted that the plaintiff may apply to the

Court for an order absolute for sale of the mortgaged property and proceeded as follows :—" And the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in S. 88 ; and thereupon the defendant's right to redeem and the security shall both be extinguished." This section has been re-enacted as O. 34, R 5 of the Code and the words in S. 89 of the Transfer of Property Act to the effect 'that 'the defendant's right to redeem and the security shall both be extinguished on an order absolute being passed' are omitted and consequently the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage-suit.

It is difficult to see how a second suit against a person not impleaded in the previous suit would be barred under any of the provisions of the Civil Procedure Code. It is no doubt true that the first mortgagee who had notice of a puisne encumbrance could have impleaded that puisne encumbrancer in the suit on the first mortgage but the failure to do so would not necessarily bar the second suit against the puisne encumbrancer unless there is anything in the Code barring such a suit. The cause of action is not the same as in the previous suit nor would the points to be decided necessarily be the same.

In *Sukhi* v. *Gulam Safdar Khan* (1). Their Lordships of the Privy Council held that the rights of the puisne mortgagee not made a party to a previous suit on the mortgage to enforce the security are not affected by the fact that a prior mortgagee obtains a decree for sale on his mortgage and brings the property to sale in execution. They also held that if a puisne mortgagee files a suit on his own mortgage, the auction-purchaser in execution sale in a prior mortgage can use the prior mortgage right as a shield and claim payment of the amount due under the prior mortgage-decree as a condition of a decree for sale in favour of the puisne mortgagee and pointed out the change effected by O. 34 Rr. (3) and (5) of the Code which do not re-enact the last portion of S. 89 of the Transfer of Property Act and distinguish the case of *Het Ram* v. *Shali Ram* (2) on the ground that that decision proceeded on S. 89 of the Transfer of Property Act. It is therefore unnecessary to consider the decisions cited by the appellant's vakil which were based on the view that on the making of an order absolute on a mortgage-decree the mortgage is extinguished. It has been held that a mortgagee not made a party to a suit by another mortgagee can file a separate suit on his own mortgage. In *Rangasamy Naicken* v. *Komarammal* (3) the property was first mortgaged to the plaintiff and then to 3rd defendant in the suit. The plaintiff brought a suit on his mortgage without making the 3rd defendant a party and obtained a decree and the share of the 1st defendant was sold in Court, auction and purchased by the plaintiff who filed a suit for partition and for the recovery of the 1st defendant's share. The 3rd defendant contended that he was entitled to redeem the plaintiff and it was held that the plaintiff was not entitled to possession without redeeming the 3rd defendant and that it was immaterial whether the plaintiffs, failure to join the 3rd defendant as a party to the previous suit was wilful or due to ignorance. In *Goverdhana Dass* v. *Veerasami Chetti* (4) the plaintiffs who had the first and second mortgages of the same property sued their mortgagors, obtained a decree, brought the property to sale and purchased it. They did not make the 3rd mortgagee a party to that suit. The plaintiffs then filed a suit against the mortgagors and the 3rd mortgagee, and prayed that the 3rd defendant might be decreed to pay them the amount due under their decree and that, in default, it be declared that he is debarred of his right to redeem the prior mortgage, and that he be ordered to surrender possession of the property to the plaintiffs. It was held that the

(1) [1921] 43 All. 469 (P.C.)

(2) [1918] 40 All. 407 (P.C.)
(3) [1902] 26 Mad. 484.
(4) [1902] 26 Mad. 537.

right of the 3rd mortgagee was not affected either by the decree or the sale, that the only effect of the sale was to transfer to the purchaser the equity of redemption of the mortgagor and that the only right which the 3rd mortgagee, could exercise was that which he could have claimed to exercise if he had been a party to the suit on the prior mortgage, namely, the right to redeem that mortgage with the view of enforcing his own mortgage. In *Ram Prasad* v. *Bhikari Das* (5) which was a case of a stranger purchaser, property subject to a mortgage was sold by auction in execution of a simple money-decree and the purchasers were put in possession. A suit was then filed by the mortgagee for sale on his mortgage without making the previous auction-purchasers as parties and a decree was obtained in execution of which the property was again sold and purchased by a third party. It was held in a suit by the purchaser at the sale held in execution of the mortgage-decree claiming payment of the amount due under the mortgage or in default possession of the mortgaged-property that the person who purchased the property in execution of the money-decree must be allowed to redeem on payment of what was found due on the mortgage at the time the mortgage decree was passed and that if the payment was not made within the time fixed, the plaintiff was entitled to a decree for foreclosure and possession of the property. *Govardhana Doss* v. *Veerasami Chettti* (4) was cited with approval. In *Sham Dei* v. *Baljit Singh* (6) a prior mortgagee brought the whole of the mortgaged property to sale without impleading a subsequent mortgagee of a portion and purchased the property himself. The subsequent mortgagee brought a suit in respect of the portion mortgaged to him without impleading the prior mortgagee and became the purchaser of the portion. The prior mortgagee who was unable to get possession from the subsequent mortgagee filed a suit to bring the property to sale for the realization of the unrecovered balance of the original mortgage money. It was held that a suit was maintainable by him and was not barred either by S. 13 or S. 43 of the C. P. C. (1882).

In *Chinnu Pillai* v. *Venkatasami* (7) Srinivasa Iyengar, J. afrer an exhaustive review of the authorities observed as follows: -"If the view which I have set forth is correct, in the case where the first mortgagee had omitted to make the second mortgagee a party, and proceeded to sale, the purchaser whether himself or another, can bring a fresh suit for sale making the second mortgagee a party; or he can as a defendant when the second mortgagee institutes a suit for sale, insist on a sale of the property free of his mortgage, or if he had not proceeded to sale before the second mortgagee's sale, he can, though not made a party, get the necessary relief by applying for sale free of encumbrances in the second mortgagee's suit." Reference was made to the observations of Sadasiva Aiyar, J. in *Lakshmanan Chetti* v. *Muthayya Chetti* (8), where the learned Judge after referring to *Jugdeo Singh* v. *Habibullah Khan* (9) observes that he was inclined to hold "that where the first mortgagee had notice of a second mortgage (which he must be presumed to have where the second mortgage is registered and where he omits to make the second mortgagee a party as he was bound to do under S. 85 of the Transfer of Property Act and O. 34, R. 1 of the present Civil Procedure Code, he ought not to be allowed to bring a second suit for sale against the second mortgage with or without the addition as party of the original mortgagor against whom he had already obtained a decree, simply because he finds his first decree valueless against the second mortgagee and is confronted with difficulties owing to the second mortgagee's putting forward his rights. It is however unnecessary to pursue this point further for the decision of this case." These observations are *obiter*, and we may point out that the recent decision of the Privy Council

(5) [1903] 26 All. 464.
(6) [1909] 32 All. 119.
(7) [1915] 40 Mad. 477.
(8) [1920] 40 M. L. J. 126.
(9) [1907] 6 C. L. J. 612.

in *Tilakdhari Lal* v. *Khedam Lal* (10) has now settled the law that registration is not notice. We have already pointed out the difference in words between S. 85 of T. P. Act and O. 34, R. 1 of the C.P.C. In view of the decisions which we have referred to above, we do not think that a second suit would be barred. The result of the authorities is where a mortgagee makes all the necessary persons parties, obtains a decree and sells the mortgaged-property, the purchaser acquires the equity of redemption of the mortgagor and the property is sold free from the mortgage-rights of the mortgagee in the working out of which rights the property is sold and the purchaser is entitled, if necessity arises, to take advantage of the lien which the mortgagor had, and use it as a shield against the claim of third persons where the owner of the equity of redemption is not made a party, it still remains in the mortgagee and different considerations would arise.

This being the state of the law as regards puisne and subsequent encumbrancers, the question arises as to what the rights of a purchaser in a Court sale are, where the purchaser purchases the items of property mortgaged, in execution of a decree to which a prior purchaser in execution of a simple money decree obtained after the mortgage of a portion of the mortgaged property has not been made a party. Where the purchaser in execution of a mortgage decree has purchased the property for an amount equal to, or more than, the amount due on the mortgage, the mortgagee who receives the purchase-money is fully satisfied and has no further claims on the mortgage which is discharged and it can only be kept alive for purposes of being used as a shield against the claimants of third persons.

So far as the present plaintiff is concerned, he is a purchaser in Court sale in execution of a mortgage-decree and the price paid by him was sufficient to discharge the mortgage debt. The purchase by the 4th defendant was subsequent to the mortgage and in execution of a simple money-decree. If he had been made a party, he would have no right except the right to redeem the mortgage and if he did not do so, the sale in execution of the mortgage decree would have conveyed his interest also in the property. As we are of opinion that it is open to the purchaser as the assignee in law of the rights of the original mortgagee by virtue of his purchase in Court-sale to institute a second suit as against persons who were not parties to the prior suit, it is clear that he has got the same rights as the original mortgagee would have had, if he had filed a suit and the defendant cannot be in a better position than he would have been, if he had been made a party to the original mortgage-decree in execution of which the property was sold.

The next question is as to the amount payable by the 4th defendant. In *Sivathi Olayan* v. *Rama Subba Aiyar* (11) three items of property were mortgaged to a person for Rs. 5,000. Two of the items were sold and the proceeds applied towards the discharge of the mortgage. The third item was sold for Rs. 990 but the money was not paid towards the discharge of the mortgage and the person to whom the third item was sold transferred his right to the defendants in that suit. The original mortgagee filed a suit on the mortgage without making the transferees of the third item as parties. A decree was passed as regards the third item for Rs. 1,050. the amount then due on the mortgage against the original mortgagor and the intermediate transferees and the land was sold and purchased by the plaintiff for Rs. 270. The purchaser filed a suit for possession of the property against the defendants who were entitled to the third item of property. It was held that the defendants who were not parties to the previous suit are entitled to redeem on payment not of Rs. 270 the amount for which the plaintiff purchased the item of property in dispute but of Rs. 1,050 the amount due under the decree. Subramania Aiyar and Benson, JJ. after referring to Fisher on Mortgages, 5th Edition, S. 1734. *Davis* v. *Barrett* (12) and *Macrae* v.

(10) [1921] 48 Cal. 1 (P.C.)

(11) [1897] 21 Mad. 64.
(12) [1851] 14 Beav. 542.

Goodman (13) held that a person who was not made a party to a previous litigation on a mortgage was bound to pay not merely the sum actually paid by the auction-purchaser at the Court-sale in execution of the decree in the previous suit but the amount actually due and payable on the mortgage so far as that item was concerned.

It is contended for the appellant that S. 60 of the Transfer of Property Act applies to the present case and that the appellant is entitled to redeem the property purchased by him in Court sale in execution of the money decree on payment of the proportionate amount as the item sold to him was liable to contribute rateably to the debt secured by the mortgage. Reference has been made to *Venkatasami Naicken* v. *Ramanathan Chettiar* (14). In that case some items of property were mortgaged, and the mortgagee in execution of the mortgage decree purchased four items himself. Before the date of the mortgage-decree one of the items purchased by the mortgagee was sold by the mortgagor to the appellant in that case who was not made a party to the suit brought by the mortgagee. It was held that the mortgagee must be taken to have split up his security and precluded himself from objecting to an apportionment, that the appellant was entitled to redeem his own share only on payment of the proportionate amount which the item sold to him was liable to contribute rateably to the debt secured by the mortgage and that the mortgagee was entitled to interest according to the mortgage-deed and not according to the decree. The learned Judges treated the sale in execution of the mortgage-decree as valid and observed as follows:—"Treating the sale then as valid, the mortgagee has acquired by purchase the interest of the mortgagor in some of the items and there is no doubt that he must be taken to have split up his security and precluded himself from objecting to an apportionment. It was then contended that the appellant must at least pay the proportionate share of the debt chargeable on the items other than those which he has purchased. When the mortgagee has split up his security and precluded himself from objecting to an apportionment, we are of opinion that he is not entitled to insist upon the appellant redeeming more than his own share on payment of the proportionate amount which item No. 4 (purchased by the appellant) is liable to contribute reteably to the debt secured, by the mortgage. The words of S 60 of the Transfer of Property Act are in favour of the view." Reference has also been made to *Moro Raghunath* v. *Balaji Trimbak* (15). In this case the plaintiff purchased part of the lands comprised in his mortgage in execution of the mortgage-decree obtained by him. The other parts of the land were in possession of third persons and were purchased by them. The contention raised was that the plaintiff having purchased part of the lands comprised in the mortgage could not seek to burden the remaining lands included in the mortgage with the whole of the mortgage debt but that only a proportionate part of the debt must be satisfied. This contention was upheld. These cases are distinguishable as in the present case the mortgagee purchased in execution of his decree all the items of property mortgaged, and has done nothing which would indicate an intention of splitting up his security. We think that the present case falls within the ruling in *Sivathi Odayan* v. *Rama Subba Aiyar* (11) above referred to.

As regards the amount payable, it will be the amount of the decree in execution of which the property was purchased by the present plaintiff.

As regards the interest, the plaintiff has been in possession of one half of the property as to which no objection has been taken. The whole difficulty has arisen out of the plaintiff's default in not making the 4th defendant a party to the original mortgage suit. We do not think that this is a case where interest ought to be allowed.

The decree of the lower Court will be modified accordingly. The parties will pay and receive proportionate costs. No personal decree. Time 6 months.

Decree modified.

(13) 5 Moo. P. C. 325.
(14) [1910] 8 M. L. T. 409.
(15) [1888] 13 Bom. 45.

** 1924 MADRAS 657

ODGERS AND WALLACE, JJ.

Nataraja Pillai—Petitioner.

v.

Rangaswamy Pillai and others—Respondents.

Cr. Mis. P. No. 374 of 1923 Decided on 3rd December 1923, from the order Addl. Dist. Magistrate Tanjore, D/-24th April 1923.

** (a) *Criminal P. C. (1898) S. 195 (6)—Application to appellate court is not an appeal—After the new Act such application does not lie—Even on sanction granted Criminaln Court can't take action but party may move court to take action.*

After the passing of the Amending Act XVIII of 1923, no Court can take cognisance of offences under sects. 172 to 188 Indian Penal Code, when the complaint is by a private party, even if a sanction had been granted to the complainant but the party aggrieved may still apply to the court to set the Criminal Law in motion against the offending party. Application to grant sanction under Sect. 195 Cl. (6) is not in the nature of an appeal to the Appellate Court against the order of the lower Court but is an application for the exercise of a special power conferred on the Appellate Court and is part of the processual law. Such an application cannot, after the Amending Act of 1923 be entertained or heard as it is in its nature an application for grant of sanction for prosecution by a private party. 39 Mad. 750 (F. B); 30 Mad. 383 foll.

[P. 657 C. 2, P. 660 C. 1, P. 661 C. 1]

(b) *Interpretation of Statutes—Rights and procedure,*

It is settled law that new procedure affects by-gone transactions and alterations in procedure are always retrospective. It is clear law that statute cannot deprive a suitor of a right in a pending action of an appeal to a superior tribunal which belonged to him as of right. No appeal is provided for in the Code, under Sect. 195 Criminal Procedure Code and further the amendments made affect only procedure. [P 657, C. 2]

K. S. Jayarama Iyer—for Petitioner.

V. L. Ethiraj-for Public Prosecutor.

A. V. Viswanatha Iyer—for Respondents.

Odgers, J.—This is an application to set aside the order of the Additional District Magistrate of Tanjore, wherein he revoked the sanction to prosecute the respondents, granted by the Sub-Divisional Magistrate of Tanjore. The application is under Sect. 195 of the Criminal Procedure Code, which has been amended by Act XVIII of 1923. The old section allowed an application to be made by a private party. This has been abolished by the amended section and no Court can take cognisance of any offence punishable under Sects. 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned etc., or of the Court, when such offence is alleged to have been committed in, or in relation to, any proceeding in that Court. Mr. A. V. Viswanatha Sastriar, who appears for the respondents takes more than one preliminary objection. We have only heard him so far on one, and that is the question whether sanction proceedings can now be entertained under the Criminal Procedure Code as amended. Mr. Viswanatha Sastriar maintains that this is not an appeal under S. 195, Criminal Procedure Code, and that the amendment of that section has affected an alteration in procedure. Now it is settled law that new procedure effects by-gone transactions and alterations in procedure are always retrospective *Gardner* v. *Lucas* (1). It is conceded by Mr K. S. Jayarama Aiyar for the petitioner that if this is a matter of procedure, the contention of the other side is correct. Mr. Jayarama Aiyar, however, contends that there is a right of appeal given under S. 195, Criminal Procedure Code itself, and that this section is self-contained and independent of, or additional to any other right of appeal given by the Code. If this is an appeal then the right of appeal inhered in the parties at the time the original application for sanction was made, which was on or before the 8th December, 1921; for it is clear law that you cannot deprive a suitor of a right, in a pending action, of an appeal to a superior tribunal, which belonged to him as of right [*Colonial Sugar Refining Company* v. *Irving* (2)] so that, if this is an appeal, we can hear the petition; if this is not an appeal, but a mere matter of procedure being retrospective, we are not at liberty to entertain it. That this is not an appeal, under the ordinary appellate chapters of the Code, chapters 31 and 32, is clear

(1) [1877] 3 A. C. 582.
(2) [1905] A. C. 369.

from the ruling in *Bapu* v. *Bapu* (3). That was a decision of the Full Bench, when the Court said they were not prepared to dissent from the conclusion arrived at by the Full Bench in *Muthuswami Mudali* v. *Veeni Chetti* (4). They added:

"We think, however, the power conferred upon this Court by S. 195 (6) of the Criminal Procedure Code, is not a part of the appellate and revisional jurisdiction of this Court, conferred by chapters 31 and 32 of the Court of Criminal Procedure. It is a special power conferred by 195 (6).

They decided that when the judges are equally divided, on a question under S. 195, the matter is governed by S. 36 of the Letters Patent and not by Sect. 429 or 439 of the Criminal Procedure Code. The bearing of this case on the case in *Muthuswami Mudali* v. *Veeni Chetti*, (4) will be considered in a moment. Meantime it is instructive to refer to the opinions of the referring judges, because, in the first instance, there were differing judgments and also an order of reference to the Full Bench, in all of which the matter was considered in some detail. Sundara Iyer, J., in his first opinion, held that. Cls. 6 and 7 of S. 195. Criminal Procedure Code, do not provide in terms that an appeal lies from an order granting or refusing sanction; nor does chapter 31, relating to appeals, provide that an appeal shall lie from such an order, that the power of the superior Court under those clauses is similar to what it possesses in appeals, and that the same may be said of the powers of the High Court in proceedings in revision. As to the language of S. 129 Criminal Procedure Code, the learned judge was of opinion that the language referring to the powers of a Court of appeal, under S. 195. Criminal Procedure Code, was employed, only because it is the Court to which an appeal lies from the decisions of the Court granting the sanction that has got power to revoke a sanction, or to give a sanction refused by an inferior Court, Spencer, J., also held that there was no rule of law, which subjects applications made under the special provisions of S. 195, Criminal Procedure Code, to the periods of limitation contained in the limitation Act. The learned judges, therefore, in their first judgment both concurred that an application uhder S. 196 (6), Criminal Procedure Code, cannot strictly be regarded as an appeal. To come to the Full Bench decision, in *Muthuswami Mudali* v. *Veeni Chetti* (4), that case decided that right of appeal conferred by S. 195 (6), Criminal Procedure Code, as read with Sub-Cl. 7, is not restricted to a right of appeal to the appellate Court, to which the Court of first instance is immediately subordinate. It also decided that revocation of a sanction is a refusal of a sanction, in the same way as an order confirming a grant of a sanction is giving of a sanction for the purposes of the sections. *Muthuswami Mudali* v. *Veeni Chetti* (4), followed *Palaniappa Chetty* v. *Annamalia Chetty* (5), where it was held that under Sub-S. (6) a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court, subordinate to it, within the meaning of Sub-S. 9 (a) gives or refuses a sanction, whether in respect of an offence committed before it, or in respect of one committed before a Court, subordinate to it, and in the latter case whether it gives a sanction refused by the subordinate Court, or revokes a sanction accorded by such Court. In all these three cases, it is to be noted that the main question before the Court was, put shortly, whether there was no right of appeal or more than one and what *Palaniappa Chetty* v. *Annamalai Chetty* (5) and *Muthuswami Mudali* v *Veeni Chetty* (4) decided is that in such a case there is more than one right of appeal. This is the point on which *Bapu* v. *Bapu* (3) confirmed *Muthuswami Mudali* v. *Veeni Chetty* (4). As stated above, *Bapu* v. *Bapu* (3) went further and held that the power conferred by S. 195 (6), Criminal Procedure Code. is not part of the appellate and revisional jurisdiction conferred by chapters 31 and 32 Cr. Pro. Code.

S. 404, Cr. Pro. Code says that

(3) [1916] 39 Mad 750 (F. B.)
(4) [1907] 30 Mad., 382 (F. B.)

(5) [1904] 27 Mad. 228.

"No appeal shall lie from any judgment or order, except as provided for by this Code."

It is therefore necessary in my opinion to find a distinct and definite right of appeal given by S. 195, Criminal Procedure Code itself, before it can be assumed that any such right of appeal exists. Now, Sub-S. 6 says that:

"any sanction given or refused under this section may be *revoked* or *granted* by an authority to which the authority giving or refusing it is subordinate, etc."

The wording itself seems to point to an original refusal, or an original grant by the High Court, as a superior authority itself. Sadasiva Iyer, J., in *Punchalu Reddi* v. *Chinna Venkata Reddy* (6) says that the powers given by S. 195 (b) of the Criminal Procedure Code to the superior 'authority' is a specific statutory power. Though it is usual to call the application to the superior authority a petition of appeal, the learned judge doubted whether it could be called an appeal. And in *Subbasari* v. *Emperor* (7), the same learned Judge was inclined to hold that the application to the appellate Court to revoke or grant a sanction granted or refused is not an appeal, but an original application. In *The Public Prosecutor* v. *Raver Unithiri* (8), it was said that a confirmation of sanction by the appellate Court is equivalent to a fresh grant of sanction by that Court. No doubt, S. 439, Criminal Procedure Code, in speaking of the High Court's powers of rivision confers on the Court any of the powers conferred on a Court of appeal by S.195, etc. But I am of opinion, which I think is supported by the authority quoted above, that the "Court of appeal" referred to is only a designation of the superior authority to which application for revocation or grant is to be made. Further, it will be noted that S 429, Criminal Procedure Code, which provides for a difference of opinion between judges composing the Court of appeal, is not confined to appeals, under chapter XXXI, whereas S. 428 (1), Criminal Procedure Code, deals with appeals under "this chapter." This distinction is important, in relation to the decision in *Bapu* v. *Bapu* (3), which held that Cl. 36 of the Letters Patent applied and not S. 429, Criminal Procedure Code, on a difference of opinion between the judges composing the superior Court to which application is made under S. 195 (6), Criminal Procedure Code. Further, I am of opinion that the alterations made by the amendments to the Code are merely alterations of procedure. Prosecutions for various offences committed in relation to proceedings before public servants or Courts are still punishable; but those proceedings are to be initiated on complaints. either of the public servants or the Courts concerned themselves and not on the application for sanction to prosecute, by a private party. The public servant or Court will still generally be set in motion by the party aggrieved, though of course it will be open to either to take proceedings *suo motu*.

For these reasons, I am of opinion that no appeal is provided for, in the Code, under S. 195, Criminal Procedure Code and further that the amendments made affect only procedure. We have therefore, since the amendment, no power to entertain this petition, which must be dismissed.

Wallace, J.—This is a petition to set aside an order of the additional District Magistrate, Tanjore, revoking the sanction granted by the Sub-Divisional Magistrate, Tanjore, for the prosecution of the respondents for an offence under S. 188, Criminal Procedure Code.

A preliminary legal point is raised by the respondents, namely that, since the new amended Criminal Procedure Code has abolished such sanctions and since that is now the law in force in this case, this petition does not lie. The petitioner rejoins that the right to move this Court for sanction is of the nature of a substantive right, such as a right of appeal, which cannot be taken away by any alteration of the processual law. I think the respondents' contention must be upheld for two

(6) [1919] 42 Mad. 96.
(7) [1921] 44 Mad. 47.
(8) [1914] 26 M.L.J. 511.

reasons: first that there is no substantive right now taken away; and the right conferred by the old S. 195 (6) of the Criminal Procedure Code is not a right in the nature of a right of appeal; and secondly, to comply with the petitioner's request and grant a sanction now, would be a futile proceeding, since no Court can now take cognisance of complaints, under any such sanction.

To take the first point, the substantive right, which the petitioner possesses is the right of setting up a Criminal prosecution in train, against a party, who has committed a breach of an order, under S. 144, Criminal Procedure Code. The necessary preliminary under the old S. 195 (1) to such a prosecution was the obtaining by the party of a sanction, or the presentation of a complaint by a public servant named therein. Now the method of proceeding by first obtaining a sanction has been abolished. Clearly the change is a change in the processual law and does not deprive petitioner of his substantive right to set the criminal law in motion. The petitioner still has a method under the new procedure, for setting the law in motion, since he may apply to the public servant, or any authority to whom that public servant is subordinate, to present a complaint.

Such an application as is now before us is not defined anywhere in the old Criminal Procedure Code, as an appeal; nor do any provisions of Chapter XXXI extend to it. The petitioner points out that under S. 439, old Criminal Procedure Code, it was laid down that the High Court may, in proceeding under that section exercise any of the rights conferred on "a Court of appeal" by S. 195 etc, which seems to imply that S. 195 confers some powers of the nature of appellate powers on a superior Court and the omission of S. 195 in the new S. 439 emphasises the fact that the phrase 'Court of appeal' as hitherto used, had reference to the powers conferred on Courts, in the matter of sanctions now abolished. However, the question whether, in taking proceedings under the old S. 195 (6), this Court is a Court of appeal, has been fully discussed, in the Full Bench case of this Court, reported in *Bapu* v. *Bapu* (3), which lays down that the power exercised under the old S. 195 (6) is neither an appellate nor a revisional power but a special power. The previous rulings of this Court which used the words "Appeal" and "Appellate Court" with reference to these powers for example, *In re Paree Kunhammed* (9), *In re Muthukudam Pillai* (10), *Palaniappa Chetti* v. *Annamalai Chetti* (5), *Muthuswami Mudali* v. *Veeni Chetti* (4) and *Jamna Doss* v. *Sabapathy Chetty* (11), must therefore be taken to have been using these words loosely and not with strict technical accuracy. S. 439 also indicates plainly enough that the powers of this Court as a Court of appeal under old S. 195 (6) are to be found in that section alone and are limited to the terms of that section. It is significant that there was no other section, which laid down that the powers of the High Court under the old S. 195 (6), Criminal Procedure Code, consisted of any of the powers, which were under the old Ss. 423, 426 427 and 428, the other sections quoted in S. 439, conferred on it. Another significant fact is that nowhere was any period of limitation fixed for petitions under S. 195 (6); whereas a regular right of appeal has always a defined period fixed, whithin which it must be exercised. Old S. 195 (6) to my mind indicates that in a case like the present, the power of the Court as a "Court of appeal" to adopt the phraseolgoy of old S. 439, is limited to granting a sanction refused by the lower appellate Court, which sanction is a fresh sanction and is not a revival or resuscitation of the original sanction granted by the original Court, which had been revoked by the Lower Appellate Court. No reported case controverting this view has been quoted to us. There is no reported case in this Presidency, so far as I know, which for example lays down that when a sanction has been granted and revoked and again granted, the six months are to date from the

(9) [1903] 26 Mad. 116.
(10) [1903] 26 Mad. 190.
(11) [1911] 36 Mad. 138.

date of the original grant, as if that had been resuscitated. The case reported in *In re Muthukudam Pillai* (10) is not in point, as there the original sanction had never been interfered with.

The same result will be obtained by considering the matter from another point of view. Assuming, without deciding, the petitioner's contention that for the purposes of a petition under old S. 195 (6), the District Magistrate, as a public servant, is within the meaning of S. 195 (1) subordinate to this Court, it is clear that petitioner might have applied in the first instance in this Court for the sanction he now seeks. It follows that his right to move this Court does not depend on there being in existence an order against him, against which he can "appeal." Such right as was given him by the section was a right to apply to this Court for a sanction, irrespective of what had happened to similar applications in any Court subordinate to this Court.

For the above reasons, I hold that petitioner's right to apply for a sanction is purely a matter of processual law and not a right of the nature of a right of appeal.

As to the second point, it rests on petitioner's contention that the grant of sanction by this Court will restore the sanction of the original Court, so as to enable the prosecution, already instituted on that sanction, to continue from where it left off, when the sanction was revoked; that is, in his view, the revocation of sanction has not destroyed the sanction but merely holds in abeyance if and while an appeal is pending. The petitioner goes further and contends that, since the Criminal Procedure Code does not contemplate a case once begun ending, merely because a requisite sanction had not been obtained, or because the sanction on which it was instituted has been revoked, no subsequent discovery of absence of sanction or revocation of sanction can interfere with its jurisdiction. Such a position I must hold to be untenable, since it would imply that the right to have a sanction revoked would be quite futile, if a complaint based on a sanction had already been put in, since on this theory, any subsequent revocation would not affect the jurisdiction of the Court to proceed with the trial of the compaint already filed. The petitioner appeals to S. 537 of the Criminal Procedure Code for his position; but it does not really help him, since that section has no application to cases *under trial*, when it is discovered that no sanction exists, or that the sanction given has been revoked. Obviously the Court has power to discharge or acquit an accused person of a charge which requires previous sanction if in the course of the trial and before judgment is pronounced, it is brought to its notice that no sanction has been obtained; and I can see no difference between such a case and a case where sanction on which the trial is proceeding has been set aside during the trial. Revocation must have some legal effect and can only imply, to my mind, that the prosecution, started under the sanction, cannot proceed further and has come to an end.

For reasons already given, I hold that the petitioner can now ask and is now asking this Court only to grant a fresh sanction and that this is not a petition of appeal against or a petition to revise any order of the lower Court, and for reasons now given I hold that the original sanction given has by the revocation been swept away for ever and cannot be revived by any order on this petition.

The new Criminal Procedure Code has abolished the right to present such a petition and this petition must be heard under the existing processual law. That law now forbids any prosecution being instituted merely upon a sanction granted to a private party. It follows then, that even if this Court does grant the petitioner the sanction that he seeks, such a sanction would be of no avail for instituting any prosecution; and this is an additional reason for refusing to grant the petitioner the sanction which he seeks, since to grant it would be a merely empty formal proceeding of no use whatever to the petitioner.

As I have already pointed out, the petitioner is not left without a

remedy, since it is still open to him to move the authority to whom the Additional District Magistrate is subordinate within the meaning of S. 195 (1) to present a complaint on which the respondents may be prosecuted for their disobedience of the order passed by the original public servant.

I therefore agree that the petitioner's petition is not maintainable and must be dismissed.

Petition dismissed.

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SCHWABE, C. J. AND KAMESAM, J.

The Official Assignee of Madras and others—Petitioners.

v.

The Official Assignee of Rangoon and another—Respondents.

Civl. Mis Petition Nos. 3032 and 3033 of 1922, Decided on 30th November 1923.

(a) *Presidency Towns Insolvency Act. (III of 1909) Sect. 8—Court of oppeal can review and rescind.*

The power to rescind, review or vary an order made in insolvency under S. 8 is not confined to the original Insolvency Court but it can be exercised also by the Court of appeal in regard to any order made by it. If the Limitation Act applies at all to the exercise of powers under the section, Court can extend the time. (1888) 21 Q. B. D. 21; (1890) 7 Moor. 71 Foll.

[P. 663, C. 1]

(b) *Presidency Towns Insolvency Act (III of 1909) S. 22—Debtor or debtors must be the same Power to review under S. 8 extends to order under S. 22.*

Under S. 22 the Court has no power to annul an adjudication on the ground of convenience unless the same debtor or debtors have been adjudged as insolvents in more than one Court. An adjudication against A and B in one Court and against A only in another is not against the same debtors. The power to review under S. 8 extends to an order made under S. 22 of the Act.

[P. 661, C. 1]

(c) *Evidence Act S. 31—Insolvency Court's order.*

An order made by an Insolvency Court declaring that a particular person was never a partner of a firm and that he was never adjudged an insolvent by that Court is not a judgment *in rem* and does not confer or take away any legal character within the meaningof S. 41.

(d) *Madras High Court Appellate side Fee Rules—Rule 41—Scope.*

The proper construction of R. 41 of the High Court Appellate Side Fee Rules is that "Original side" means the original side when exercising the jurisdiction referred to, in the preamble to the original side rules, and it was not intended to have and has no application at all to insolvency. That being so, the privileges under R. 41 extend to appeals from insolvency.

G. Krishnaswami Aiyar, R. Swaminatha Aiyar and *K. P. Mahadeva Aiyar*—for Petitioners.

T. R. Venkatarama Sastri and *L. S. Veeraraghava Aiyar* — for Official Assignee of Rangoon.

Alladi Krishnaswami Aiyar, N. Chandrasekara Aiyar, M. Subbaroya Aiyar and *N. Sivaramakrishna Aiyar* —for Insolvent.

Sehwabe, C. J. — A preliminary point is taken in this motion, that this Court has no jurisdiction to hear it. The motion is to set aside, an order made by the Court of Appeal, on appeal from an order of Bakewell, J., sitting in Insolvency, under S. 22 of the Presidency Towns Insolvency Act. The Court ordered that the adjudication of the insolvent by the Insolvency Court should be annulled, on the ground that there had been a later adjudication in Burma, and that it would be better and more convenient that the estate should be administered by that Court.

By S. 8, the Court may review, rescind or vary any order made by it, in its insolvency jurisdiction and by S. 2, "Court" "means" the Court exercising jurisdiction under this Act." It is said that the original Insolvency Court which is the Court presided over by the Judge appointed under S. 6, by the Chief Justice to exercise jurisdiction in insolvency, can review, rescind or vary an order; but that where an appeal has been taken from that Judge and an order made by the Court of Appeal, there is no power to rescind, review or vary that order, either in the Court of Appeal or in the Judge sitting in insolvency. This would be a somewhat startling result, because the Court of Appeal may, and does make orders clearly in the exercise of insolvency jurisdiction or as in this case, annulling an adjudication. I would want very clear words to make me construe the section as giving an in-

ferior Court power to review, rescind or vary its orders, while refusing that same power to a superior Court. I can find no such words in the section. It is true that a Court of Appeal has no power as such to review, rescind or vary its orders, except under the particular circumstances provided by the Statute or Rules having statutory force, such as in the case of slips; but in insolvency, the legislature has chosen both here, and in England, to give this power of review, rescission or variation in insolvency, which is not given to other Courts; and in my judgment, it follows that this Court has the power to review, rescind, or vary an order made by it, in the exercise of its insolvency jurisdiction, and, in my view, the order in this case was an order made in the exercise of its insolvency jurisdiction.

There is a direct authority on this point in England, in *Re Maugham*, *Ex parte Maugham*, (1), where A. L. Smith J., said:

"If the Registrar makes the order, he alone is the Court that can review or rescind it and the same power is given to the Judge, the Divisional Court and the Court of Appeal; but no one of these Courts can review, rescind or vary the order of any other, unless a right of appeal is clearly given by the statute."

That point came directly before the Court of Appeal in *Re Ex parte Perkins* (2), where the Court of Appeal rescinded its own order, reversing the decision of the Registrar and it held it had jurisdiction to adjudicate a man a bankrupt. The English Section and the Indian Section are in effect identical and I see no reason to take a different view of its proper construction. The preliminary point fails.

A further preliminary point was taken that this power did not apply to matters, which came under S.22; but in my judgment, the exercise of power, under S. 22, is the exercise of power under the insolvency jurisdiction, and there is nothing in this point.

A further preliminary point is taken that the application to review or rescind is out of time. We have not at this moment sufficient materials to consider this point, and we reserve it till later in the case.

This petition comes on before us in rather curious circumstances. An order was made in 1917, adjudicating two partners of the firm of T. A. R. A. R. M. namely Ramanthan Chetty, since deceased, and his only son Annamalai Chetty. Insovency proceedings were also taken in Burma against the firm. For some reason, for which we have no explanation, the proceedings in Madras which were *ex parte*, were not published and at any rate for some time, no further steps were taken, beyond the adjudication. The proceedings in Rangoon were however pressed and a considerable amount of work was done, under the order in that Court. At a later date, application was taken in the Insolvency Court here to stay the proceedings here, pending the completion of the proceedings in Rangoon, or to take some other course which would have the same result. In the end the matter came before this Court on appeal from Bakewell, J., and this Court ordered that the adjudication in Mardas should be annulled on certain terms, and the reason given was that the whole matter would be better disposed off in the Rangoon proceedings. Things have gone on, after that order in Rangoon and there seems to have been considerable amount of litigation; but, fairly soon, Annamalai Chetty took proceedings to have it declared that he was not a partner in the firm and therefore was not included in the order adjudicating the firm. The Official Assignee of Rangoon did not oppose that application, perhaps being satisfied that it made no difference to him, as he got all that he was likely to get; but however that may be, ultimately Annamalai Chetty was held definitely not to be an insolvent in Rangoon.

Now this petition is brought before this Court, under S. 8 of the Presidency Towns Insolvency Act, asking us to rescind or review the order of this Court annulling the insolvency

(1) [1888] 21 Q B. D. 21.
(2) [1890] 7 Morr., 78

here. One of the grounds, on which it is put, is this: The Court here thought, when it passed that order, that the insolvency in Rangoon was the same as the insolvency here. That in fact was not, because here there were two insolvents and there but one, because the Burma Court has found since that its order of adjudication applied only to Ramanatha Chetty and not to Annamalai Chetty; and if this had been known to this Court, at the time it made this order, it was bound to refuse that order because under S. 22 of the Presidency Towns Insolvency Act, under which the Court purported to act, this Court had no power to act, unless the debtors were the same. The words of the section are:

"When it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court against the same person, the Court may annul the adjudication or may stay all proceeding therein"

I think, they must be read to mean that the debtor or the debtors must be the same; for, I think it would be an absurd construction to hold, where there was an adjudication against A and B in one Court and against A only in another it could under that section annul the insolvency of A and B. It follows therefore, we should be prepared to act under S. 8, if we were otherwise satisfied that it is right that we should. I am not considering now the question, whether in so doing, we would impose any and what conditions. It may be a matter for further consideration hereafter. But Annamalai Chetty, who has appeared before us, being a person as much interested in this as anybody, but at the present moment he is not and never has been an insolvent, says that the view that was taken in Burma was the right view and that he in fact was never a partner in the firm and if this Court had not annulled the order against him, he would have applied to this Court to have that order annulled and got it annulled. If he is right about that, then the position in respect of what this Court had done entirely changes; because it had then, in effect, acted in an insolvency in which Ramanathan Chetty was the debtor, and he being the only debtor in Rangoon, there would be no legitimate complaint on this ground, in respect of the action taken by this Court; because this Court. it is true, has annulled the adjudication against Annamalai Chetty, which, under the circumstances, we hold, it had no power to do; but, if that adjudication was itself wrong, and one that ought never to have been made, it can do no one any harm, it having been annulled by this Court's order. We therefore think it right that this question of fact should be investigated. so that we can decide, whether or not this order under S. 8 should be made; and we propose, by consent of all parties before us, to refer this matter to one member of this Bench for enquiry and report by him to the Bench and pending that enquiry, this appeal must be adjourned. The question for enquiry will be whether or not Annamalai Chetty was a partner in the firm of T. A. R. A. R. M. in 1917, or otherwise liable to be adjudicated as a member of that firm. All costs will be reserved.

A list of documents alleged to be in the custody of the Official Assignee of Rangoon will be furnished by the petitioner's vakil to the vakil for the Official Assignee of Rangoon; and this Court, so far as it can, directs that such of those documents as are relevant to the proposed enquiry shall be produced, on the enquiry. The parties will be at liberty to call oral evidence.

The case will be posted for hearing before one of us, on the 16th April. Any further application in regard to inspection of documents or anything of that kind must be made to my brother Ramesam, J.

Ramesam, J.—I agree.

[His Lordship Justice Ramesam after recording the evidence made a report holding that Annamalai Chetty was a partner of the firm and that the firm did not cease to carry on business at Madras, before April, 1916, the latter point being permitted to be raised on Annamalai Chetty's application: The case came on for hearing on the 15th, 24th, 29th and 30th

days of October, 1923 before their Lordships, the Chief Justice and Ramesam, J.]

Schwabe, C. J.—This petition was adjourned so that Annamalai Chetty might have an opportunity of appearing, reserving the question of limitation, for further argument and also the question whether any and what terms should be imposed upon the petitioner, in the order which we propose to make. A long and protracted hearing took place on the application of Annamalai Chetty and the evidence before my brother Ramesam, J., was directed to the question whether or not Annamalai Chetty was in fact a partner in the firm and whether the firm had carried on business in Madras, within one year prior to the order of adjudication. He heard this evidence and made, as it was arranged, a report to this Court. He came to the conclusion on the evidence that Annamalai Chetty was a partner and that the business had been carried on within one year. On the evidence and on his report, I am quite satisfied that the conclusion he came to, was the right conclusion. There is nothing more to be said in the matter.

It was then argued on behalf of Annamalai Chetty that he ought never to have been adjudicated as insolvent at all, because there was no proof of any act of insolvency. I think there is nothing in this point at all. There was ample proof before the Court of more than one act of insolvency.

The point of limitation was then dealt with, both on behalf of Annamalai Chetty and on behalf of the Official Assignee of Rangoon. The point is, whether this application which is an application under S. 8 of the Presidency Towns Insolvency Act is barred by the lapse of time, since the passing of the order now under review. Under S. 8, there is power in this Court in insolvency to review, rescind or vary any order made by it, under its insolvency jurisdiction. If the Limitation Act applies at all to the exercise of powers under that section about which I express no opinion, the article applicable would be Art. 162 for a review of the judgment by the High Court, the period of limitation for which is 20 days from the date of the order; or Art. 173 for a review of judgment except in the case provided for by Arts. 161 and 162, the period of limitation for which is 90 days from the date of the order. But there is a further statutory provision under S. 5 of the Limitation Act, that if the Court is satisfied by the applicant that he had sufficient cause for not making the application within the prescribed period, it, the Court, can extend the time. I am quite satisfied on the evidence before us that the Official Assignee of Madras had sufficient cause for not preferring the application earlier, the cause being that he first heard of the order of the Rangoon Court and it was through no fault of his that he did not hear earlier, just before this application was made.

Then remains the question whether any conditions should be imposed upon the petitioner, in setting aside this order. It is suggested that we ought to stay all proceedings in the insolvency here, until the Rangoon Court has finally finished the insolvency proceedings there. I think there is no ground at all for any such order being made. But it may be open to the Official Assignee, Rangoon, at some future date, to satisfy the Insolvency Court, here, that some stay should be granted, in respect of some part of the proceedings, though on the facts at present before me, I am quite clear that I should refuse to make any such order. The effect of setting aside the order annulling the adjudication will result in the whole of the order being set aside. Under that order, some provision was made for the costs of the Official Assignee of Madras out of the assets. Of course, those costs which he has received will be a matter, for which he will be accountable to the Insolvency Court here to say whether those costs should come out of the estate. Meanwhile, he will retain what he has got as part of the assets of the insolvent in his hands; whether the amount will be available for distribution is a matter for the Insolvency Court and not for us.

It was contended on behalf of Annamalai Chetty and on behalf of the Official Assignee, Rangoon, that the order of the Rangoon Court refusing to adjudicate Annamalai Chetty a bankrupt, on the ground that he was not a member of the firm which had been declared insolvent in Rangoon was a final order under S. 41 of the Indian Evidence Act, which conferred upon, or took away from, Annamalai Chetty, a legal character, and therefore being made by the Insolvency Court, it was a judgment *in rem* binding on all the world, whether the parties in subsequent proceedings were represented before the Court or not In my judgment, this is not an order conferring upon Annamalai Chetty or taking away from him any legal character. It did decide and decide finally that as far as the Rangoon Insolvency was concerned, Annamalai was not an insolvent. It is true that it based that finding on the view that he was not a partner: but I do not think that being a partner in a firm is a legal character within the meaning of S. 41. Further, we are now sitting to review the decision of this Court made in 1918, and we have to say what order that Court ought to have made then. At that time, there was before the Court an order of this Court in Insolvency that Annamalai was a partner, and I do not think that it is open to him, on an application of this nature, to say that subsequently it has been held by some other Court in another insolvency that he was not a partner in the firm. The result of holding otherwise would be extraordinary. In this case, the way the Court in Rangoon arrived at its decision was by saying that Annamalai was a member of the joint family and that he had disclaimed any interest in the joint family property, as against his creditors, that there was no evidence before it that he was a partner. It will be a very remarkable thing, if that is a binding decision on all the world that a partnership did not exist. For instance, if a creditor, here or elsewhere, were taking proceedings against Annamalai Chetty, on the basis of the partnership, he could set up the decision of the Rangoon Court as a judgment *in rem*, binding on the party here, who was not a party in Rangoon. I do not think that that was the intention of S. 41 at all; nor do I think that the subsequent decision of the Rangoon Court is relevant to what we have to consider, *viz.* the position that existed, before the Rangoon Court gave that decision.

I propose to order the costs of this petition to be paid by the Official Assignee of Rangoon except in so far as those costs have been incurred owing to the intervention in the matter by Annamalai Chetty. So far as the costs incurred in the enquiry, as to whether Annamalai was a partner or not, are concerned and whether the firm carried on business within a year the petitioner will get those costs against Annamalai Chetty. As regards the scale, I am clear that this is a case of special difficulty and importance, and I am clear that this is a proper case to direct that a higher fee than the ordinary fee should be admissible and that two sets of fees should be allowed, whether or not it comes under our powers to so order is a matter which I am prepared to hear further argued, but I am not at present prepared to make any order.

C. M. P. No. 2235 *of* 1923.—This is an application to excuse the delay in making the application to this Court, made as a counterblast to the plea of limitation. The delay is excused and the Official Assignee will have his taxed costs out of the estate.

C. M. P. No. 1546 *of* 1923.—This is an application for contempt of Court arising out of the alleged contempt of Court by the Official Assignee of Rangoon for non-compliance with the orders of this Court. There is no doubt that he did not comply with the orders of this Court in producing certain documents. Various notices and telegrams were sent to him and every step was taken for obtaining the production of documents which he admittedly had had in his possession, because he had given extracts of them which have been filed in this Court, and no notice was taken. Now he comes before the Court with an affidavit in which he expresses no regret

at all as to his conduct as far as this Court is concerned. He says that he has not been able to find those documents, and has devoted considerable paragraphs to abusing the petitioner. His vakil quite properly here expresses, what his client omitted to express, proper regret to this Court for the action of the Official Assignee of Rangoon. There is nothing to be gained now by making any order. Nor am I clear on this affidavit as to where these documents are and what has become of them ; but I am quite satisfied that either proper search has not been made, or that there has been great carelessness in the office of the official Assignee of Rangoon and I think that his explanation given on affidavit is quite unsatisfactory. It amounts to no explanation at all, and the result must be that he will have to pay the taxed costs of this motion.

C. M. P. No. 859 *of* 1923.—Ordered. No costs.

C. M. P. Nos. 1867, 1932, 1942. 2015, 2251, 2158, 2184, *and* 1931 *of* 1923.—Ordered that the various parties be brought on record. No costs.

C. M. P. No. 3032 *of* 1922.—Rs. 500 will be sanctioned as extra remuneration for the shorthand writers, who took down the evidence in the case, and this amount will be added to the costs in the case.

Ramesam, J.—I agree and have nothing to add.

[This appeal came on for hearing on the 16th and 21st days of November 1923, before their Lordships, the Chief Justice and Ramesam, J:—]

C. M. P. No. 3032 *of* 1922.—

Schwabe, C. J.—We have now heard further arguments on the question of the fees payable to a vakil on an Insolvency Appeal, and the question is whether he is, or, when more than one is employed, they are, confined to the scale of fees, payable to vakils under the appellate side rules. One of those rules is R. 41 of Appendix II to those rules. By that rule, on the appellate side of the High Court (except in appeals from Original Side) in cases of special difficulty or importance, certain extra fees are payable to the vakils, if so ordered. If this appeal to us is an appeal from the Original Side within the meaning of that rule, it would seem to follow that the vakil should be relegated to the ordinary scale for Vakils on the appellate side, without the privilege of having a higher fee allowed in a suitable case.

Now, insolvency is a branch of work which is conducted by a particular judge on the Original Side and has its own set of rules, with statutory force. One of those rules is R. 137, which, in effect, makes the High Court Fee rules applicable in insolvency, except certain specified rules, one of which is R. 63. R. 63 of the High Court Fee rules is the rule, and the only rule, which provides for the scale of fees payable to vakils on appeals, and by R. 137 of the Insolvency Rules for some reason, that rule was in terms made not applicable to insolvency matters. It is quite possible that the reason for it was that in insolvency matters on the Original Side, Vakils have no right of audience and it is possible, though I do no think it right to speculate on the reason for the legislature making that omission, that the omission of that rule in terms was due to the fact that Vakils do not appear in insolvency in the Court of first instance. However that may be, R, 63 does not apply in insolvency.

The next thing to be observed is that the Original Side Rules, which govern the practice and procedure on the Original Side by the preamble are made to apply to varied jurisdictions of the Original Side—Ordinary, Original, Admiralty, Testamentary, Matrimonial and to appeals from judgments, decrees and orders in the exercise of such jurisdiction, but there is no mention of the insolvency jurisdiction, the reason no doubt being that insolvency jurisdiction is governed by the rules of its own, and, insolvency matters were therefore left out of the Original Side Rules applicable to the Original Side altogether.

Taking those facts into consideration, one has to consider what was the intention of R. 41 dealing with practitioners' fees and whether, in excepting appeals from Original Side from these cases when the privilege of obtaining a higher fee is in proper

cases allowed, and whether it was intended to exclude at the same time appeals from insolvency. I think not. I think that the proper construction of R. 41 is that ‚Original Side' means the Original Side when exercising the jurisdiction referred to in the preamble to the Original Side Rules and that it was not intended to have and has no application at all to insolvency. That being so, the privileges under R. 41, in my judgment, extend to appeals from insolvency.

I think this is a case of special difficulty and importance and it is right that there should be a special order as to costs and it is a case in which a higher fee should be allowed than would ordinarily be admissible; and it is certainly a case where it was right to employ more than one Vakil and a case in which two sets of fees should be allowed. We had figures before us in this case and we think that the right direction to the taxing officer in this case is that he should allow to the Vakils employed jointly a sum of Rs. 3,000.

Ramesam, J.—I agree.

Petitions allowed.

✱ 1924 MADRAS 668

KRISHNAN AND WALLER, JJ.

Vairavan Servai—In Re.

Cr. Rev. No. 644 of the 1923, Decided on 17th January 1924.

✱ *Arms Act, S. 19 cl. (e)—Use by servant.*

Use of a gun by the servant of a licensee for his own purposes is an offence though the servant can carry legally the gun for the purposes of his master or in the presence of his master. [P 669, Cl]

M. Patanjali Sastry and *C. S. Rama Rao*—for Petitioner.

J. C. Adam—for the Crown.

Krishnan, J.—This is an application made to this Court to revise the conviction of the accused, one Vairavan Servai, under S. 19 (*e*) of the Arms Act, as he was found carrying a loaded gun in contravention of the provisions of S. 13 of the same Act, which runs thus: "No person shall go armed with any arms, except under a license and to the extent and in the manner provided thereby."

What happened in this case was that the accused, Vairavan Servai, was found armed with a loaded gun trying to shoot game in the forest. When he was asked for an explanation, he said that his master Mr. Delhi Batcha Thevar owned the gun, that he was carrying it for him and that his master was some where in the neighbourhood; but, when he was asked to fetch his master he was unable to do so; in fact, his master was nowhere near. The finding is that he was using the gun for his own purposes.

It has been urged before us that Mr. Delhi Batcha Thevar is a person exempted under the Rules framed under the Arms Act, published in the Fort St. George Gazette of 13th January, 1920, and that as a retainer or servant of Delhi Batcha Thevar, the accused was also entitled to carry the gun and he has therefore committed no offence by doing so. In the first place, we are not sure whether the accused's master is entitled to claim exemption under Cl. 11 in the list of exempted persons as a landholder, as the learned Vakil argues. To make sure of it, it would be necessary to call for an express finding on that point. But we will assume for the purposes of this case, without deciding the question, that Mr. Delhi Batcha Thevar is an exempted person. The question then really is whether the accused, as a servant of Mr. Delhi Batcha Thevar, is entitled to contend that because his master is an exempted person, he has not infringed the Act. We do not think, his contention is correct; for, on the findings in this case, he was not carrying the gun for his master at all, but he was using the gun himself, for his own purposes in the forest, for shooting game. We do not think there is anything in the wording of S. 19 (*e*) of the Act, which would justify us, in going so far as to say that any person, who has got a license, or who is exempted from taking out a license, is entitled to allow any servant of his to use the gun for the latter's own purposes.

We need not refer to all the authorities that have been cited to us; for, except the case in *Madho Lal* v. *The Emperor* (1), the other cases turn upon the facts of those cases. It has been held in that case that, where an accused, a servant, was found using a gun lent to him by his master, who had a license, and using it for his own purposes, his act was an infringement of the provisions of S. 19, Cl. (*f*) of the Arms Act. Cl. (*e*) of the section is very similar to Cl. (*f*). We agree with that ruling of the Calcutta High Court; that case has considered the previous cases including *Queen Empress* v. *Ganga Din* (2). We think it will be an unjustifiable extension of the Act to hold that a person having a license can allow any servant of his to do what he likes with his gun, as the learned Vakil for accused argues before us. If the servant carries the gun for purposes of his master, or in the presence of his master, that may not be an offence under the Act; but to go further, we think, will be going against the terms of the Act. We think that in this case, there was a clear infringement of the provisions of Cl. (*e*), S. 19 of the Act by the accused and, that therefore he is guilty of the offence that has been found proved against him by the Lower Courts.

The question, however, remains as to what the punishment should be and whether the gun which has been ordered to be confiscated should be confiscated. It would seem from the correspondence that Mr. Delhi Batcha Thevar was rather misled by certain letters of the District Magistrate, particularly Ex. I, in thinking that he was entitled to allow his own gun to be used by his servant, Vairavan Servai, the accused in this case, whose name he gave to the District Magistrate in Ex. V; apparently he and his servant honestly believed, that they were doing nothing wrong, in allowing the servant to take the gun and use it as was done in this case. We, therefore, think the order of confiscation should not be enforced. We set aside the order of confiscation of the gun in this case. We consider, however, that the fine of Rs. 30 in the circumstances of this case is not an excessive sentence and we confirm the fine. Subject to the above modification as to confiscation, we dismiss the petition.

Petition dismissed.

(1) [1909] 13 C. W. N. 124.
(2) [1900] 22 All. 118.

1924 MADRAS 669

KRISHNAN AND ODGERS, JJ.

Punya Syamalo—In Re.

Criminal Revision Case No. 222 of 1923, Decided on 19th September 1923.

Madras Local Boards Act, XIV of 1920 S. 221—Money due under a contract of lease of tolls is not recoverable under warrants.

The amount due under a contract of lease of the tolls due to a Local Board is not "any fee, toll, costs, compensation, damages, penalties, charges, expenses or other sums due to a Local Board" within S. 221 and is not recoverable under the warrant of a Magistrate. [P 670, C 1]

The words "other sums" in the section should be read *ejusdem generis* with what precedes them. [P 670, C 2]

V. L. Ethiraj for Public Prosecutor—for the Crown.

Facts.—The President of Ganjam District Board leased to the petitioner the right to collect tolls at a certain toll-gate during the financial year 1921-22, on the petitioner agreeing to pay Rs. 4,450 in certain instalments. Petitioner being in arrears with his payments, an official of the District Board applied to the Town Sub Magistrate of Berhampur to recover Rs. 1,112-8-0 with interest from the petitioner under S. 221 of the Madras Local Boards Act, 1920. The Magistrate found that Rs. 612 was due from the petitioner and, purporting to proceed under S. 221 of the Act, ordered the petitioner to pay that amount to the District Board with interest at 8 per cent, the rate of interest provided in the contract being 12 per cent. Petitioner prays that the case may be reported to the High Court for revision.

Petitioner's main contention is that the case is not covered by S. 221 of the Act and that the Magistrate acted without jurisdiction. In that, I think,

he is correct. S. 221 of the Act provides that " in default of payment of any fee, toll, costs. compensation, damages, penalties charges expenses or other sums due to a Local Board under, or by virtue of this Act, the same may be recovered under the warrant of the Magistrate." These words do not appear to include a sum due to a Local Board under a contract. The respondent's vakil does not contend that the section would apply to the recovery of rent due from a tenant on land leased to him by a local board, or of money due to a local board under a contract unconnected with the collection of any tax or toll levied by the board. But he contends that, because the District Board is empowered under S. 75 of the Act to levy tolls, and under S. 106 to lease out the right to collect them, any sum which a toll-contractor or lessee agrees to pay to the board for the right, is a sum due to the board " under or by virtue of the Act " within the meaning of S. 221 That contention appears to me unsound. The fees, tolls, costs, etc., mentioned in S. 221 are all amounts which the member of the public concerned is bound to pay under orders made by virtue of the Act irrespective of his own wishes or consent. A sum due to the board from a party to a contract with it is not *ejusdem generis* with such fees, tolls, costs, etc., and cannot by any proper interpretation be brought within the words " other sum " in that section. Moreover, an amount due to the board under a contract cannot be said to be due to it under, or by virtue of the Act merely because the contract relates to the collection from the public of sums which, under the Act, the board can require the public to pay, or the contract is one into which the Act permits the board to enter. But for his contract the board would have no claim on the petitioner for the amount in question, and it is not by virtue of the Act but by virtue of his contract that he is liable for it. In my opinion S. 221 of the Act does not apply to the case and the Magistrate's order is illegal.

In his explanation the Magistrate suggests that in making his order he was not acting as a Criminal Court, from which it would follow that I have no power to examine his proceedings under S. 435, Code of Criminal Procedure, or to report the case to the High Court for revision under S. 438, Code of Criminal Procedure. But in view of the decision of the High Court in Criminal Revision Case No. 427 of 1922, the respondent's vakil does not press that point. The case will be reported to the High Court for revision.

Order.—We think the reasons stated in the order of the learned Sessions Judge are correct and we accept the same. The amount due under a contract of lease though of the toll cannot be treated as falling within the words of S. 221 of the Local Boards Act. The words " other sums " in the section should be read *ejus em generis* with what precedes them. Then again the sum in question here, is not payable " under or by virtue of this Act," but is payable under the contract between the parties. S. 106 has no bearing on this question; it merely authorizes the leasing out of the tolls but does not make the money payable under the contract of lease, money payable under the Act.

We, therefore, set aside the order of the Town Sub-Magistrate of Berhampur in M. C. No. 44 of 1922 as made without jurisdiction.

Order set aside.

✱ ✱ 1924 MADRAS 670

WALLACE, J.

Ayyaswami Iyer and others—Accused Nos. 1 to 5—Petitioners.

Anan Thirumalai Iyer—Complainant—Respondent.

Cr. R. C. No. 420 of 1923, (Cr. R. P. No. 322 of 1923), Decided on 7th February 1924.

✱ ✱ *Penal Code, S. 499 Exception 9—Defamation—In sectarian disputes excommunication of a member of a community and publication in the course of duty in good faith are no defamation.*

Where the facts were that the accused as the head of the Sabha, to which complainant was then subordinate received notice of the charge against him which he after due notice given

made no attempt to meet and they then, according to the usual procedure when an accused party fails to appear to answer to a charge, passed an order of excommunication and in accordance with the usual procedure imparted that fact to the heads of the community in other places in the usual form containing a brief and accurate statement of what had occurred, and there was no suggestion of any publication to any persons who had not a right by virtue of their caste position to know of the fact.

Held: that there was no malice however defective that procedure might appear to more judicial minds; that the accused were acting in good faith and in the interests of their community and that the accused were fully protected by the ninth exception to S. 499.

[P 673 C 2]

Nugent Grant and *N. C. Vijayaraghavachariar*—for Petitioners.

K. P. M. Menon and *Salem Ramaswami Iyer*—for Respondent.

Order.—The petitioners have been convicted of defamation. It was found and petitioners did not deny, that they, as executive members of the Shevapet Sowrashtra Sabha, communicated to other local Sabhas reports of the nature of Ex. A, filed in this case, in which it is stated that a complaint had been received that one K. Narasimha Iyer said that Anan Thirumalai Iyer—P. W. 1, had been born to Putta Venkata Subbayya, and that he, while an infant, was rolled up in a mat and thrown; that the sabha met accused and under their orders a servant was sent to bring P. W. 1, and on his report that P. W. 1 could not come, they considered the matter and decided that P. W. 1 should be removed from the community, and that that had accordingly been done.

The lower Courts have found that this report was defamatory of P. W. 1 and was not privileged. It is argued in revision that the lower appellate Court has based its confirming judgment on mistakes of fact and that both Courts had fundamentally erred in their conception of what would constitute malice in law.

There have been for some time two rival Sourashtra Sabhas in Shevapet, the accused's Sabha having seceded from the local Shevapet Sabha, because it would not conform to the ruling of the main assembly allowing the reinstatement in caste of a member who had gone to England and returned. The accused upheld the ruling of the main assembly. The original Sabha headed by P. Ws. 2 and 3 refuse to recognise it Since the secession, evidently, each branch has claimed to be the proper caste tribunal for Shevapet. In December 1920, the accused's Sabha excommunicated P. W. 1 as set out in Ex. A. In April 1921, the rival Sabha excommunicated accused 1, 3, 4 and 5 By Ex. IV on 14—1—1922, P. W. 2 and others of his Sabha communicated the excommunication of accused 1, 3, 4 and 5 to the very same parties to whom Ex. A was sent. Ex. A was sent to these parties on 4—9—1922.

There was no suggestion that Ex. A had been concocted for the occasion and that it was not true that P. W. 1 was excommunicatad in December 1920. The lower appellate Court has therefore erred in supposing that P. W. 1's excommunication was retaliatory measure for the excommunication of accused 1, 3, 4 and 5 by P. W. 2's Sabha since it was three or four months anterior in date. This erroneous view has, to my mind, considerably influenced the lower appellate Court, which proceeded on the idea that the excommunication of P. W. 1 was an act of retaliation and revenge and, therefore, likely to have been due to malice. It then proceeded to put forward other grounds, insufficient to my mind, in themselves to support that finding.

There is no finding that Ex. A does not truly set out the facts, *i.e.*, that it is not true that such a complaint was made to the accused's Sabha, or that the Sabha had sent for P. W. 1 or that P. W. 1 was removed in consequence by the accused's community. Nor is there any clear finding that P. W. 1 was not at the time subject to the spiritual discipline of the accused's Sabha. The lower appellate Court thinks that the accused had not proved the latter point, but I do not find that P. W. 1 even challenged it. Certainly in his evidence there is no statement that he was not subject to their control. On the other hand, he says that "in those days K. Narasimha Iyer (P. W. 3) was in one Sabha and I was in the other Sabha." A Criminal Court should certainly not assume against an accused person anything

which has not been made the subject of proof. The lower Courts seem to me to have further confused the issue by taking Ex. A to mean that the Sabha found that the charge was true and therefore circulated as true a libel which is probably false. But that is not what Ex. A says. It merely mentions the nature of the charge, that P. W. 1 refused to turn up to defend himself and therefore was excommunicated. There is no statement in Ex. A to the effect that the charge was true.

I proceed then on the footing that the statements in Ex. A are true and that P. W. 1 was under the jurisdiction of the accused's Sabha at the time of his excommunication and at the time of the publication of Exhibit A. The lower appellate Court having taken, as shown above, an erroneous view of the facts proceeded to find malice, on the ground, first that if P. W. 3 made the charge alleged he did not mean it literally, secondly that the complaint to the Sabha was not made by the party who made the charge but by one who merely overheard it, and thirdly that the Sabha had no evidence before it for holding that the charge was true. None of these grounds seem to be substantial and clearly rest on the mistaken idea that the Sabha had held that the charge was proved. It is suggested further by the counter-petitioners, that no notice giving the substances of the charges was sent to P. W. 1 and that no enquiry was held, but I find no justification for such a suggestion. This point had never been so far gone into and it may be noted that P. W. 1 has not stated that he did not know the nature of the charge.

The Sabha then had before them a serious charge of which, I must in the absence of evidence to the contrary presume in favour of the accused that, the delinquent had notice, that it has sent for him to explain and he failed to appear. The prosecution witnesses themselves admit that in such cases, it is the usual practice for Sabhas to excommunicate without further delay or enquiry. P. W. 1 says: "If a member refuses to attend as per the summons of the Sabha, he will be put out of the Sabha." P. W. 2 similarly says, "If any one is called by the Sabha to answer a charge and if he refused to attend, he will be excommunicated," and Ex. IV, the document communicating the excommunication of accused 1, 3, 4 and 5 to the other Sabhas sent by P. W. 2 gives several instances of excommunication simply on the ground that the parties summoned to appear before the Sabha had refused to do so. Three of those relate to accused 3, 4 and 5 themselves. P. W. 2 in fact admits that accused 3 and 4 were excommunicated simply because they did not appear. The evidence of P. Ws. 6 and 7 is to the same effect. The accused therefore, so far as appears were merely following the usual procedure and it is difficult to conclude that, by merely doing so, they must have been actuated by malice, however defective that procedure might appear to more judicial minds. The Sabha must be found to have fallen short of their own standard of justice before malice could be imputed to them, and, in this case, I judge the accused Sabha by the standard of justice they themselves get from the Sabha of P. W. 2. As to the allegation that no enquiry was held assuming that it be true, such enquiry, as I have shown above is not the usual procedure when a delinquent does not turn up after notice. As to whether notice was actually sent there is no clear finding that it was not. P. W. 1 says he got no notice, but the lower Courts did not accept his statement; and assumed that the accused's version that P. W. 1 got the notice was true. I am not prepared to assume against the accused that the notice was not sent.

It is urged further by the counter-petitioners that the long delay in publishing the fact of excommunication and the fact that it was published a few days after the publication of the accused's excommunication by P. W. 2's Sabha justify the inference of malice. But it is obvious that such long delays are also usual. The excommunication of the accused was not published until 16 months after it occurred. Ex. A was published 21 months after the excom-

munication. I am not prepared to infer malice from the mere fact of delay That such a publication by the caste-head was the proper and the recognised procedure is obvious from Ex. IV itself, which publishes the accused's excommunication by P. W. 2's Sabha to the very same persons, and in the very same manner as Ex. A does. It hardly lies in the mouth of P. W. 2's party to which P. W. 1 now belongs to argue that such publication is not the usual procedure or that the delay in the publication is any evidence of want of good faith.

The facts then are that the accused as the head of the Sabha, to which P. W. 1 was then subordinate, received notice of the charge against him which he, after due notice given, made no attempt to meet, that they then, according to the usual procedure when an accused party fails to appear to answer to a charge, passed an order of excommunication, and that then they in accordance with the usual procedure imparted that fact to the heads of the community in other places in the usual form containing a brief and accurate statement of what had occurred. There is no suggestion of any publication to any persons who had not a right by virtue of their caste position to know of the fact.

It has been suggested that I should send the case for findings on the various points on which findings ought to have been recorded, such as, whether a proper enquiry was held and whether Sabha had authority over P. W. 1; but I can see no object to be served by fomenting any more this internecine quarrel. On their own showing, P. W. 1's party has done almost exactly the same thing in the matter of excommunicating the accused and publishing the fact, I am not prepared to send the case back.

It is impossible then to support the lower Court's conclusion that the accused circulated the libel as a charge enquired into and proved. On the other hand there is no evidence from which to conclude that the accused circulated the charge knowing it to be false, they circulated it in the ordinary routine procedure. according to which, even if the charge was false, P. W. 1 would be liable to excommunication for mere refusal to attend. I find therefore that the publication complained of was made in the course of the usual routine procedure in such matters, that the usual procedure was followed regarding the enquiry into the charge itself, and that the accused's Sabha, to which P. W. 1 then owed allegiance, were bound on P. W. 1's own showing to communicate the fact to the other sabhas of the community. P. W. 1 says, "If any one be excommunicated from one sabha the matter will be communicated to sabhas in other places" and again, "Either after inquiry or if the persons against whom information is laid, absent themselves from the Sabha after being sent for, we used to communicate the complaint and the decision of the sabha to the other sabhas."

It appears to me that the publication in this case was in the usual course of accused's duty, that there is nothing to show that the accused were not acting in good faith in the interests of their community and that the publication is therefore protected by the ninth exception to S. 499 of the Indian Penal Code. I am of opinion that the convictions therefore cannot be supported. The convictions and the sentences are therefore reversed and the fines, if paid will be refunded to the petitioners.

Conviction set aside.

** 1924 MADRAS 673

PHILLIPS AND ODGERS, JJ.

Kalepalli Rajitagiripathy—Appellant.

v.

Kalepalli Bhavani Sankaran and another—Respondents.

A. A. O. No. 60 of 1923, Decided on 22nd February 1924, from the order of the District Court of Kistna at Masulipatam.

* (a) *Limitation Act, S. 15—Prohibiting execution by anybody amounts to injunction.*

An attachment before judgment of a decree and a consequent order issued by the Court attaching the decree absolutely prohibiting the execution of the decree by anybody amounts to an injunction and the period of its pendency is excluded under S. 15 in executing the decree. [P 675 C 2]

★ (b) *Limitation Act, Art, 182—Application for recognising assignment of decree and for execution is a step in-aid.*

An application by a transferee decree-holder for a recognition of his transfer and to execute the decree is a step-in-aid of execution and saves limitation. 12 M. L. J. 348 Foll. [P. 675 C. 2]

★★ (c) *Civil P. C. S. 11—In execution proceedings on application for transfer of decree, failure to plead limitation creates constructive res judicata.*

Even in an application for transfer of a decree the judgment-debtor can plead limitation and he ought to do so. If he fails the point is barred by constructive *res judicata*. [P. 675 C. 9]

T. Ramchandra Rao and *N. Mangapathi Naidu*—for Appellant

P Somasundaram and *P. Satyanarayana*—for Respondent.

Judgment.—This appeal relates to the execution of a decree dated 27-3-1918. On 26-7-1919 the transferee decree-holders applied for recognition of their transfer and for execution. However, in consequence of an attachment of the decree, this petition was dismissed. The next petition was put in on 4-1-1922 asking for the transmission of the decree to the District Court for execution, and on 26-4-1922 the present execution petition was filed. It was contended that the present petition was barred by limitation, but four grounds were urged by the decree-holder for allowing execution. The District Judge has held that two of these grounds were valid and has ordered execution to proceed. Now, this appeal is filed by the first defendant, the judgment-debtor.

The first ground taken is that the plea of limitation is *res judicata* by reason of the order on the application of 4-4-1922 directing the transmission of the decree to the District Court. It has been held in the Calcutta Court in *Sreepati Charan Chowdhary* v *Belchambers* (1) and in *Chutterput Singh* v. *Rai Bahadur Soomarimull* (2) that, when an order for transmission of the decree is made no question of limitation is decided and therefore such an order does not amount to *res judicata* on the question of limitation. In fact, in the former case, Mukerjee, J., held that the judgment-debtor could not at that stage possibly contend that the decree was barred by limitation: but, apparently no notice was issued to the judgment-debtor under S. 248 of the Code of Civil Procedure: the Court held further that, even though notice under S. 248 is issued, it is not competent for a judgment-debtor at that stage to contend that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous as being barred by limitation. In the judgment no authority is given for this proposition of law and possibly it is based upon the rules of the Calcutta High Court, which do not require the issue of a notice to the judgment-debtor in an application for transmission of the decree. On the other hand, in Madras under R. 161 (3) of the Civil Rules of Practice, a notice should be issued, and a notice was accordingly issued in this case. It is now argued for the respondent that the judgment-debtor had an opportunity of appearing and pleading that the application was barred by limitation, and it would seem that, when there was that opportunity, S. II, Expl. IV would be applicable and that the question would be *res judicata* because it was one which might and ought to have been put forward to show that the decree was not one that could be executed. In fact in *Mungul Prasad Dichit* v. *Grija Kant Lahiri* (3) it was held that, where an execution petition was barred by limitation but execution had been ordered to proceed, it was not open to the judgment-debtor in a subsequent application to plead that the former application was barred by limitation. Similarly in *Rajah of Ramnad* v. *Velusami Tevar* (4) the

(1) [1910] 15 C.L.J. 123—8 I.C. 22—15 C.W.N. 661.

(2) [1916] 43 Cal. 903—20 C.W.N. 889—36 I.C. 602—23 C.L.J. 645.

(3) [1882] 8 Cal. 51—8 I.A. 123—11 C.L.R. 113—4 Sar. 248 (P. C.)

(4) [1921] 48 I.A. 45—19 A.L.J. 168—40 M.L.J. 197—13 L.W. 290—(1921) M.W.N. 51—59 I.C. 880—33 C.L.J. 218—25 C.W.N. 581—28 Bom.L.R. 701—20 M.L.T. 345 (P. C.)

Privy Council held that, when an assignee of a decree applied to be brought on the record and to have the decree execution was allowed although the judgment-debtor had raised the plea that execution was barred by limitation. In the order allowing execution the plea of limitation was not dealt with specifically but it was held that in a subsequent application the plea of limitation could not be urged, for it must be deemed to have been decided in the order on the former application. In that case the plea was raised in the first proceedings but their Lordships remark in the judgment (at page 200). "It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it. No appeal was brought from the order then made and therefore it was not competent for the Subordinate Judge to admit the plea on the subsequent proceedings." It would appear from this that, even in an application for transfer of a decree, it is open to a judgment-debtor to plead limitation and in fact he ought to do so. If the decree is barred by limitation, the transfer of it to another Court is a mere infructuous proceeding which ought not to be taken and, therefore, if a valid plea of limitation is available, it should be urged in order to prevent multiplicity of proceedings. In this view we think that the District Judge's order in the present case was correct.

The second ground on which the District Judge allowed execution is that the petition put in on 26-7-1919 was a step in aid of execution, and, being less than three years before the present application, the latter is not barred. The application of 26-7 1919 was one put in by the transferee decree-holders to recognise the transfer and to execute the decree in certain methods specified in the petition. The petition was dismissed because execution of the decree had been stayed and it appears that in subsequent proceedings the right of those transferee decree-holders has been negatived. At the time the application was made they were transferee decree-holders by assignment from the original decree-holders and as such the proper persons to execute the decree. It was held in *Sreepada Brahmayya Pantulu* v. *Parasuram Ayya* (5) that such an application as this would have the effect of saving the bar of limitation. The transfer in that case was effected by a decree of Court whereas in the present case the transfer is effected by an assignment by the parties, but this cannot affect the question whether the application was one made in accordance with law. Until the assignment had been held to be invalid, the transferees were the persons who had title to execute the decree. On this ground also we think the District Judge was right.

The District Judge had rejected the third ground, namely, that, limitation is saved under S. 15 of the Limitation Act, and he has based his decision on *Rangaswami Chetty* v. *Thangavelu Chetty* (6). In that case, however, the attachment was of a book-debt and it is clear that an attachment of a book-debt does not operate as an injunction within the meaning of S. 15 of the Limitation Act. When a decree is attached, the form of attachment is given in Appendix E, forms Nos. 22 and 23, and, in accordance with those forms, there would not really be any injunction against execution, for the attaching decree-holder can execute the decree himself; but, in the present case, the attachment was not by a decree-holder, but it was an attachment before judgment, and consequently the order issued by the Court attaching the decree absolutely prohibited the execution of the decree by anybody, as will be seen by a reference to the attachment order. This order clearly amounts to an injunction and it is not denied that, if the period during which that injunc was in force be deducted, the present application would be within time.

(5) [1902] 12 M.L.J. 348.
(6) [1919] 42 Mad.637-(1919) M.W.N. 448—50 I.C. 380-26 M.L.T. 147-10 L.W. 333.

For all these reasons we think that the present petition is not barred by limitation and therefore dismiss this appeal with costs.

Appeal dismissed.

✱✱ 1924 MADRAS 676

WALLACE, J.

A. R. Srinivasachariar—Appellant.

v.

A. Raghavachariar and others—Respondents.

S.A. No. 578 of 1921, Decided on 25th January 1924 against the decree of the Court of the Subordinate Judge of Chingleput.

✱✱ (a) ***Hindu Law—Widow—Will—Legatee cant sue even trespasser.***

A Legatee under the will of a Hindu widow by which she bequeaths her husband's property derives no title under the will even to maintain a suit in ejectment against a trespasser.

(b) ***Possession—Vacant site.***

In the case of vacant site of which no effective physical possession is feasible the presumption is that possession will follow title.

[P. 676 C. 1.]

M. Patanjali Sastri—for Appellant.

T. Narasimha Aiyangar and *S. Rangaswami*—for Respondents.

Judgment.—The suit site in this case was a vacant site of which no effective physical possession was feasible. In such a case, there is no doubt that the presumption is, that, when there has been no effective physical possession, possession will follow title. The lower appellate Court found in this case that plaintiff had no title, and that he had not been in possession within 12 years of suit. The decision on the question of title was one in law, and thus open to argument in Second Appeal As there was no very clear finding by the lower appellate Court that defendants had been in physical possession, and that therefore the presumption that possession follows title could not be called in aid on behalf of plaintiff, it was necessary to have the question of law, *i. e.*, the question of the existence of any title in plaintiff, argued.

The plaintiff claims title to the property as legatee under the will of a Hindu widow bequeathing her husband's property. It is conceded, of course, that as against a reversioner plaintiff could have no title at all, but it is argued that as against any one but a reversioner, *e. g.*, as against alleged trespassers like defendants, the will would convey a title to plaintiff. For this position a Privy Council Ruling in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1) is relied on; wherein it was held that an alienee not for necessity from a Hindu widow took with his alienation sufficient title to resist or eject a trespasser. The alienation in that case was before the widow's death, and naturally is voidable, on good cause shown by the reversioners. But until the reversioners choose to attack it there is no obvious reason why the title, valid at its commencement, if not avoided, and *ex hypothesi* not yet avoided, should not remain valid until avoided. This seems to me a very different proposition to that of holding that the Hindu widow has the power over her husband's estate of alienation after her death, that she has the right to say to any one "after my death you shall enjoy my husband's estate," when at her death her interest in that estate and therefore her power of disposition over it came to an end. The ruling in *Durga Sundari* v. *Ramakrishna Poddar* (2) is clear authority that she has no such power of disposition whatever and, in my view, a Bench of this Court in *Mahalakshmamma* v *Venkata Reddi* (3), has taken the same stand point. See also *Raghava Mudaliar* v. *Narayanaswami Mudaliar* (4).

The right of a trespasser to devise his possessory title, so far as it has reached, is cited by way of analogy, but in the case of a trespasser, his

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(1) [1907] 34 Cal. 329—34 I.A. 87—11 C.W.N. 424—5 C.L.J. 334—9 Bom. L.R. 602—2 M.L.T. 133—17 M.L.J. 154—4 A.L.J. 329. (P.C.)

(2) [1913] 18 C.L.J. 162—21 I.C. 714.

(3) 1923 Mad. 367—44 M.L.J. 60—17 L.W. 8—32 M.L.T. 44.

(4) [1893] 4 M.L.J. 88.

estate, such as it is, is not a limited estate, and the analogy seems to me to fail.

I therefore hold that the lower appellate Court's decision on the question of title is correct. I have been urged to refer the question to a Bench, but the 34 Cal. case seems to me hardly strong enough foundation for holding that that case made any change in the law on this point as it has been up till now understood, though the interesting argument of the appellant's vakil gave a certain plausibility to his view.

As plaintiff therefore has no title, he cannot fall back on any legal possession resting solely on title, and actual physical possession by him within 12 years of suit has been negatived by the lower appellate Court. This appeal must fail.

I dismiss the appeal with costs.

Appeal dismissed.

✱✱ 1924 MADRAS 677

KRISHNAN, J.

Palani alias Thirumeni Thevan (minor by next friend Pechi Ammal)—Appellant.

v.

Sethu and others—Respondents,

S. A. No. 1115 of 1921, Decided on 7th March 1924, against the decree of the Court of the Subordinate Judge of Madura. in A. S. No. 40 of 1920.

✱✱ ***Evidence Act, S. 112—Non-access alone can rebut presumption-Son born after dissolution of first marriage but during second marriage is the son of second husband.***

S. 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of the conception of that child. The point of time of the conception of the child has to be considered only to see whether the husband had not access to the mother. If he had access then the child that is born must be treated as the child of the father. The child born in wedlock should be treated as the child of the father, who was then the husband of the mother unless it is shown that he had no access to the mother, at the time of conception, quite irrespective of the question whether the mother was a married woman or not. Where the mother was married again after dissolution of the first marriage before the child was born the child is the legitimate son of the second husband.

[P. 678, C. 2 ; P. 679, C. 1]

K. V. Krishnaswami Aiyar — for Appellant.

C. V. Ananthakrishna Aiyar, P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* — for Respondents.

Judgment.—In this case, an interesting question arises for decision regarding the legitimacy of the plaintiff. The plaintiff's mother Pechi Ammal, was first married to one Subramania Thevar in September or October, 1903. That marriage, it is found, was dissolved in May or June 1904, and then she married again one Thirumeni Thevan in June or July 1904. The Plaintiff was born to her in September, 1904 These are the findings of fact by the lower Courts.

The question that has to be decided is whether on these facts the plaintiff is to be treated as the legitimate son of Thirumeni Thevan and is entitled to a share of his properties as the District Munsif has held, or whether he is not the son of Thirumeni Thevan but the legitimate son of Subramania Thevan, as the Subordinate Judge seems to consider. Pechi Ammal's marriage with Subramania Thevan did not prove to be a happy one. Thirumeni Thevan seems to have conceived a great regard for her and was a rival for her affections from the very commencement. Subramania Thevan and Pechi Ammal seem to have quarrelled with each other and she left his protection, and there was a criminal case in which Subramania Thevan charged Thirumeni Thevan and others that his wife had been enticed away by Thirumeni Thevan for the purpose of illicit sexual intercourse with her. In that case, however, the accused were discharged; thereupon Subramania Thevean divorced his wife. The District Munsif has held that Thirumeni Thevan is really the father of the plaintiff and that he had access to Pechi, at the time the child was begotten, even though she was the wife of Subramania Thevan. He also refers to evidence, which shows that Thirumeni Thevan treated the young

boy as his own son till his death in April, 1917.

The question whether the plaintiff is to be treated as the legitimate son of Thirumeni Thevan or not seems to me to depend entirely upon the language of S. 112 of the Evidence Act, which lays down the rule, which really governs this case. That section says that:

"The fact that a person is born during the continuance of a valid marriage between his mother and a man "shall be conclusive proof that he is the legitimate son of that man, unlese it can be shown that the parties to the marriage had no access to each other, at any time when he could have been begotten".

In this case, the plaintiff was born during the continuance of a valid marriage between his mother and Thirumeni Thevan. The section is very clear and unless non-access of Thirumeni Thevan to her is proved at the time, when the plaintiff would have been begotten, he must necessarily be treated as the ligitimate son of Thirumeni Thevan, for the section says that the fact of birth must be taken as conclusive proof of the son's legitimacy. A married woman might have many paramours; but the child born to her must be treated under S. 112 as the legitimate son of her husband, and the fact that she has paramours is of no account whatsoever, unlese her husband, if he disputes the paternity of the child, is able to show that he had no access to her at the time of conception. The fact that other people had also access is not material in considering the legitimacy of the child. That is the rule framed by the legislature in S. 112 and we must follow that rule in dealing with questions of legitimacy. The difficulty that arises in this case is from the fact that at the time conception must have taken place, the plaintiff's mother was the lawful wife of Subramania Thevan. The Subordinate Judge seems to think that because she was Subramania Thevan's lawful wife, it must necessarily be presumed that Thirumeni Thevan had no access to her. I am not prepared to adopt such a presumption, particularly in this case, where the evidence points the other way, as the District Munsif has clearly explained. There is absolutely no evidence as to non-access of Thirumeni Thevan, at the time the child was begotten. Applying S. 112, the question raised in the case must be answered in favour of the Munsif's view that the plaintiff is the legitimate son of Thirumeni Thevan. The mistake made by the Subordinate Judge is in failing to notice that S. 112, refers to the point of time of the birth of the child as the deciding factor and not to the time of the conception of the child. The point of time of the conception of the child, has to be considered only to see whether the husband had not access to the mother. If he had access, then the child that is born must be treated as the child of the father. A case, *Ingestre* v. *Attorney General* [not reported, but referred to in 30 Law quarterly Review.] seems to have been recently decided in the same way in England, where a question exactly similar to this arose. I have not been able to refer to the case itself, for it seems to have been reported only in the Times Newspaper. But the case is referred to in a learned article in *Ingestre* v. *Attorney General* which deals with this question. The conclusion which the writer of that article comes to is that the decision makes it clear that the rule in modern English Law, is that birth in wedlock nakes a child legitimate and the only ground for disputing its paternity is to show that the father had no access to the mother, at the time the child was begotten, and no other exception is allowed. That seems to be clearly the English law. S. 112 of the Evidence Act is really based upon the English rule, and its language clearly supports the view I am taking that the child born in wedlock should be treated as the child of the father, who was then the husband of the mother, unless it is shown that he had no access to the mother, at the time of conception, quite irrespective of the question, whether the mother was a married woman or not. It is quite true that if the palintiff had been born within 280 days after the dissolution of the marriage of his mother with Subramania Thevan and if she had not been married by the time of his birth, the section would have made him the

legitimate son of Subramania Thevan. But those are not the facts here. The fact here is that the mother was married again before the child was born and applying the rule of S. 112 we must necessarily hold that the child is the legitimate son of the second husband. The rule may be somewhat artificial and may not always correspond with actualities in nature. But it is necessary to have a rule like this, to avoid unnecessary disputes as to the legitimacy of children and the rule must be worked according to its terms.

The Subordinate Judge has relied upon a case in *Nicholas* v. *Asphar* (1). There the learned Judge no doubt held in somewhat similar circumstances that the child should be treated as the legitimate child of the first husband during the subsistance of whose marriage the child was conceived. With very great respect to the learned Judge who tried the case, it seems to me that he overlooks the exact language of S. 112, when he says at p. 222 that

"There is no evidence of want of access, and S. 112 of the Evidence Act, in the absence of such evidence, regards the presumption of legitimacy arising from conception, during a valid subsisting marriage as conclusive.

In S. 112, there is no reference to conception in the first part of it. The presumption of legitimacy arises from birth and not from conception, unless as already stated it can be shown by proof of non-access that conception could not have resulted from the connection of the husband with the wife.

In the view I am taking, I do not think the second point dealt with by the Subordinate Judge, that the child was the result of Pechi's adulterous sexual intercourse with Thirumeni Thevan and therefore he is not entitled to inherit to him can be supported either, for the section excludes any such allegation or proof. The section says that I should take it as conclusively proved that plaintiff is his legitimate son and the question whether the original connection was adulterous or not, does not arise. Treating the plaintiff as the legitimate son of Thirumeni Thevan, he is entitled to share in his property, considering that Thirumeni Thevan was treating the plaintiff all along as his own son, and that he knew perfectly well, when he married Pechi Ammal, that she was a pregnant woman and yet took no objection himself to the parentage of the child and considering that in all possibility Thirumeni Thevan is the real father of the child, I am glad I have been able to arrive at a conclusion in favour of the plaintiff's right to inherit to him. The parties are Maravars, and divorces and second marriages of women are quite common among them and a man is allowed to marry more than one wife. There is thus no difficulty of the second marriage with Thirumeni Thevan being invalid or illegal.

The Subordinate Judge, in paragraph 13 of his judgment, states that since the law presumes chastity of a married woman, it is impossible to hold that Thirumeni Thevan could have had access to Pechi Ammal. It seems to me that the latter statement of his goes too far. Whether there be a presumption or not, that a married women is chaste, a presumption for which no authority has been quoted, it is clear that in the circumstances of this case Pechi Ammal was not chaste. She seems to have had connection with Thirumeni Thevan, while she was the wife of Suoramania Thevan and that was probably the reason for her divorce. The question whether he had access or had no access is a question to be decided on the evidence and on the facts proved and not on any presumptions. It was suggested that I should call for a finding from the Subordinate Judge on the question of Thirumeni's access to Pechi; but in the state of evidence, which has been fully discussed by the District Munsif, I think his finding is correct and it is not necessary to send the case down for a fresh finding, as I can myself find the fact under S. 103 of the Civil Procedure Code. There is good reason to find that he had access to the woman at the time the child was begotten. The decree of the Lower Appellate Court is reversed and that of the District Munsif is restored with costs here and in the Lower Appellate Court.

Appeal allowed.

(1) [1897] 24 Cal. 216.

✱ ✱ 1924 MADRAS 680

RAMESAM AND J CKSON, JJ.

Narayana Chetty and others—Defendants—Appellants.

v.

Muthiah Chetty (dead) and others—Plaintiffs—Respondents.

Appeals Nos. 25 and 26 of 1917, Decided on 6th March 1924, against the decrees of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 84 of 1915 and 90 of 1914, D. 14th August 1916.

✱ ✱ (*a*) *Specific performance—Contract by manager of a joint Hindu family to sell property can be specifically enforced against minor members after death of manager.*

There is no general rule that no decree for specific performance can be passed against minors. Where a contract is entered into by a Hindu in respect of property which is not joint family property and the property devolves by inheritance on heirs, some or all of whom are minors, decree for specific performance can be made. Where a Hindu who is a member of a joint family enters into contract to sell his own share and dies and the property descends by survivorship to other members of the family some or all of whom may be minors, it can be enforced against the undivided sons of the deceased. Where a joint family consists of minors only and therefore has no manager and a guardian of all the minors who is, *ex-hypothesi* not manager, not being member of the family but is merely their guardian, enters into a contract on behalf of some or all of the minors that contract cannot be specifically enforced even though it may be for purposes of necessity. Where a contract is by manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against the survivors even when some of the survivors are minors 22 Bom. L. R. 997. Foll, [P. 681, C. 1 2 P. 682, C. 1.]

(*b*) *Specific performance—Limitation*

The words 'on demand' indicate that the cause of action arises only after request.

[P. 682 C. 1.]

A. Krishnaswami Aiyar, T. V. Muthukrishna Aiyar and N. Muthuswami Aiyar—for Appellants.

S. Srinivasa Aiyangar, K. Rajah Aiyar and R. Srinivasa Aiyangar—for Respondents.

Ramesam, J.—Appeal No. 25 of 1917. This appeal arises out of a suit for specific performance of an agreement to sell. The Subordinate Judge decreed the suit. The defendants appeal.

Narayana Chetti, father of 4th defendant and his younger brother, Muthiah Chetti, father of defendants 1 to 3 were carrying on business at Rangoon under the style of M. P. M. Rm. In the course of the business, one Veerappa Chettiar of the Pl. R. M, Firm became indebted to the firm to the extent of Rs. 3,000, but was unable to pay the debt. The 2nd plaintiff advised the agent (Alagappa) of the defendants through P. W. 6 of the connected suit O. S. No. 90 of 1916 (examined on commission at Rangoon), to buy the suit site and that he (the 2nd plaintiff) would "take it off him afterwards," so that defendants' firm who are not in need of the site need not lose interest. (*Vide*, Ex. G-2). The defendant's father purchased the site for Rs. 5 000, the consideration consisting partly of cash and partly of the debt due by Veerappa (Ex. A). Before it could be re-conveyed to plaintiffs, it was found that, out of Veerappa's two brothers, while one attested the sale deed, the other Murugappa Chetti was disputing the validity of the sale. The plaintiffs and defendant's father discussed the best method of satisfying him and ultimately (*vide*, Ex. G-1), the plaintiffs paid Rs. 1,000 to buy him off, and obtained a release deed, Ex. D, at Rangoon. Meanwhile, before the payment and execution of Ex. D, were known to the parties, the defendant's father executed Ex. C in favour of plaintiffs. The document has been proved to be genuine. All the evidence oral and documentary supports it. The plaintiffs agreed to pay Rs. 4,500 besides the Rs. 1,000 paid to Murugappa for executing Ex. D. They issued a Hundi (Ex. B) and it was cashed, (Exs. F and K). The incorrect date in Ex. F (an account book of the defendants) cannot affect the plaintiff's case.

Thus, the plaintiff's have proved the suit agreement, the payment of consideration and that the transaction was beneficial to the defendant's firm who were anxious to part with the site to the plaintiffs who, by offering to purchase, diminished the defendants loss. Assuming that the proper price of the site at the time was Rs. 5,000, the defendants, if they wanted to

keep the site, would have had to pay Rs 1,000 to Murugappa. The plaintiffs by intervening and paying Rs. 5,500 (i. e.,) Rs. 1,000 to Murugappa and Rs. 4,500 to the defendants' firm) reduced the defendant's loss from Rs 1,000 to Rs 500. In this sense, it was beneficial to the family of the defendants who were a trading firm in need of money rather than the suit property which was not situate in the defendant's village.

The point strongly pressed by the Vakil for the appellants is that, the defendants 2 and 3 being minors, there can be no decree for specific performance against them. There is no general rule that no decree for specific performance can be passed against minors. For instance, in the simplest and obvious case where a contract is entered into by a Hindu in respect of property which is not joint family property and the property devolved by inheritance on heirs, some or all of whom are minors, it cannot be contended that no decree for specific performance can be made and this is conceded by the appellant. The next case is where a Hindu, who is a member of a joint family enters into contract *to sell his own share* and dies and the property descends by survivorship to other members of the family some or all of whom may be minors. In *Bhagwan* v. *Kaishnaji* (1) it was held that it can be enforced against the undivided *sons* of the deceased. I think this decision is not in conflict with the opinions of Wallis, C. J. and Sadasiva Aiyar, J. in *Rangayya Reddi* v. *Subramania Aiyar* (2): nor with the actual decision in *Bappu* v. *Annamalai Chettiar* (3), which is not a case of a member contracting *to sell his own share*. If the point arises for decision, I would perhaps hold that the case in *Bhagwan* v. *Krishnaji* (1) is correctly decided on grounds which need not be stated. The case when the contract is made on behalf of a minor or minors, is settled by the decision in *Mir Sarvarjan* v. *Fakhruddin Mahomed Chowdhury* (4). Mr. Srinivasa Aiyangar contends that, all that the Judicial Committee decided was that such a contract cannot be specifically enforced only when it was not for purposes of necessity, binding on the minors and the contract in that case which was one for the purpose of immoveable property was not for the benefit of the minors. I cannot agree with this narrow interpretation of the decision. Their Lordships say at p 237: "They are, however, of opinion that it is not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property." There is no reference here to necessity' nor is any distinction drawn between a contract being merely 'advantageous' to a minor as opposed to its being for necessary purposes binding on the minor though, earlier in the Judgment, their Lordships accept the assumption that the purchase was an advantageous "purchase for the minor." I think this decision also covers this case where a joint family consists of minors only and therefore has no manager and a guardian of all the minors who is *ex hypothesi* not manager not being member of the family, but is merely their guardian enters, into a contract on behalf of some or all of the minors, whatever the nature of the contract may be.

The present is a case where the contract is entered into by the manager of a family on behalf of the whole family for purposes binding on the family. The decision in *Bappu* v. *Annamalai Chettiar* (3) does not help the appellant for the contract in that case was not for purposes binding on the family and the remarks at page 228 are against him. The remarks in *Krishna Aiyar* v. *Shamanna* (5) are

(1) [1920] 22 Bom. L. R. 997—58 I.C. 335.
(2) [1917] 40 Mad. 365—32 M. L. J. 575—5 L. W. 797—40 I. C. 429—21 M. L. T. 385 (F. B.)
(3) 1923 Mad. 313—44 M. L. J. 226—17 M. L. W. 364—(1923) M.W.N. 218—32 M. L. T. 253.
(4) [1911] 39 Cal 232—39 I. A. 1—21 M. L. J. 1156—16 C. W. N. 74—(1912) M. W. N. 22—9 A. L. J. 33—13 I. C. 331—15 C. L.J. 69—14 Bom. L. R. 5—11 M. L. T. 8 (P. C.)
(5) [1912] 23 M. L. J. 610—17 I. C. 497—(1912) M. W. N 1188.

against the appellant and in favour of the respondent. The observations in both these cases are *obiter*, not being necessary for the decisions. In *Narayana Rao* v. *Venkatasubba Rao* (6) Spencer, J., conceded that a contract made by a manager on behalf of the family may be enforced against the manager and where it is for the benefit of the family, the completed contract will certainly bind the minor members. Should the accident of the death of the manager before completion in such a case make any difference? Where a contract is by a manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against the survivors when they are all majors, *Venkateswara Aiyar* v. *Raman Nambudripad* (7). Should it make any difference that some of the survivors are minors, and does the case in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* (4) support such a distinction? The matter is *res integra* and I am inclined to answer the above queries in the negative. I agree with Phillips, J.'s remarks in *Bappu* v. *Annamalai Chettiar* (3) where he refers with approval to *Ramachandra Aiyar* v. *Sundar amurthi Mudali* (8 and the *cbiter dicta* in *Krishna Aiyar* v. *Shamanna* (5). The result is, we are of opinion that a decree for specific performance may be passed against the minor defendants 2 and 3. The pleadings and the allegations in I. A. No. 728 of 1914 (in O. S. No 90 of 1914) show that 4th defendant is not divided from defendants 1 to 3 and no separate argument can be adduced for him.

The suit is not barred by limitation as it does not appear that the specific performance of the contract was refused more than three years prior to suit [*Venkanna* v. *Venkatakrishnayya* (9)]. The words 'on demand' in Ex. C show, in a case like this, the cause of action arises only after request (See 49 Halsbury, S. 65, p. 43).

(6) [1919] 38 M. L. J. 77—27 M. L. T. 264—55 I.C. 377—(1920) M.W.N. 129.
(7) [1916] 3 L. W. 435—33 I. C. 696—19 M. L. T. 329.
(8) [1893] 4 M. L. J. 9.
(9) [1917] 41 Mad. 18.

The result is, the appeal fails and is dismissed with costs. It is conceded that A. S. No 26 of 1917 follows. It is also dismissed with costs.

Jackson, J.—I agree.

Appeal rejected.

✱✱ 1924 MADRAS 682

RAMESAM AND JACKSON, JJ.

T. Ramachandra Jagannatharao and others—Defendants—Appellants.

v

Vadrevu Viswesam — Plaintiff — Respondent.

F. Appeal No. 175 of 1921, Decided on 11th February 1924, against the decree of the District Court of Godavary at Rajahmundry in O. S. No. 10 of 1920.

✱✱ (a) *Hindu Law—Debts—Partition—Son's shares even after partition are liable for the pre-partition debts of their father.*

A son is not liable unless the self-acquired property of the father or property which had been joint between them has devolved upon the son. Ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts. The ancestral property in which the son as the son of his father acquired an interest by birth is liable for the father's debts. A son in possession of property which had been joint and which fell to his share in partition is liable in suit brought after partition, impleading also the son, for the father's debts incurred before the partition and which are not illegal or immoral. 24 Mad. 555 and 38 Mad. 1120 Foll. 41 Mad. 136 Considered. 40 M. L. J. 473 Diss.

[P, 683, C. 2 P, 684 C. 1 P. 687 C. 1]

✱ (b) *Hindu Law—Joint family.*

A family does not continue to be joint in cases where there is a relinquishment by the father of his share-subject to a provision for maintenance. 6 Mad. 71 Doubted.

[P. 633 C, 2]

T. M. Krishnaswami Iyer and *N. Rama Rao*—for Appellants.

S. Varadachariar T.S. Raghunatha Rao and *V. Viyanna*—for Respondent.

Ramesam, J.—Suit by the plaintiff to recover (1) a sum of Rs. 2,500 deposited with 1st defendant on 6th July 1917 and (2) a sum of Rs. 350 payable to plaintiff for money paid for 1st defendant. The defendants 2 to 5 are the sons of 1st defendant who formed with him, members of a

joint family up to 1918. In that year a suit was filed by the present 2nd defendant against his father and brothers for partition. No written statement was filed and the suit was compromised and a decree was passed in terms of the compromise on 23-1-1920. Under the compromise, provision was made for paying off most of the debts contracted by the 1st defendant but not the suit debt. No specific properties were allotted to the 1st defendant and it was arranged that a maintenace of Rs 30 should be paid to him every month. The present suit was filed on 6-7-1920 and the defendants 2 to 5 are sought to be made liable with reference to the shares in their hands of what had been prior to 1920, joint family property. The defendants denied the genuineness of the debts. The District Judge found that the debts were true. He had doubts about the *bona fides* of the partition, but on the ground that under the compromise it was agreed that all the debts of the 1st defendant were agreed to be paid by all the defendants, decreed the suit. All the defendants appealed. The 1st defendant died during the pendency of the appeal. With the construction of the terms of the compromise by the District Judge, we are not able to agree.

The other appellants do not question the correctness of the finding that the debts are true. Nor do they say that the debts are illegal or immoral. They contend that the sons are not liable for the father's debt (not charged on the property) after partition and rely on *Karri Venkatareddi* v. *Chelluri Satyanarayanamurthi* (1) following *Peda Venkanna* v. *Sreeneevasa Dikshathulu* (2). The respondent replies that the partition is not *bona fide* within the meaning of the exception recognised in these cases and if the partition is held *bona fide*, he contends that *Karri Venkata Reddi* v. *Chelluri Satyanarayanamurthi* (1) is incorrectly decided and as to *Peda Venkanna* v. *Sreeneevasa Dikshathulu* (2) while conceding that the actual decision is correct, in so far as it rests on any ground other than the ground that the pronote in that case was renewed by the father after partition, such ground is not correctly decided.

We are of opinion that the partition by the decree of 1920 was *bona fide* in the sense that the intention was to really divide the status of the parties ; it is probably also *bona fide* though the matter has not been fully gone into, in the sense that there has been no unequal allotment of properties if we regard all the debts as debts of 1st defendant only *i. e.*, that his share, minus all the debts would have been much less than what he actually got *viz.*, an annuity of Rs. 360 and we come to this conclusion in spite of the fact that there has been no division by metes and bounds and the decision in *Appa* v. *Ranga* (3) is doubtful, if it meant to decide that the family continues joint in cases where there is a relinquishment by the father subject to a maintenance. It is not *bona fide* only in the sense, that provision was not made for all the debts of 1st defendant not illegal and immoral (Ghose's Hindu Law Vol. 1 page 438) out of the whole joint family properties from which they would have been recoverable if there had been no partition and debts like the plaintiff's will be defeated if it is held that the defendants 2 to 5 are not liable. As it is doubtful whether the exception mentioned in the cases uses the expression '*bona fide*' in this sense, we had to consider the question of the correctness of the decisions relied on.

It may be that. under the primitive Hindu Law, a son is under a pious duty to discharge his father's debts irrespective of the devolution, on him, of any kind of property. But the decisions have established the principle that a son is not liable unless the self-acquired property of the father or property which had

(1) [1920] 40 M. L. J. 473—29 M.L.T. 265—62 I.C. 980—(1921) M.W.N. 261—13 L. W. 516.

(2) [1917] 41 Mad. 136—33 M. L. J. 519—22 M. L T. 334—43 I. C. 225—6 L W. 649—(1918) M.W.N. 55.

(3) [1882] 6 Mad. 71.

been joint between them has devolved upon the son For the purposes of this case, it is not necessary to go further case behind the of *Girdharee Lal* v. *Kantoo Lal* (4) at p. 331 (I. A) their Lordships quote from Knight Bruce L. J. in *Hanuman Prasad Panday* v. *Mt. Baboee* (5) "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu Law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not the nature of the estate, whether ancestral or acquired by the creator of the debt" and say" That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts the ancestral property, in which the son as the son of his father acquired an interest by birth, is liable to the father's debts." At page 334, effect was given to these observations, in *Muddum Thakur's* case in favour of a creditor in execution. While the Calcutta High Court gave full effect in a case from Bengal in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (6) the Madras High Court at first did not, on the ground that the decision in 1 I. A. 321 cannot apply to Madras where a member of a joint family has a right to alienate his share (unlike Bengal) and there is no need for the equitable right, recognised in favour of the executing creditor in 1 I. A. 321. The creditor carried the case to the Privy Council *Muttayan* v. *Zamindar of Sivagiri* (7). Meanwhile a Full Bench of the Madras High Court in *Ponnappa Pillai* v. *Papnu Iyengar* (8) (Muthuswami Iyer, J. who decided the earlier case and Innes J. dissenting) held that the decision in 1 I. A. 321 applied to Madras equally. The Privy Council in *Muttayan* v. *Zamindar of Sivagiri* (7) while deciding the case on another point, pointed out that there was no ground for not applying the decision in 1 I. A. 321 to Madras In *Ramaswami Nandan* v. *Ulaganatha Goundan* (9) a Full Bench held that the liability of the father and son was co-extensive and the cause of action against the son arose simultaneously with that against the father though it must be added that the son cannot be sued alone during the father's life. *Periaswami Mudaliar* v. *Seetharam Chettiar* (10) In *Krishnaswami Konan* v. *Ramaswami Iyer* (11) the question arose whether in execution of a decree obtained against the father alone, the share of the son in the joint family property allotted to him in a partition can be seized in execution. The District Judge (afterwards Miller, J.) held "when the separation is before the suit as in this case, I think the creditor is bound to make parties all those whose interests he wishes to bind by his decree. The property is, from the date of separation, the son's property in which the father has no interest, and though the son may be liable to pay the debt, his liability must be enforced in a suit against himself." Incidentally it may be observed that the son's share, even after partition may and is spoken of in this and other cases as ancestral property and even joint property (in the sense that it represents what had been joint property). It is indeed ancestral property in the hands of the son as against his own sons. The High Court said "The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured

(4) [1874] 1 I.A. 321—14 B.L.R. 187—22 W.R. 56—3 Sar. 380 (P.C.)
(5) [1856] 6 M.I.A. 393—18 W.R. 81—1 Sar. 552—2 Suther. 29 (P.C.)
(6) [1879] 5 Cal. 148—6 I. A. 88—4 C. L.R. 226—4 Sar. 1 (P.C.)
(7) [1882] 6 Mad. 1—9 I. A. 128—12 C.L.R. 169—4 Sar. 354 (P. C.)
(8) [1881] 4 Mad. 1 (F. B.)
(9) [1898] 22 Mad. 49—8 M. L. J. 312 (F. B.)
(10) [1903] 27 Mad. 243—14 M. L. J. 84 (F. B.)
(11) [1899] 22 Mad. 519—9 M.L.J. 127

personal debt of the father is that the father, under the Hindu Law is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is seized, it remains the undivided estate of the father and son . . . Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would be otherwise, but no such case is made out here." This is the first case which considered the effect of a partition.

The whole decision and the exception in case of a *mala fide* partition relate to the seizure in execution of a decree to which the son was not a party. In *Ramachandra Padayachi* v. *Kondayya Chetty* (12), the sons were parties to the suit and it was held (Bhashyam Aiyangar, J. being one of the Judges) that the son was liable to the extent of the family property which had come to him under the partition. *Krishnaswami Konan* v. *Ramaswami Iyer* (11) was thus distinguished, at a page 557. "In that case the suit was brought after partition against the father alone and the point decided was that property taken by a son under a partition effected before the suit could not be seized in execution of a decree obtained against the father only in such suit. The case turned on the plaintiff's right in execution not as here on the question whether the plaintiff is entitled to judgment as against the son." The next case is *Kameswaramma* v *Venkatasubba Rao* (13) (Wallis, C. J. and Oldfield, J.). In my opinion the reasoning in this case is conclusive against the appellants. The learned Judges say : I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition [*Ramachandra Padayachi* v. *Kondayya Chetty* (12)]." They quote the sentence I already quoted from *Krishnaswami Konan* v. *Ramaswami Aiyar* (11) and say "That necessarily implies that at the time the property is attached, it remains the undivided property of the father and son. The same view has been taken under very similar circumstances (Miller and Krishnaswami Aiyar, JJ.) in *Lakshmi Chettiar* v. *Govindarajulu Naidu* (14). see also *Rathna Naidu* v. *Aiyana Chariar* (15) . . . . . At the date of the execution the property now in question had ceased to be joint family property and the cases referred to on the other side are cases in which the property remained joint and so subject to alienation by the father in *satisfaction of the debt.*" Incidentally it may be mentioned that the case in *Rathna Naidu* v. *Aiyana Chariar* (15) is one where the father mortgaged his son's share after partition. Obviously he has no such power and the case cannot help the point under discussion. Now comes the case in *Peda Venkanna* v. *Sreenivasa Deekshathulu* 2). The point elaborately argued in that case and also elaborately discussed is whether *Sahu Ram's case* (16) effected any change in the law relating to the son's liability a point which, after giving rise to Full Bench decisions in this Court, is set at rest by Lord Dunedin's Judgment in *Raja Brij Narain Rai* v. *Mangla Prasad Rai* (17) (a Judgment of a Full Board of the Privy Council);

(12) [1901] 24 Mad. 555.

(13) [1914] 38 Mad. 1120- 27 M. L. J. 112—24 I.C. 474—(1914) M.W.N. 742.

(14) [1910] 8 M.L.T. 349—8 I.C. 131—(1910) M. W. N. 565.

(15) [1890] 18 M. L. J. 599—4 M.L.T. 277.

(16) [1916] 39 All. 437—44 I. A. 126—21 C. W. N. 698—1 P.L.W. 557—15 A. L. J. 437—19 Bom. L. R. 498—26 C. L. J. 1—33 M. L. J. 14—39 I. C. 280—(1917) M.W.N. 439—22 M. L. T. 22—6 L. W. 213 (P. C.)

(17) 1924 P.C. 50—46 All. 95—51 I.A. 12:—21 A. L. J. 934—L. R. 5 P. C. 1—28 C. W. N. 253—46 M. L. J. 23—5 P. L T. 1—2 Pat. L. R. 41—19 M. L. W. 72—(1924) M. W. N. 68—33 M. L. T. 457—26 Bom. L. R. 500—11 O.L.J. 107 (P. C.)

while deciding that it did not, Wallis, C. J. said "This Court has held in a series of cases that as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt it also puts an end to the creditor's right to *bring the son's share to sale* during his lifetime at any rate when the partition has not been effected to defeat and delay creditors : *Krishnaswami Konan* v. *Ramaswami Iyer* (11), *Kameswaramma* v. *Venkatasubba Rao* (13).' Having regard to the expression "to bring the son's share to sale" and to the fact that *Kameswaramma* v. *Venkatasubba Rao* (13) was cited in support of his Lordship's proposition and without any qualification or disapproval, it is impossible to say, solely because, lower down the page His Lordship used the expression "to say nothing of the further ground, etc.," that His Lordship impliedly intended to over-rule his own opinion in *Kameswaramma* v. *Venkatasubba Rao* (13) following *Ramachandra Padayachi* v. *Kondayya Chetty* (12). Kumaraswami Sastri, J. begins by saying he agrees with the Judgment of the Chief Justice on the narrower ground "that a son is not after partition liable to be *proceeded against* in respect of a personal debt incurred by the father before partition." If "proceeded against" meant "proceeded against in execution" there is no difficulty in accepting the statement but if it meant, as it was intended to mean, "proceeded against in suit" it is not justified, I say with great deference to my learned brother, by Wallis, C. J.'s expression "to say nothing of the further ground" and by imputing to it a significance inconsistent with the earlier statement of the law following *Kameswaramma* v. *Venkatasubba Rao* (13). His Lordship then reviews the cases at page 143. It is difficult to see how it can be said that *Rathna Naidu* v. *Aiyana Chariar* (15) followed *Krishnaswami Konan* v. *Ramaswami Aiyar* (11). He then distinguishes *Ramchandra Padayachi* v. *Kondayya Chetti* (12) by saying that "the debt sued on arose out of a joint family business carried on by the father and son before partition and he liability of the son rose l . . . . . on contract entered into in respect of a joint family trade to the extent of the joint family assests, etc." I am not able to follow the distinction. If the son was a party to the contract, he is liable not only as to the joint family property but even as to his self-acquired property and unless he is a minor, he is liable to be arrested. In other words, he is personally liable and there is no question of Hindu Law in the case. If he was not a party, this liability rests only on the Hindu Law relating to son's liability on the contracts of a father or manager. Suppose the family trade is not ancestral trade but a new trade started by the father and cannot therefore be said to be for justifiable necessity, can it be said that *Ramachandra Padayachi* v. *Kondayya Chetty* (12) does not apply to such a case. No such distinction was made in *Kameswaramma* v. *Venkatasubba Rao* (13) which is not the case of a family trade. He then refers to the renewal of the note by the father. In my opinion the case in *Peda Venkanna* v. *Srinivasa Dikshitulu* (2) is correctly decided so far as it rests on the ground that the note sued on was renewed by the father after partition. Wallis, C.J. did not intend to over-rule *Ramachandra Padayachi* v. *Kondayya Chetty* (12) and *Kameswaramma* v. *Venkatasubba Rao* (13), or even to distinguish *Ramachandra Padayachi* v. *Kondayya Chetty* (12) in the manner suggested by Kumaraswami Sastri, J. In these circumstances we cannot accept the decision in *Karri Venkata Reddi* v. *Satyanarayana murthi* (1) as binding on us as it rests solely on the ground that the matter was concluded by *Peda Venkanna* v. *Srinivasa Deekshathulu* (2). Our brother Oldfield, J. who was also a party to *Kameswaramma* v. *Venkatasubba Rao* (13) made no reference to it in the later case and gave no additional reasons. Abdur Rahim, J. simply said that all the cases were considered by *Peda Venkanna* v. *Srinivasa Deekshathulu* (2). He also referred to an unreported decision in A. S. 419 of 1918 by Abdur Rahim and Phillips, JJ. It purports to follow *Peda Venkanna* v. *Srinivasa Deekshathulu* (2) and I concurs with Kumaraswami

Sastri, J. in his distinction of *Ramachandra Padacachi* v. *Kondayya Chetti* (12). I have already dealt with this. This case does not add to the other cases. We are of opinion that *Ramachandra Padayachi* v. *Kondayya Chetti* (12) and *Kameswaramma* v. *Venkatasubba Rao* (13) were not overruled and following them, we hold that a son in possession of property which had been joint and which fell to his share in partition is liable in a suit brought after partition (impleading the son also) for the father's debts incurred before the partition and not illegal and immoral (see also Strange's Hindu Law, Vol. 1 page 191).

We do not think it necessary to refer the question to a Full Bench. On this ground, the appeal is dismissed with costs.

Jackson, J.—I agree.

The point is correctly appreciated in Dr. Gour's Hindu Code, S. 118, paragraph 311 with reference to *Ramachandra Padayachi* v. *Kondayya Chetti* (12) and *Kameswaramma* v. *Venkatasubba Rao* (13). "On separation the son . . . is liable for debts incurred before partition." But in Trevelyan's Hindu Law, 2nd Edition, page 308, the point is not stated so clearly. "A creditor cannot enforce the payment of the debt of the father against property which has been allotted on partition to the son." This would be correct if "enforce in execution" is meant and not correct if it also includes 'enforce by suit.'

In Mayne's Hindu Law, 9th Edition, page 411, it is stated "where the son is joined in a suit against the father this is for the purpose of enabling the Court to exercise the power of the father to sell family property in discharge of his debts not being illegal or immoral and to prevent the son from questioning the nature of the debt in execution proceedings against the property. After partition, of course, the son holds the share which is allotted to him free from any such liability," If 'any such liability' be taken to mean attachment in execution proceedings the passage presents no difficulty but if the words mean free from any liability for such debts the statement seems to go too far.

Appeal rejected.

✱ 1924 MADRAS 687

PHILLIPS AND VENKATA SUBBA RAO, JJ.

A. Suryachandra Mouleswar Rao and another—Defendants—Appellents.

v.

A. Durgamba-Plaintiff-Respondent.

A. S. No. 68 of 1921, Decided on 17th October 1923, against the Decree of Sub-J. Bezwada in O. S. No. 34 of 1919.

✱ *Hindu Law—Maintenance—Widow.*

An agreement by a widow not to claim enhancement of the maintenance is a binding agreement and must be enforced. 14 M. L. J. 339 Dist. (P. 688, C. 1.)

V. Suryanarayana—for Appellants.

V. Ramadoss and N. Rama Rao—for Respondent.

Judgment.—In this case, the plaintiff is the widow of the deceased brother of the 1st defendant's father and she brought this suit for maintenance and obtained a decree. The defendants now appeal.

When the plaintiff brought her suit originally, she ignored the existence of certain documents executed in 1913, Exs II and IV, whereby her right to maintenance was fixed at Rs. 75 per annum, but after the written statement was filed, she amended her plaint and alleged that these documents were not binding on her and that she was entitled to maintenance at a higher rate. The Subordinate Judge found the documents of 1913 were not obtained by undue influence and that the plaintiff had executed her counter-part, with full knowledge of its contents and effect; but he held that the stipulation in that document that she would not claim any higher rate of maintenance in the future was not binding on her, apparently because the 1st defendant's father had not similarly undertaken that he would never claim a right to reduce the rate of her maintenance. On this ground, he held that plaintiff was not bound by her agreement.

The argument advanced by Mr. Rama Doss, on behalf of the Respondent, is that in no circumstance can a Hindu widow enter into a valid agreement, agreeing to relinquish her right to claim enhanced maintenance in future; but we have

been referred by the learned Vakil for the appellants to cases of this Court, in which the right of a widow to relinquish her right to enhanced maintenance in the future has been recognised, and in two unreported cases, Appeal No. 12 of 1920 and A. A. O No 316 of 1918, it has been definitely held that an agreement by a widow not to claim enhanced maintenance is a binding agreement and must be enforced The case in *Subramanian Patter* v. *Vembammal* (1), is not a direct authority, because in that case there was only an agreement to receive maintenance, at a certain rate for life, and it was there held that that did not amount to a release of the widow's right to increased maintenance in the future; but it is clear from the judgment that the learned Judges recognised the possibility of a widow releasing her right, such a release being binding upon her. As against this, Mr. Rama Doss has referred us to several cases, not one of which is exactly in point, but which go to show that an agreement or a decree for maintenance, at a specific rate, is always subject to alteration in the future, if the circumstances of the family necessitate such a change. *vide Gopikabai* v. *Dattatraya* (2), *Rajah Venkatappa Nayanim Varu* v *Rajah Thimma Naynim Varu* (3) and *Bangaru Ammal* v. *Vijayamachi Reddiar* (4). They undoubtedly recognised the fact that an agreement to receive maintenance at a particular rate is not binding for all time but none of them is authority for holding that, when the agreement goes further and binds the widow not to claim a higher rate, even in changed circumstances, it is not binding on her. The cases we have already referred to, cited by the appellant are authority to the contrary and we entirely agree with the views therein expressed In that view, these documents, Exs. II and IV are binding on the plaintiff and she is not entitled to any higher maintenance.

(1) [1904] 14 M.L.J. 339.
(2) [1900] 24 Bom. 386—2 Bom. L. R. 191.
(3) [1914] 27 M.L.J. 656—27 I. C. 379—(1914) M.W.N. 900.
(4) [1899] 22 Mad. 175.

It was then sought to support the decree of the lower Court on the grounds that the findin that Exs II and. IV were execug' h plaintiff's knowledge of their contents and effect, was wroog. The argument put forward here was that the plaintiff being a woman had not had the opportunity of extraneous advice and that she had been induced by her brother-in-law, the 1st defendant's father, to execute these deeds. In the first place, that was not her case in the plaint, where she alleged that she was deceived into putting her signature to some documents, of the contents of which she had no idea ; and in her evidence she also stated that it was only after the written statement in this suit was filed that she understood that the maintenance deed was in existence. In the evidence as put forward, the only thing that appears, even if we believe the witnesses, is that neither the plaintiff's father nor her brother was present, when the maintenance deed was executed : but it is admitted that one Veerabhadra Aiyar who is closely connected with the plaintiff's uncle and manages his estate, not only attested the document, but identified the plaintiff at the Registration office. On this evidence, we think that the Subordinate Judge's conclusion is perfectly right.

It is then urged for the Respondent that she ought to be given a right of residence, because that was not expressly released in the documents executed by her and it is contended that the right of residence is a separate right from that of maintenance. Without our deciding that point, however, the 1st defendant has agreed that the plaintiff should be allowed a room which is to be built on a site adjoining the family house in Nandigama for her residence. Therefore, while allowing the appeal and setting aside the decree of the lower Court we give a direction that the plaintiff be given one room to be built as above.

The Respondent will pay the Appellants' costs throughout.

Appeal allowed.

✱✱ 1924 MADRAS 689

KUMARASWAMI SASTRI J.

N. Venkateswaralu—1st Defendant Appellant.

v.

B. Lingayya and others— Plaintiff and Defendants—Respondents.

S. A. No. 340, of 1921, Decided on 13th February 1924, against the decree of the Court of the Subordinate Judge of Bapatla.

✱ *(a) Civil P. C. S. 11—Party—Official assignee not a party*

Decision against insolvent after insolvency is not decided plea bar as against official assignee who is not made a party.

✱✱ *(b) Civil P. C. S. 96 — Appeal will lie against favourable decree if point substantially in issue is decided against the party.*

Where the point adversely decided to the defendant is correctly and substantially in issue and where in other proceedings the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground. In suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare it would be better if the decree formally embodied the result of the declaration; but even if it does not do so but simply dismisses the suit the decree in substance is one where the declaration is refused 30 Mad 447; 9 C. W. N. 584. Fol. 37 Mad. 25 Dist.

[P. 690, C. 1.]

B. Somayya—for Appellant.

K. Krishnaswamy Ayyangar—for 2nd Respondent.

Judgment.—The 1st defendant is the appellant. The plaintiff is a lessee from the 1st defendant, under a cowle (Ex. F), dated the 29th of February 1916. The document is a lease for 11 years of the immoveable property in dispute, which it is alledged fell to the share of the 1st defendant, in pursuance of a partition entered into, in the year 1898. The first defendant's father became an insolvent and the Official Receiver sold the property and the second defendant purchased the same. As the partition was long before the insolvency, it is contended that the sale by the Official Receiver passed no property to the 2nd defendant. Both the District Munsif and the Subordinate Judge held against the alleged partition and dismissed the plaintiff's suit.

The present second appeal is not by the plaintiff but by the 1st defendant, and a preliminary objection is taken that, as both the Lower Courts dismissed the plaintiff's suit with costs against the 1st defendant the second appeal by him is not competent, as there can be no appeal as against a mere finding. Reference has been made to *Ramdoss Lushkur* v. *Hureehur Mookerjee* (1), *Venkatasuryanarayana* v. *Sivasankara Narayana* (2). *Nayanna* v *Venkata Krishnamma* (3), *Nan Lal Pal* v. *Naresh Chandra Deb* (4), *Muthu Pillai* v. *Vela Vysa Chariar* (5), *Bysnkes* v. *Bhut Nath* (6) and *Secretary of State* v. *Saminatha Kowndan* (7).

For the appellant, it is contended that the 1st defendant being a lessor and his title being in dispute, the decree, though it nominally dismissed the suit of the lessee, dismissed it on the ground that the first defendant, the lessor, had no title, that as between the first and the other defendants the question at issue was whether the first defendant had any title to the property; the matter would be *res judicata* between co-defendants and that consequently the first defendant is entitled to appeal. Reference is made to *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (8), *Yusuf Sahsib* v. *Durgi* (9) and *Nagalla Kotayya* v. *Nagalla Mallayya* (10).

In *Yusuf Sahib* v. *Durgi* (9), it was held, following the decision of Woodroffe, J., in *Krishna Chandra Goldar*

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(1) 23 W. R 86.
(2) [1915] 17 M. L. T. 85—27 I. C. 861—2 L W. 1 1.
(3) [1896] 6 M. L. J. 86.
(4) [1917] 41 I. C. 468—2 Pat. L.W. 108.
(5) [1921] 60 I.C. 397—12 L. W.277.
(6) [1921 34 C.L.J. 489—66 I.C. 906.
(7) [1914] 37 Mad. 25—21 M. L. J. 947—10 M. L. T. 291—12 I. C. 167—(1911) 2 M. W. N. 303.
(8) [1905] 9 C. W. N. 584.
(9) [1907) 30 Mad. 447—27 M. L. J. 260—2 M. L. T. 368.
(10) [1910] M. W. N. 719—8 I. C. 337— 9 M. L. T. 39.

v. *Mohesh Chandra Saha* (8), that where a decision dismissing a suit is in fact wholly against the defendant, such defendant can appeal against it. The decision in *Secretary of State* v. *Saminatha Kownden* (7), which was quoted was simply to the effect that a judgment dismissing a suit would not give a right of appeal, merely because there was an adverse finding on a point which is not directly and substantially in issue between the parties and which would not act as *res judicata* between co-defendants in other proceedings.

I think the true test in cases of this kind is to see not merely the form but the substance of the decree and judgment. Where the point adversely decided to the defendant is correctly and substantially in issue and where in other proceedings the matter would be *res judicata*, I think it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal, merely because the suit was decided in his favour on some other ground.

In the present case, it is clear that the question as to whether the 1st defendant was divided or not from his father, long before the insolvency of his father, would be *res judicata*, in subsequent proceedings between the Official Receiver and his assignee and the first defendant. I am therefore of opinion that the first defendant is entitled to appeal. I think that in suits where declaration and consequential relief are sought and the consequential relief is refused, because the Court is against the plaintiff's rights, which he seeks to declare, it would be better if the decree formally embodied the result of the declaration; but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused.

It is argued for the appellant that the question as to the factum and *bona fides* of the partition alleged in the plaint is *res judicata*, by reason of the proceedings in suit No. 175 of 1908, on the file of the District Munsif of Ongole, which was filed by the next friend of the first defendant against the first defendant's father and certain attaching creditors and the question in issue was whether the partition now set up was valid. The District Munsif held that the partition was *bona fide* and valid and decreed the plaintiff's suit. Ex. A is a copy of the judgment of the District Munsif. This judgment was confirmed in appeal by the District Judge of Guntur. Ex. B is a copy of the judgment of the District Judge. A Second Appeal was filed in the High Court but it was dismissed by Justice Sir Sankaran Nair. A Letters Patent Appeal, which was filed was also dismissed by Miller and Sadasiva Aiyar, JJ, as appears from Ex. C. It is argued that long before the Insolvency proceedings, the issue as to the partition being *bona fide* or not was decided in favour of the 1st defendant and against his father (the Insolvent) and that consequently the Official Receiver in the Insolvency proceedings, which were subsequent to the above decision, and the 2nd defendant the purchaser cannot be in a better position than the Insolvent. I agree with this contention and hold that the question as to whether the 1st defendant and his father were divided or undivided is *res judicata*. There were later suits which it is alleged by the respondent's vakil took away any effect which suit No. 175 1908 gave rise to.

Suit No. 905 of 1912 on the file of the District Munsif of Ongole was by the mother of the present 1st defendant and the wife of the Insolvent. 1st defendant in that suit was an attaching creditor, the 2nd defendant was the husband of the plaintiff and the 3rd defendant a lessee from her. An issue was raised as to the partition, as between the 2nd defendant and his son, as it was alleged that the plaintiff got the suit property for her maintenance. It was held that there was no arrangement as pleaded by the plaintiff settling the suit property on her at the partition between the second defendant and his son. The judgment in that suit is marked as Ex. II. It was not necessary to decide in that suit whether the partition was *bona fide*, as the claim of the plaintiff was based on an oral ar-

rangement contemporaneous with the partition giving her the property in dispute. Suit No. 299 of 1917, on the file of the Principal District Munsif's Court of Bezwada, which was transferred to the Additional District Munsif's Court of Bezwada and numbered there, as suit No. 19 of 1919, was filed by the present 1st defendant against his father and the other members of his family, to establish his conclusive right to certain lands. The 1st defendant's father was the 9th defendant in that suit. It was alleged by the plaintiff in that suit that there was a partition between him and his father, the 9th defendant. It appears from paragraph 9 of the judgment, which has been filed as Ex. V, that a subsidiary issue was raised, as to whether partition alleged by the plaintiff was true. The District Munsif held that there was no *bona fide* partition and that the alleged partition was merely a cloak to be used against subsequent transferees from plaintiff's father.

The suit was filed in 1917, while the Insolvency Petition of the 1st defendant's father was in 1912. The Official Receiver was not a party. The lease to the present plaintiff was on the 4th February 1916, and the sale by the Official Receiver to the 2nd defendant herein was on the 16th September, 1916. Neither the plaintiff nor the 2nd and 3rd defendants herein were parties to the litigation of 1917 and it is clear that the findings in that suit are not *res judicata* against them. The only party to that suit who is a party to these proceedings is the present appellant. It is true that the appellant's father was the 9th defendant in that suit, but he had become insolvent, long before all his properties had vested in the Official Receiver. If the decision in the suit of 1917 was that the partition was *bona fide*, it would be open to the Official Receiver and his vendee to plead that it is not binding on them, as they were not parties. I find it difficult to see how they can now say that that decision being the other way renders the question *res judicata*, so far as the 1st defendant is concerned. After the lease by the 1st defendant and after insolvency of his father, they ceased to have an interest in the property, sufficient to make them represent the alienees. It seems to me, however, that the finding of both the District Munsif and the Subordinate Judge, that it has not been shown that the land in dispute fell to the share of the 1st defendant at the partition, or was in the possession or enjoyment of the 1st defendant, is a finding of fact, which cannot now be questioned. Even assuming that there was a partition, the plaintiff who seeks for a declaration that the lease to him is valid and binding on the defendants has to show that the lands, which were leased to him by the 1st defendant, fell to the share of the 1st defendant and that they were in the possession and enjoyment of his lessor. So far as the litigation in Suit No. 175 of 1908 was concerned, it did not decide that the lands now in dispute fell to the share of the 1st defendant, who was the plaintiff in that suit. All that it decided was that there was a partition and that the land is question *in that suit* fell to the share of the plaintiff. Strong reliance was placed upon a registered letter, Ex. K, dated the 19th of August, 1898 and it is argued that that letter shows that there was a partition, at which the suit land fell to the share of the 1st defendant. This letter was not filed in the previous suits or proceedings, and both the District Munsif and Subordinate Judge do not place any reliance on the letter. The District Munsif in his judgment observed :—

"The letter Ex. K, which is now filed in this Court has not been filed in the previous suits and no grounds are alleged for the non-filing of the same in those suits. I cannot attach much weight to that letter, as evidencing partition. After all, the partition appears to me to be a cloak to be used against the alienees from 1st defendant's father."

The Subordinate Judge says in appeal with reference to Ex. K:—

"The preservation of that letter and the production of it by 1st defendant's father proves beyond the shadow of a doubt that the alleged partition was a bogus affair and that the 1st defendant's father brought into existence letters like Ex. K, to serve as evidence to defraud his alienees and creditors."

Both the lower Courts having refused to attach any weight to Ex. K. as evidence of the fact that at the

partition in the year 1898, the suit land fell to the share of first defendant, I do not see how I can in Second Appeal reverse these findings of fact. It is also found that the first defendant was not in possession and enjoyment. The plaintiff before he succeeds in this suit has to show not only that there was a partition but at the partition the properties in dispute were allotted to the share of the first defendant and that they were in his possession and enjoyment. As he has not done so the suit was rightly dismiss d. The Second Appeal fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 MADRAS 692

SCHWABE, C. J.

Kandaswami Naidu—1st Defendant-Appellant.

v.

M. Kanniah Naidu and others—Plaintiff & 2nd Defdt—Respondents.

C. C. C. Appeal No. 1 of 1923, Decided on 11th December 1923 against the decree of the City Civil Court Madras, D/- 24th August 1922, in O. S. No. 702 of 1921.

✱ (a) *Damages—Breach of promise of marriage*

In an action for damages for breach of promise of marriage, plaintiffs are entitled to recover money actually thrown away and alsodamages to credit and reputation by reason of the refusal. 7 B. H. C. R. 122 Foll. 39 Bom 682, 714 not foll [P. 692, C. 2.]

(b) *Civil P. C. S. 35—Exaggerated claim justifies award of proportionate costs.*

Where the plaintiffs have grossly and intentionally exaggerated their claim for damages and only a small portion of the claim is decreed the defendants are liable to pay only a proportionate share of the Court fees paid by plaintiffs. [P. 692, C. 1,]

P. G. Krishna Aiyar—for Appellant

V. Visvanatha Sastri—for Respondents.

Judgment.—This is an appeal from the City Civil Court in an action for breach of promise of marriage. The action is not by either of the parties proposed for the marriage but mainly by the brother of the proposed bridegroom against the father of the proposed bride. The contract was proved under which the first defendant agreed to give his daughter in marriage to the 2nd plaintiff who is 1st plaintiff's brother. It is well established that on breach of such a contract an action for damages lies. The Mitakshara itself provides that, if a more suitable suitor is found, a man will be justified in breaking off a marriage contract: but I think that it is quite clear that, when that course is pursued, it is also provided that some form of damages can be provided against the father who so changes mind. This is stated to be the law in *Umed Kika* v. *Nagindas Narotamdas* (1). There is a passage to the contrary in a decision of Beaman, J., in *Khimji Vassonji* v. *Narsi Dhunji* (2) which I think, is inaccurate and is based, as pointed out in Mayne's Hindu Law at page 118, on a misconception of Mitakshara. *Umed Kika* v. *Nagindas Narotamdas* (1) is authority for the proposition that, in such cases, the plaintiff is entitled to recover money actually thrown away and also damages to his credit and reputation by reason of the refusal. I should have myself felt a little doubtful as regards the second head of damages though this kind of damages is allowed in the well known English form of action for breach of promise of marriage and allowed to the plaintiff concerned who is actually a party to the marriage contract but not to the parents; but I see no reason for saying that the decision in 7 Bom. H. C. R to which that learned Chief Justice Westropp was a party is wrong. Under the circumstances the learned Judge awarded in this case Rs. 50 as damages under that head and also Rs. 200 for damages actually sustained. The claim had been preferred for a very much larger amount. The learned Judge discounted the claim and disallowed a large part of the damages claimed on the ground that the plaintiffs had intentionally aggravated the damages by spending money, though they knew that the marriage would not take place;

(1) 7 B. H. C. O. C. 122.
(2) (1915) 39 Bom. 682—28 I. C. 408—17 Bom. L. R 225.

and he reduced, I think, the amount to what he considered to be the actual minimum amount expended by the plaintiffs without knowing of the other marriage. I must say that I am not certain that he has not from that point of view given a little too much, but to some extent it had to be a guess work, and I think he has given if anything a little too little on the other head. I think that it will not be right to interfere with the amount of damages he has awarded in this case. But I do not think he was right in awarding the full costs that he awarded. The claim was for Rs. 2,000 and a stamp had been paid on the plaint of Rs. 125 based on the valuation and the learned Judge found that the case for the plaintiffs was grossly exaggerated and intentionally exaggerated. I do not think that it is right when a Judge adopts that view of the case, to award costs or a scale which includes the amount paid as tax to Government based on the larger amount which had been falsely put forward. I do not think the amount allowed as vakil's fees was at all excessive in view of the case but I think that the amount recoverable for stamp must be reduced to its proper amount, namely, Rs. 18 12 0. This appeal has substantially failed and has succeeded on this minor point. I think that the result must be that there will be no order as to the costs of this appeal.

Appeal partly allowed.

✱ 1924 MADRAS 693

COUTTS TROTTER, C. J. AND WALLACE, J.

The Commissioner of Income Tax Madras—Referring Officer.

v.

The Nedungadi Bank Ltd, Calicut by its Secretary—Respondent.

Referred Case No. 10 of 1923, Decided on 21st March 1924.

✱ *Income Tax Act, (XI of 1922), S. 10 (2)—Income-tax on trading companies by the Municipality in the shape of a license fee can be deducted as a proper business allowance.*

A company is entitled to deduct for purposes of income-tax from its income as a business allowance under S. 10 (2) the tax levied upon it by the Municipality under S. 92 of the Madras District Municipalities Act 1920 (1911) A.C. 150 Foll. 44 Mad. 489; Dist. [P. 695 C. 1]

The Government Pleader—for Referring Officer.

T. V. Muthukrishna Aiyar and S. Chinnaswami—for Respondent.

Judgment.— This is a reference under S. 66 (2) of the Income-tax Act, and the question for decision is whether tax on companies levied under S. 92 of the Madras District Municipalities Act, V of 1920 may be deducted as a business allowance, under S. 10 (2) Cl. 9 of the Income-tax Act. According to S. 91 of the District Municipalities Act, under the notification of the chairman, every company transacting business within the Municipality for profit shall pay a half yearly tax, known as "Tax on companies" on the scale shown in Sch. IV, provided it has transacted business for more than 60 days in the half year. S. 16 of Sch. IV lays down the method of assessment, from which it is clear, that the assessment is made on the paid-up capital of the company, although in certain cases if the Head office or a Branch or Principal Office of the company is not in the Municipality, and it is able to show certain figures of gross income, the tax on the paid-up capital is to some extent reduced. The penalty for non-payment of this tax is set out in S. 30 and the subsequent sections of Sch IV. It appears quite clear that this is a tax or a toll, not on profits or on income, or on profession, since it is based not on the amount of profit or salary earned but on the paid-up Capital. It is, therefore, in no sense an income or profession tax. It is a compulsory toll on such trading companies, without which they are not permitted to carry on their trade for more than 60 days in any half year. It is not strictly a license fee, but it is nearer in analogy to that, than it is to an income-tax.

That being the nature of the tax or toll levied, the question is whether it is a species of expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning profits or gains. It is clearly not in the nature of capital expenditure, since it is not met out

of capital and does not diminish the capital. Is it then an expenditure for any other purpose than for the purpose of earning profits or gains? We are of opinion that it is not. It is not a tax on profits or income but a necessary condition precedent to any earning of profits. It is an impost without paying which the firm cannot trade within the Municipality.

Arguments by analogy from the fact that Income-tax may not be deducted in calculating the income assessable to Indian Income-tax are not of any help in this case since this is in no sense an Income-tax. The case quoted by the Government Pleader, *viz.*, *The Chief Commissioner of Income-tax, Madras* v. *The Eastern Extension Australasia and China Telegraph* Co., (*Ltd*) (1), is therefore of no assistance. Another case quoted by him appears to us equally not in point. It is *Ward and* Co., *Ltd.* v. *Commissioner of Taxes* (2). There it was held that money spent by a brewery company in printing and distributing anti-prohibition literature was not "expenditure exclusively incurred in the production of the assessable income" and therefore the company was not entitled to make the deduction, the ground of the decision being that such expenditure was not incurred in the production of the assessable income, but was expended with a view to influencing public opinion against taking a step which would have partly destroyed the earning of profit. In the case, in *The Secretary, Board of Revenue* v. *Munusamy Chetty* (3), a Bench of this Court to which one of us was a party held that expenses for legal advice in a dispute between Government and the assessee regarding excess profits duty and in drawing up an income-tax return, could not be legitimately deducted. This case also does not seem to us to assist the decision of the present case. The only useful cases quoted before us are two English cases, *Smith* v. *Lion Brewery Co. Ltd* (4) and *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (5), both of which support the assessee. These were cases decided under the English Income-tax Act of 1842, where a phrase not dissimilar to the phrase, which we are now seeking to interpret had to be interpreted, namely, "money wholly and exclusively laid out or expended for the purposes of such trade." In the former case, a Brewery company had in order to extend their business acquired certain licensed houses, which they let out to tenants who covenanted to retail the company's beer. By thus becoming landlords of those licensed premises, the company had to pay a statutory levy imposed by the Licensing Act of 1904, S 3, and the question was whether such payment could legitimately be deducted in the estimate of the balance of profits and gains. The House of Lords which consisted of four learned Lords was equally divided and the decision of the Court of Appeal in favour of allowing the deduction was affirmed. One of the learned Judges, The Earl of Halsbury, in that case, lays down as a deciding factor in the case that a person engaging in such a business "must if he carries on that business pay this tax; it is the Act of the legislature which makes him pay it, and it is not a thing that is open to his own will or option." Another learned Judge Lord Atkinson, called it a compulsory levy and described it as an impost, which "must necessarily be paid in order to set up the system which is found to be vital to their trade prospects to set up." In the second case, *Usher's Wiltshire Brewery Company Ltd* v. *Bruce* (5), all the five learned judges composing the House followed the former case. That case is even stronger in the assessee's favour than the 1911 Appeal Cases case. It was another instance of a Brewery Company, acquiring or letting licensed houses to tied tenants and it was there laid

(1) [1921] 44 Mad. 489—13 L. W 468—63 I. C. 485—(1921) M. W. N. 296—40 M. L. J. 560.
(2) [1923] A. C. 145.
(3) 1924 Mad. 205—45 M. L. J. 711—18 M. L. W. 792—33 M. L, T. 122.
(4) [1911] A. C. 150—80 L. J. K. B. 566—104 L. T. 321—75 J. P. 273—55 S.J. 269—27 T. L. R. 261—5 Tax. Cas. 568.
(5) [1915] A. C. 433—84 L. J. K. B. 417—113 L.T.651—6 Tax Cas 399—59 S.J.144—31 T.L.R. 104.

down that even expenses in respec of premia on fire insurances over these houses and premia on Insurance against the loss of their licenses for the sale of liquor were legitimate deductions in arriving at the assessable income. These were both cases of expenses properly, though voluntarily, incurred in the extension of the trade. The Co npanies thought it necessary for the extension of their trade that they should become themselves the landlords of the retailing houses and thereby subjected themselves to the compulsory compensation levy. The present case seems to us an even stronger one. The payment of the compulsory levy to the Municipality, by way of the tax on Companies, is not merely for the purpose of extension of trade but is a condition precedent to the exercise of the trade at all, within the Municipal boundaries.

We are, therefore, clear that the payment of Companies' tax compulsorily levied on this Company by the Municipality is wholly and exclusively for purposes of the trade and that the object which that payment accomplishes is the same. The answer to the Reference, therefore, is that the expenditure is incurred solely for the purpose of earning profits and gains, and we answer accordingly.

Costs of the reference will be taxed, as on the Original side. The assessee will get his costs from Government.

Reference answered in the affirmative.

✱ 1924 MADRAS 695

PHILLIPS AND ODGERS, JJ.

Kalyani Pillay and others—Defendants—Appellants.

v.

Thiruvenkataswami Aiyengar and another—Plaintiffs 7 & 9—Respondents.

Appeal against Order No. 61 of 1923, Decided on 12th February 1924, from the Court of the Subordinate Judge of Tanjore, D/-10th November 1922.

✱ (a) *Privy Council — Decree —Death of some respondents when the appeal was heard and judgment was deliverd does not make decree a nullity—Application to bring on record the legal representatives of such respondents under Art 181 is three years from decree directing execution.*

A decree of the Privy Council shall have full force and effect notwithstanding the death of some of the respondents before it, prior to judgment and even on the date of hearing and the same can be executed against the legal representatives of the deceased respondents. S. 23 of William IV Ch. 41; Relied on. [P. 695, C. 2]

The period of limitation to bring on record the legal representatives of such deceased respondents for purposes of execution is 3 years from the date of the decree. 5 P. L. J. 314 Foll. [P. 695, C. 2]

✱ (b) *Execution of decree—Executing Court can't allow plea of bar of limitation where the decree directs execution to proceed.—An executing Court cannot go behind the decree.*

Where the decree of the Privy Council in an execution matter directed execution to proceed no objection can be entertained by the executing Court, to the execution of the decree of the the Privy Council on the ground that the Privy Council failed to consider an objection to execution on the ground of limitation. [P. 696, C. 1]

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar*—for Appellants.

V. N. Venkatavaradachariar — for Respondents.

Phillips, J.—Objection is taken by appellants to execution of a decree of the Privy Council. It is first contended that, as three of the respondents were dead, when the appeal was heard and the judgment was pronounced, the decree against them is a nullity. S. 23 of William IV, Ch. 41, however, cures the defect in the judgment; for, it enacts that the order shall have full force and effect, notwithstanding the death of any of the parties interested therein; *Vide Deonandan Prasad Singh* v. *Janki Singh* (1). The deceased respondents must therefore be considered as parties to the decree, notwithstanding their death before it was passed.

It is next urged that the application to bring on record their legal reperesentatives is barred by limitation, being made more than three years after their death; but Art. 181 of the Limitation Act gives 3 years, from the date when the right to apply accrued. The right to implead parties

(1) [1920] 5 Pat. L. J. 314—1 Pat, L. T. 325—56 I. C. 322—(1920) P.H.C.O. 266.

to a decree cannot arise, until the decree is passed. This objection must therefore fail.

The further argument that the Privy Council failed to consider another objection to the execution petition, on the score of limitation, ignores the fact that the Privy Council decree orders execution to proceed and the executing Court cannot go behind the decree.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

✱ 1924 MADRAS 696

KRISHNAN AND WALLER, JJ.

Rukmani Ammal—Appellant.

v.

Narasimhachariar and others—Respondent.

F. A. No. 85 of 1923, Decided on 7th December 1923, from the order of District Court Coimbatore in Appeal No. 283 of 1921, D/-12th November 1922.

✱ *Hindu Law—Partition—Sisters' Right to survivorship is lost by relinquishment.*

By a partition deed two step sisters who inherited their father's properties divided his immoveable properties. It closed with the following words:—Henceforth the only relationship between us will be one of friendship and not of property."

Held: that the parties intended not merely to give their present right to the properties but to exclude the right of succession by survivorship in case one of them predeceased the other. [P, 696 C. 1.]

A. Krishnaswami Iyer—for Appellant.

N. S. Rangaswami Aiyangar—for Respondent.

Waller, J.—The question for decision is as to the proper construction of a partition deed executed by two step sisters. They inherited the properties of their father after the death of his widow. The moveable properties they divided without a deed and the immoveable by the deed in question. Nine years after, one of them Janaki by name died leaving a will in favour of the plaintiff. The will is disputed by the other sister who claims the property by right of survivorship. The partition deed is Ex. A. It refers to the fact that the moveable properties had already been divided, allots a decree to one sister and an usufructuary mortgage to the other and divides the immoveable properties between them. It closes with the sentence "Henceforth the only relationship between us will be one of friendship and not of property." The question is whether they intended by this expression to exclude the right of succession by survivorship. It is argued that their intention was merely to give up their present and not their future rights.

The phrase used in Ex. A is sometimes to be found in deeds of partition between males. In such cases there is no question of right of survivorship and the phrase would seem to carry no special significance. In a case like this, however, there is a question of a right of survivorship and the phrase might well have been intended to carry a special significance.

Several rulings have been cited. The first is *Muttu Vaduganadha Tevar* v. *Dora Singh Thevar* (1). A partition deed was relied on in which occurred precisely the same phrase as is now under consideration. The finding was (*vide* page 339) that the right renounced in the partition deed was absolutely different from the right in contest in the subsequent litigation. The decision does not, I think, help the appellant. Here each sister renounced "henceforth" all right to the other's share and they cannot but have had in contemplation the certainty that one of them would predecease the other.

The next ruling, *Gomathi Ammal* v. *Kupputhayi Ammal* (2) is of no greater service to the appellant, for the finding was that the sisters could not have had in contemplation the renunciation of the right of survivorship, as they believed themselves to be entitled to an absolute estate. Had they known that their estate was limited to the language of the deed—that th reafter the connection between them was to be that of blood only might have led the Court to a different conclusion. The Munsif in this case has

(1) [1881 3 Mad. 290 (P. C.)
(2) [1903] 14 M. L. J. 175.

entirely failed to grasp the real significance of the ruling.

The last ruling is no more favourable to the appellant. It is *Subbbammal* v. *Krishna Iyer* (3). In that case certain expressions had been used in a deed which were not very apt to the occasion but had been interpreted by the lower Courts as excluding the right to succeed by survivorship. The High Court held that all doubt would have been set at rest had the more usual words that "the parties henceforth had no connection of property but only of blood" been added. The Munsif interprets the ruling as meaning that it is essential that all the three expressions should be present in order to justify the inference that the right of survivorship had been renounced. He is, I think, wrong It seems to me clear that the High Court regarded the first two phrases as being of doubtful import and the third as quite conclusive.

In the result I think that the learned District Judge rightly interpreted the partition-deed and would dismiss the appeal with costs.

Krishnan, J.—I agree that the construction placed in Ex. A by the District Judge is correct and that his appeal fails and is dismissed with costs.

Appeal dismissed.

(3) [1914] 26 M. L. J. 479.

✱ 1924 MADRAS 697

ODGERS AND WALLACE, JJ.

Ramani alias Venkatramani & others—Appellants.

v.

M. Narayanaswami Iyer & others—Respondents.

A. A. O. No. 377 of 1923, Decided on 9th January 1924, against the order of the Sub-Judge of Mayavaram D/- 22nd October 1923, in I. A. No. 228 of 1923, in O. S. No. 98 of 1922.

✱ *Civil P. C., S. 21—Absence of objection to local jurisdiction which was transferred by notification precludes party from objecting an appeal.*

The distinction between territorial jurisdiction and that as to subject matter is fundamental. [P 698 C 2]

Where the local jurisdiction of a Court was transferred to another Court by a notification but the party did not raise any objection at the time of judgment.

Held: that the objection to the want of jurisdiction must be deemed to have been waived. [P 698 C 2]

Per Wallace, J.—Transfer of local jurisdiction automatically effects the transfer of all suits and proceedings arising originally from that local jurisdiction. S. 21 covers all cases of want of territorial jurisdiction [P 700 C 2]

T. R. Venkatrama Sastri—for Appellants.

T. R. Ramachandra Ayyar and *S. Ramaswami Dikshit*—for Respondents.

Odgers, J.—In this case the suit was on a usufructuary mortgage bond executed by the 1st and 2nd defendants to the plaintiff, the 1st defendant being the father of defendants 2, 3 and 4. The last two are the appellants before us. The 3rd and 4th defendants who are undivided members of a joint Hindu family which owns apparently large properties, have brought the suit to set aside that suit mortgage alleging *inter alia* that the document was only intended to operate if, on taking the accounts between the defendants and the plaintiff, any amount was found due from the latter to the former. The matter before us arises directly out of the petition for the appointment of a receiver in the Mayavaram Sub-Court in which the suit had been instituted. The suit was numbered 98 of 1922. Arguments were heard on the 19th September, 1923, the petition was adjourned for orders to the 21st September. For various reasons, the order was not pronounced till the 2nd October, 1923, when the plaintiff was appointed receiver. The difficulty arises from the fact that on the 1st October, 1923, a notification of Government took effect by which the local limits of the jurisdiction of the Mayavaram Sub-Court were changed and the Nannilam Munsif in which the lands in question are situate was transferred to the Tiruvalur Sub-Court. The first question raised before us in appeal from the order appointing the plaintiff receiver is that on the 2nd October the learned Subordinate Judge of Mayavaram had no jurisdiction to pronounce the order which is therefore void. The notifica-

tion unfortunately does not "say pending suits", and we had a long argument chiefly based on *Subbiah Naicker* v *Ramanathan Chettiar* (1) and *Seeni Nadan* v. *Muthusami Pillai* (2) on a question whether the Court to which the jurisdiction has been transferred is the only Court which can execute a decree passed by the Court from which the jurisdiction has been transferred. In my opinion, it is quite unnecessary to examine the cases on this subject for the petitioner at a later stage of his argument propounded other authorities to show that the learned Subordinate Judge had no jurisdiction. It may be premised that authority on this question is scanty. We have however a Full Bench decision of this Court. The *Zamindar of Ettiyapuram* v. *Chidambaram Chettiar* (3) which lays down that S 21 C. P. C. applies to objections with regard to want of territorial jurisdiction. Further Wallis, C. J. there said: "S. 21 forbids any appellate or revisional Court to allow any objection as to the place of suing unless it was taken in the Original Court and even then unless there was a competent failure of justice. The effect of the section, in my opinion is that objection which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the Original Court".

S. 21 is inapplicable in terms to the present case because issues have been settled in the mortgage suit, and the section provides that any objection should be taken at or before such settlement and that no objection shall be allowed unless there has been consequent failure of justice. It is quite obvious that the objection could not in this case have been taken before or at the settlement of issues at which date the Mayavaram Sub-Court had full territorial jurisdiction over the subject matter in dispute. It is objected that, the transfer having been made on the 1st October, when something in the nature of an application in arrest of judgment should have been put in by the appellant on the 1st or 2nd of October before the learned Subordinate Judge delivered his order and he not having done so, the appellant must be debarred from raising any objection now to the validity of the judgment. With this contention I agree. It has been held in the Full Bench case referred to that if no objection to jurisdiction is raised on the passing of a preliminary decree on a mortgage, it cannot be raised afterwards in execution. There the reasons are based on the wording of S. 47 C. P. C. but it seems to be that the principle is that objection should be taken under S. 21 at the earliest possible opportunity and if it is not then taken, the objector is debarred from raising it afterwards. The objection further will be disallowed unless there has been a failure of justice.

The cases *Jyotish Prakas* v. *Bagala* (4) and *Vajechand* v. *Nandram* (5) and *The Queen* v. *The Inhabitants of Denton* (6) were all cases of jurisdiction over subject matter and therefore do not apply to the present case. As pointed out by Mukerjee, J. in the first of these cases the distinction between territorial jurisdiction and that as to the subject-matter is fundamental.

Moreover it was held by Phillips and Venkata-Subba Rao, JJ. in appeals 312 and 329 of 1920, that the principle underlying S. 21 C. P. C. is that objection to territorial jurisdiction may be waived. So here it may be said that the appellant not having taken objection to the passing of the Sub. Judge's order must be held to have waived his objection to his doing so on the ground of want of jurisdiction.

As to the question the Full Bench thought it unnecessary to deal with it or whether the words "place of suing" were not wide enough to include objections to the place of prosecutions as well as of instituting suits. Wallis C. J. however, with whose judgment the other members of the

(1) [1914] 37 Mad. 462—26 M. L. J. 189—22 I C. 899—(1914) M.W.N. 205—1 L.W.521.
(2) [1919] 42 Mad. 821—37 M. L. J. 284—26 M. L. T. 223—53 I. C. 213—11 L. W. 63—1919 M. W. N. 640.
(3) [1920] 43 Mad. 675—39 M. L. J. 203—28 M. L. T. 75—58 I. C. 871—(1920) M.W.N. 400—12 L. W. 217 (F. B.)
(4) 1922 Cal. 274—36 C. L J. 124.
(5) [1907] 31 Bom. 545—9 Bom. L. R. 1028.
(6) [1852] 18 Q. B. 761—118 E. R. 287.

Court agreed, appears to me to have been inclined to the opinion that they were. This really concludes the point under discussion.

I am, therefore, of opinion that this objection ought to have been taken before the judgment was pronounced and that, no objection having been taken the appellant must be taken to have waived all objections to the pronouncement by the Subordinate Judge of his order. In any case, the question is entirely technical as regards the circumstances of the present appeal and I am, for the reasons given, of opinion that the objection to the appeal under S. 21 C. P. C. must be upheld.

Moreover I am of opinion that no failure of justice has taken place. It is, therefore, necessary to shortly consider the merits which have been argued before us at great length. The appeallant argued that there was no case made out for a Receiver. I am not prepared, on a consideration of the whole of the documents filed, to come to a conclusion against that of the Subordinate Judge in this matter, The plaintiff and defendants, or at least the 1st defendant's father, have been close friends for a number of years and the friendship was apparently only broken when the question of settlement of accounts occurred between them. The defendants are rich men. The plaintiff was in management of the properties. It is said, he has been trusted by the 1st defendant as a man of business to look after the properties as his agent. For a number of years the plaintiff appears to have occupied a position of the trust with regard to the 1st defendant, but it is said by the latter that at the end of 1921, the plaintiff was removed from his position. If that is so, it is rather significant that the plaintiff in January 1922 appears to have paid the kist on the plaint land. The allegation for the plaintiff is of course, that he was never a manager but that he was in possession in his own right. The plaintiff is not in possession of the mortgage bond on which he sues, but that is apparently in the possession of the defendant's agent who was also the Kariastan. The Subordinate Judge has come to the conclusion that the plaintiff ought to remain in possession until the decision of the suit. I am not prepared to say that he has exercised his discretion wrongly. I refuse to interfere with his appointment of the plaintiff as receiver and dismiss the C. M. A. with costs.

Wallace. J :—There is no need to re-state the facts of this case. The first point for decision is whether any want of jurisdiction exists. This depends on the answer to the question whether, when a particular local jurisdiction of one Court is transferred to another by notification under S. 10 or 11 of the Madras Civil Courts Act, such transfer carries with it automatically all pending suits and proceedings of any and every sort arising out of that local jurisdiction, so that the Court in which they were originally filed loses jurisdiction and the Court to which the local jurisdiction is transferred assumes it. This seems to be a point not free from difficulty and I can find no direct authority on it. If a Court having a particular local jurisdiction is abolished and another Court takes over that jurisdiction it seems to me that the latter takes over all pending proceedings in the former. The principle is that only the Court, in whose local jurisdiction the suit arises, can deal with all proceedings of a civil nature in that jurisdiction, whether previously pending in other Courts or not, so if any fresh application had to be put in a suit arising in a local jurisdiction since transferred to another Court the appellant would have to be guided as to the forum for his application by considering not whether the suit had been instituted in a particular Court but which Court has local jurisdiction with the local limits from which his application arises. It is difficult to see why a Court having local jurisdiction should not have jurisdiction to receive such an application, and if it has such jurisdiction, the other Court cannot have that jurisdiction also.

As regards the cases cited before us, that of *Subbiah Naicker* v. *Ramanathan Chettiar* (1) is a least authority for the proposition that when, after an order for sale in execution was passed by one Court, the local limits

of the jurisdiction of that Court were so altered that the property falls within the local limits of another Court's jurisdiction, the former Court loses its control over the execution proceedings which pass automatically to the latter Court. The case of *Subbiah* v. *Rachayya* (7) also favours the view that the original Court in which a suit on contract was first instituted ceased to have jurisdiction when the place where the contract was made was taken away from its limits. I do not find that the Full Bench case in *Seeni Nadan* v. *Muthusami Pillai* (2) in any way overrules this general proposition. I proceeded on the general bearing of Ss. 37 and 38 of the C. P. C, which allow a decree-holder to apply for execution to the Court which passed the decree as well as to the Court having local jurisdiction if that is a different Court. There is in that report no expression of any doubt as to the proposition that, generally and apart from the provisions of Ss. 37 & 38 of the C. P. C. when the local jurisdiction has been transferred from one Court to another pending civil proceedings in the former Court are automatically transferred to the latter; and Sadasiva Ayyar, J. held to his former view in *Subbiah Naicker* v. *Ramanathan Chettiar* (1). See his remarks in *Seeni Nadan* v. *Muthuswami Pillai* (2). "The fact that at a particular time the Court, was competent to pass a decree for sale cannot mean that its jurisdiction to proceed further could be retained for ever". The cases in *Ranganatha Rao Srinivasa Rao* v. *Hanumantha Rao* (8) and *Gurusami* v. *Mahammadhu Rowther* (9) also support the general proposition advanced above; and also all the cases in which the power of a Court, which passed the decree, to execute it after its local jurisdiction has been transferred, have been considered, for example *Manavikraman* v. *Anantha-narayana Ayyar* (10), all of which cases assume that with the transfer of local jurisdiction the power to execute follows automatically. See also *Venkobi Rao* v. *Sastha Ayyar* (11). It is difficult then to say that the view, that a Court must have territorial jurisdiction all through the trial of a suit before it, is an unsound one, and I am inclined as at present advised, to the view that the transfer of local jurisdiction does automatically effect the transfer of all pending suits and proceedings arising originally from that local jurisdiction. In the present case, then the Sub-Court of Mayavaram lost jurisdiction over this suit and all proceedings therein on the first of October and had therefore no jurisdiction to deliver the order under revision.

The next question is whether the petitioner is estopped by force of S. 21 C. P. C., from raising in this Court the plea of want of jurisdiction in the Mayavaram Sub-Court. He is met by the other side by the argument that as he did not, on the 2nd October, on which date the Sub. Court passed the order in this case, object to the Sub-Court so pronouncing its order, he is precluded by S. 21, C.P.C. from now raising that contention. Again there is some lack of authority to guide us on this point. The nearest case on the point which I am able to trace is the Full Bench case in *Zamindar of Ettiyapuram* v. *Chidambaram Chettiar* (1), where it was held, first that S. 21 governs all cases of lack of territorial jurisdiction, secondly that it applies to execution proceedings, that is, to proceedings after the decree in a suit, and thirdly that a party cannot plead in execution that the decree under execution was passed without jurisdiction. The third point is not applicable to the present case. The answer to the second does not appear to be of much help in deciding as to the validity of applying S. 21 to proceedings in suits after issues have been framed and before decree is passed. The answer of the Full Bench was given on the narrow ground that the want of jurisdiction to pass a decree is ordinarily not open as a ground of attack on appeal or revision, and that S. 21 forbids such

(7) [1914] 37 Mad. 477—26 I. C. 519.
(8) 1922 M d. 10—46 Mad. 1—43 M. L. J. 344—15 M. L. W. 458—(1922) M. W. N. 349-31 M. L. T. 79.
(9) 1923 Mad. 92 -46 Mad. 83—(1923) M.W.N. 73—16 M. L. W. 748—43 M. L. J. 713.
(10) 1924 Mad. 457—19 M.L.W. 16—46 M.L.J. 250—(1924) M. W. N. 38

(11) [1914] 2 L.W. 255—28 I.C. 269—17 M.L.T. 190.

attack unless it was made in the original Court and unless the want of jurisdiction led to a failure of justice. The reasoning set out at page 686 seems to suggest that S. 21 forbids any objection as to want of territorial jurisdiction being raised on appeal or revision unless it was raised in the original Court; that again being based on an interpretation of the phrase 'objection as to the place of suing' in the section which was held to mean objection to the institution of the suit on the ground that the Court in which it was instituted has no jurisdiction over the property which was the subject matter of the suit. I am not sure that the Court further held that the phrase 'institution of the suit' covered all proceedings in the suit after the institution. That the Court felt this difficulty is plain from the passage in p. 687, 'It is unnecessary to consider whether those particular words may not be read as applying only to cases where it is possible to take the objections at or before the settlement of issues, and whether the words 'place of suing' are not wide enough to include objections to the place of prosecuting as well as of insinuating suits" and the case was finally decided on the assumption that even if S. 21 did not apply, the jurisdiction of the Court which passed the decree could not be questioned in execution for which proposition there was direct authority. So I find no clear guidance in this ruling as to whether S. 21 applies when during the pendency of a suit and after the framing of issues the local jurisdiction from which the suit arose has been transferred to another Court, and whether all proceedings in that suit, after the transfer, if taken in the original Court, would be void.

On this point I find myself most in agreement with the referring Judgment of Seshagiri Ayyar, J, who points out that to hold that the phrase 'place of suing' is synonymous with territorial jurisdiction is to hold that jurisdiction may be conferred by consent or at least by silence and by refraining from objecting to it.

I consider, however, that I must follow the Full Bench ruling in so far as it lays down that S. 21 governs all cases of want of territorial jurisdiction. In that case this plea of want of jurisdiction shall, under the section, not be entertained unless *inter alia* there has been a consequent failure of justice. On the merits, I agree with my learned brother for the reasons given by him that the petitioner has not made out any case of failure of justice consequent on this want of jurisdiction and I therefore agree that the C. M. A. must fail and be dismissed with costs.

Appeal rejected.

✱ 1924 MADRAS 701

SPENCER, OG. C. J. AND DEVADOSS, J.

John Joseph Brito—Petitioner.

v.

Mrs. S. S. Brito—Respondent.

Civil Mis. Petitions Nos. 2886 and 2887 of 1923, Decided on 17th January 1924.

✱ (a) *Civil P. C., S. 109—Final order.*

An order passed by the High Court refusing to set aside an order of the Court below restoring to file a suit is not a final order within the meaning of S. 109. [P 702, C 1 & 2]

✱ (b) *Civil P. C., S. 105—Scope.*

S. 105 does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in S. 109. [P 702, C 2]

C. V. Ananthakrishna Aiyar — for Petitioner.

B. Sitarama Rao—for Respondent.

Order.—This is an application for leave to appeal to the Privy Council against an order passed by us in C. R. P. No. 423 of 1922, in which we refused to interfere in revision with the order of a Subordinate Court, restoring to file a suit which had been first disposed of upon an alleged compromise between the parties.

Before we can certify that the case is a fit one for appeal to His Majesty in Council, we must be satisfied that the order passed by us was a final order within the meaning of S. 109, Civil Procedure Code What is a "final order" has been defined in *Ramchand Manjimal* v. *Goverdhandas Vishandas Ratanchand* (1). The Privy

(1) [1920] 47 Cal. 918 (P.C.)

Council say that "an order is a final one, if it finally disposes of the rights of the parties." A similar interpretation of the word "final" has been adopted in *Shankar Bharati* v. *Narasimha Bharati* (2) where Shah, C. J., says that "a final order is one which decides a cardinal point in the suit and finally disposes of the rights of the parties" Crump, J., who sat with him, took the word "final" to mean "an order which puts an end to the litigation between the parties, or at all events disposes so substantially the matters in issue between them as to leave merely subordinate or ancillary matters for decision." An English case, *Croasdell and Cammel, Laird & Co. Ltd.. In re* (3): has been quoted before us in which it was held that "an order passed by a Divisional Court setting aside an award made by an arbitrator on the ground of misconduct on the part of the arbitrator was not a final order but an interlocutory one which involved no determination of the rights of the parties as regards the matters which were in dispute in the arbitration" Applying these definitions to the case before us, let us see what is the result. The Court below restored the suit to file, because it found as a result of an enquiry that the defendant caused the plaintiff to sign a compromise petition by fraud and undue influence. The matter came up to us because it was argued that the Subordinate Court had no power to make such an order under S. 151, Civil Procedure Code. We refused to interfere on the ground that the lower Court could have made such an order in the exercise of its powers of review and because the merits of the case would be finally enquired into at the trial, which was to take place thereafter. Assuming that the lower Court's order refusing to act upon the compromise did in some way dispose of the rights of the parties, our order did not take away from or add anything to what the lower Court decided. We only decided the question of jurisdiction. The rights of the parties in the suit were left open for decision and have since been decided. We are therefore, of opinion that our order was not a final order, within the meaning of S. 109, Civil Procedure Code.

It is argued that, if the petitioner is not given leave to appeal against our order, he will be precluded from raising the contention that the matter has been settled by compromise and making that a ground of appeal against the final decree, and in that connection, reference has been made to S. 105 which may also be read with S. 97, Civil Procedure Code, and to the right of a party to raise an issue in appealing against a final decree, which he has not appealed against in appeal from the preliminary decree. The answer to that argument is found in *Venkataranga Row* v. *Narasinga Rao* (4), where it was pointed out by Miller and Sadasiva Aiyar, JJ., that S. 105 does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in S. 109. In *Saratmani Debi* v *Bata Krishna Banerjee* (5), Mookerjee, J., defined a "final order" as "one which finally decides any matter which is directly at issue in the case in respect of the rights of the parties." With due respect, we consider that this, as it stands, is a definition which cannot be quite reconciled with the definition in *Ramachand Manjimul* v. *Goverdhandas Vishandas Ratanchand* (1) and *Shankar Bharati* v. *Narasimha Bharati* (2) "but as the learned Judge goes on to say that the answer to the question whether the order is final or not must depend on whether it decides finally the cardinal point in the suit or an issue which goes to the foundation of the suit," there is no need to quarrel with his first definition. *Meghraj* v. *Bidyabati Koer* (6) and *Lachminarayan* v. *Balamukund* (7) are both cases in which an order was passed setting aside a decree dismissing a suit for default. It is unnecessary to canvass the correctness of the view that such an order might be a final order, because the orders there passed do not in any way correspond to the order which we passed on the Revision

(2) 1922 Bom. 383.
(3) [1906] 2 K.B. 569.
(4) [1915] 38 Mad, 509.
(5) [1909] 10 C.L.J. 336.
(6) [1915] 21 C.L.J. 279.
(7) [1920] 6 Pat. L.J. 116.

Petition in this suit. Assuming that the Subordinate Judge's order finally disposed of the rights of the parties to have their dispute settled by compromise and was thus a "final order," our order did no more than refuse to interfere with that order upon a question being raised as to the Subordinate Judge's jurisdiction to pass it.

Holding that the order passed by us was not a final order, we dismiss the present application with costs.

C. M. P. No. 2887 of 1923 which is a petition for stay of proceedings is dismissed without costs.

Petitions dismissed.

✱ 1924 MADRAS 703

DEVADOSS, J.

Mirza Ahamad Namazi In Re and *In Re Companies Act VII of* 1913.

Original Petition No. 85 of 1922, Decided on 14th March 1924.

✱ (a) *Companies Act, Ss. 55 and 50—Shares can be surrendered only on conditions applicable to forfeiture.*

A company can accept a surrender of shares from a share-holder only under the conditions and limitations applicable to the case of forfeiture of shares and even in such a case it will be a case of forfeiture and not of surrender. [P 704 C 1, 2]

✱ (b) *Company—Shareholder is liable even after transfer, forfeiture or surrender within a year of liquidation if he is in the list of contributories.*

Under the Indian Companies Act which is almost a reproduction of the English Act the liability of the share holder is not in any way taken away so far as the company is concerned by any transfer, surrender or forfeiture of the shares. The rule in Knights' Case (1867) 3 Ch. App. 321 that an entry of forfeiture in the books of the company must be presumed to have been properly made can have no application to cases where the facts are against any such presumption being raised. To make a person who has forfeited his shares liable as a contributory on a liquidation all that is necessary is that the liquidation must have taken place within one year of the alleged date of forfeiture and that a list of contributories must have been made. It is not necessary that the list should have been placed before a meeting of the creditors. Under the Indian Companies Act a person who is a signatory to the Memorandum of association is responsible for the shares which in the Memorandum of Association is shown opposite to his own name and such a person is bound so far as the creditors of the company are concerned to pay up the amount due on such shares. [P 705 C 1, 2]

✱ (c) *Company—Rules—Quorum fixed for a meeting of directors only can transact valid business notwithstanding provision for transaction of business by circulation.*

Where the rules of a company lay down the quorum for a meeting of the Directors for enacting any business it is not competent for a less number of directors alone to transact any binding business by circulation even though the rules authorizing the despatch of business by circulation do not lay down any restriction at all as to the number of directors to whom the papers ought to be circulated. [P 704 C 1]

C. Srinivasachari—for Petitioner.

A. Narasimhachari and *T. C. A. Anandalwar*—for Respondents.

Judgment—This is a Judge's Summons, to show cause why the alleged surrender of the shares, held by respondents 1 and 2, and the forfeiture of the shares, held by respondents 3 to 6, should not be declared to be invalid, and why all the respondents herein should not be directed, to pay to the liquidators, the respective call amounts, and allotment monies, due in respect of the shares, held by them and for incidental reliefs. There are 9 respondents to this application. Respondents 2, 7 and 9 do not appear and they are declared *ex parte*. The 3rd respondent is dead and the application is withdrawn as against him. The eighth respondent admits his liability and his letter is filed as Ex. K.

The contention of the first respondent is that he surrendered the shares to the company and the surrender was accepted by the directors. On behalf of the liquidator, who has taken out this Judge's summons, it is alleged that there were 4 directors in Madras, at the time when the resolution accepting the surrender was passed, and three only signed the resolution. There is no evidence that a fourth director was present in Madras at the time; for the evidence of Bhanu Prasad on the point is only hearsay. But under R. 107 of the Articles of Association of the Madras Taxi and Transport Service Limited, 4 is the quorum for a Directors' Meeting. The resolution which was passed in circulation accepting the surrender of the 1st respondent's shares was signed by only three persons. On behalf of that respondent, Mr. Narasimhachari contends that R. 114 says that a resolution in writing signed by all the

Directors present in Madras, shall be, as valid and effectual, as if it had been passed, at a meeting of the Directors, duly called and constituted and so a resolution passed in circulation and signed by only three persons is valid. The argument that R. 114 cuts down the number required for a quorum is opposed to common sense; for, if that contention is good, a resolution may be passed by two directors in circulation. When R. 107 provides that the quorum for a meeting of the directors for despatch of business shall be 4, it cannot be said that it was intended that the quorum should be cut down to any number less than 4, if there is no meeting, for the despatch of business, and if it is to be transacted by getting the consent of the directors in circulation.

Granting for argument's sake that the resolution is according to the rules, I am unable to accept the contention that the surrender of shares is permitted by law, so as to enable the directors, or the company, to reduce its capital R. 118 (5) gives power to the directors to accept surrender of shares by share-holders; but this power which is an unusual power, granting that it is valid, is subject to restrictions. Table A of the Indian Companies Act does not contain any clause, empowering any company to accept surrender of shares. The Indian Companies Act permits forfeiture of shares on certain grounds; but to give an unlimited or wide power to a company to accept surrender of shares is, I think, opposed to the principle that a company cannot buy its own shares and to the principle that a company can reduce its capital, only with the permission of the Court and on such terms and conditions as it may impose. The power given by R. 118 (5) is very wide. It is in these terms:

"To accept from any member on such terms and conditions as shall be agreed a surrender of his shares or stock, or part thereof."

Whatever might have been the view as regards the power of a company to accept surrender of shares, I think it is well settled now that a company cannot exercise wide powers of accepting a surrender. It can only accept a surrender under conditions and limitations under which shares can be forfeited. Reliance is placed upon *Snell's case* (1). In that case, Sir G. N. Giffard, Lord Justice, held that the surrender of shares by Snell was valid. The main reason for the learned Lord Justice holding that Snell's surrender was valid was that his name was not entered on the register of share-holders and that no specific shares were allotted to him, though for purposes of the Act he was a share holder. He found that the substance of the transaction was that both parties were offering to sever their connection with each other and that the Articles of Association contained a power to cancel shares and that there was nothing in the form preventing the parties from carrying out their intention. *Snell's case* (1) cannot be considered to be good law, in view of the decision of the Court of Appeal in *Bellerby* v. *Rowland Marwoods Steamship Co., Ltd.* (2) Carins, L. J., lays down the law thus:—

"Every surrender of shares, whether fully paid up or not, involves a reduction of capital which is unlawful, except when sanctioned by the Court under the Companies Act of 1867 and 1877. Forfeiture is a statutory exception, and is the only exception, for I regard surrender under circumstances which would justify a forfeiture as merely equivalent to a forfeiture."

Collins, M. R., quotes with approval the following observation of the learned Master of the Rolls in *In re Dronfield Silkstone Co.* (3).

"There is no reference in the Act to surrender of shares; but these have been permitted by the Court upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that, the one is a proceeding *in invitum* and the other a proceeding taken with the assent of the share-holder, who is unable to retain and pay future calls on the shares."

The principle therefore applicable to cases of surrender is, the surrender is good, if it amounts to a forfeiture. It is not open to the share-holder to surrender at will his shares, especially when he has to meet future calls and it is not open to a company to accept a surrender of shares, unless the act of the company can be brought within

(1) 5 Ch. App. 22.
(2) [1902] 2 Ch. 14—71 L.J. Ch. 541—86 L.T. 671—50 W.R. 566—9 Manson 291—18 T.L.R. 582.
(3) [1880] 17 Ch. D. 76—50 L.J.Ch. 387—44 L.T. 361—29 W.R. 768.

the rules relating to forfeiture of shares. To hold that a company can by a resolution of its directors accept a surrender of shares would be to allow a company to reduce its capital at its pleasure. The surrender of the shares by the first respondent being illegal, he continues to be a shareholder and he thereby becomes a contributory and the amount claimed from him on that basis is not disputed.

Respondents 4 and 5 contend that their shares have been forfeited and they are not liable as contributaries. There is no evidence that any resolution was passed by the directors, as required by R 26 of the Articles of Association and no notice was given to respondents 4 and 5 that their shares had been forfeited. Mr. Anandalwar, who appears for respondents 4 and 5 contends on the authority of *In re North Hallenbergle Mining Co.*, known as *Knights case* (4)' that there is an entry in the registers to the effect that his clients' shares have been forfeited and therefore their shares must be considered to have been forfeited. That case does hot help him. What was held in that case was that an entry of forfeiture in the books of the company must be presumed to have been properly made after a resolution to that effect was passed by the directors. Here the matter does not rest on mere presumption; there is evidence that no resolution was passed by the directors as required by R. 26, granting for argument's sake that there was a forfeiture, that does not relieve respondents 4 and 5 from their responsibility to the company's creditors, to the extent of the amounts due by them. The company was registered on the first June 1921 and went into voluntary liquidation in March 1922 and respondents 4 and 5 cannot escape their liability to pay the amounts due on their shares, as the winding up proceedings were started before the lapse of one year from the alleged date of foreiture. In *Snell's Case* (1), it was held that the liability of a past member is entirely created by the Companies Act, 1862, and it is immaterial whether his shares have been transferred or have been extinguished by forfeiture. The Indian Companies Act, 1913, is almost a reproduction of the English Act and the liability of the share-holder is not taken away, either by transfer or by forfeiture of hir shares. Hardly any liability was incurred by the company, after the date of the alleged forfeiture.

Mr. Anandalwans's next contention is that there was no list of contributories prepared and therefore his clients are not liable as contributories. Ex. A is the list of contributaries prepared by the liquidators appointed by the company. Bhanu Prasad, one of the liquidators, swears that Ex. A was placed before the creditors' meeting. Subramania Aiyar, a representative of one of the creditors, was asked to preside at the meeting of creditors and he says that Ex. A was placed before the meeting of the creditors and they had an opportunity of perusing its contents and it was also read out to them. Ex. A is the list of assets and liabilities of the company and contains other information as well. That he presided over the meeting is clear from Ex. VII-A, which contains the minutes of the meeting of the creditors. Mirza Ahamad Namazi, another liquidator, also proves that Ex. A was placed before the meeting. It is unnecessary to prove that Ex. A was prepared and placed before the meeting of the creditors, in order to make respondents 4 and 5 responsible as contributaries. All that is required is that a list of contributories shall be prepared. The amounts due from the respondents 4 and 5 are not disputed. Therefore, they are bound to pay the amount due on their shares as contributaries to the liquidators.

Mr. Narasimhachari, on behalf of the sixth respondent contends that he is responsible only in respect of 30 shares. His contention that he did not take 250 shares rests upon the fact that share certificates were not issued to him. Sixth respondent was one of the signatories to the Memorandum of Association. What he says now is that he changed his mind after signing the Memorandum of Association and wrote Ex. L, resigning his

(4) 3 Ch. App. 321.

directorship and asking that 30 shares might be considered to be fully paid up and that the balance should be returned to him. Evey person applying for shares was asked to deposit Rs. 2 per share and sixth respondent who signed the Memorandum of Association paid Rs. 500 for 250 shares. The company was registered on the 1st of June. It began to work from the 15th June 1921. The allotment of shares was made on the 14th July, the resolution to allot shares having been made on the 14th June. Sixth respondent took part in a meeting of the directors on the 11th June 1921 (Ex. D-I) and signed the resolution. His resignation of the directorship was only on the 30th June 1921 and his letter offering to take 30 fully paid up shares was written on the 13th July 19 1. The managing agents wrote Ex. N on the 30th July 1921, accepting the resignation with regret and intimating that there was no provision in the articles for refunding money on shares already paid up and drew the attention of the 6th respondent to Art, 93 of the Articles of Association. Art. 93 is in these terms :—

"A first director may act before acquiring his qualification but shall in any case acquire the same within one month from his appointment; and unless he shall do so he shall be deemed to have agreed to take the said shares from the company and the same shall be forthwith alloted to him accordingly."

The managing agents were perfectly right in intimating to the 6th respondent that, inasmuch as he signed the Memorandum of Association and acted as director, he must be deemed to have the 250 shares alloted to him. The matter did not rest there. On the 25th August, 1921, the 6th respondent wrote Ex. O to the managing agents offering to sell 250 shares for Rs. 450. It is quite clear therefore that in August, 1921 the 6th respondent was a shareholder of the company. His present contention that he wrote a letter asking that he should be treated as a share-holder, only in respect of 30 fully paid up shares before the actual allotment was made on the 14th July is not a valid contention. Apart from Rule 93 of the Articles of Association, the Indian Companies Act makes it obligatory on a signatory to the Memorandum of Association to be responsible for the shares, which are shown as being his in the Memorandum of Association. S. 6 (3) of the Indian Companies Act requires that each subscriber shall write opposite to his name the number of shares he takes. By S. 30, those who sign the Memorandum of Association of a company shall be deemed to have agreed to become members of the company, and on its registration should be entered as members on its register. The 6th respondent having held himself out as the owner of so many shares is bound, so far as the creditors of the company are concerned, to pay up the amount due on those shares. In *Evan's case In re London, Hamburg and Continental Exchange Bank* (5), E signed the Memorandum of Association of a company, as the holder of 10 shares and acted for a short time as a director of the company. No shares were ever allottad to him and his name was never on the register. The Court of Appeal held that his name ought to have been in the register and that he was contributary in respect of 10 shares. Sir G. J. Turner, L. J., referred to S. 23 of the Act which is similar to S. 30 of the Indian Act and stated :—

"It was therefore the plain duty of Mr. Evans to enter his own name on the register. This however, he did not do, but went on leaving the matter exactly as it stood. Then can he take advantage of his own neglect? For, if he had entered his name on the register, he could only have got rid of his liability by a regular transfer and it is impossible to say he transferred the shares."

Cairns, L. J., observed :—

"The provisions of the Act are intended to meet this case and must be strictly pursued."

The contention of the 6th respondent that there was no allotment of shares to him before he withdrew his offer to take shares is, on the face of it, untenable. As regards the number of shares, Ex. O clearly shows that he was the owner of 250 shares in August, 1921. Apart from that, he having signed the Memorandum of Association and paid Rs. 500 for 250 shares and one of the conditions of the memorandum being that a director should have 250 shares and he having acted as director cannot now

(5) [1867] 2 Ch. App. 427.

be heard to say that he was owner of only 30 shares. He is therefore liable as a share-holder to the extent of 250 shares.

The judge's summons is ordered in the terms prayed for, with taxed costs, except as against the 3rd respondent, against whom the application has been withdrawn.

Petition allowed.

✱ 1924 MADRAS 707

KRISHNAN AND WALLER, JJ.

Bommayya Naicken—Appellant.

v

C. Subramania Iyer—Respondent.

Appeal against Order No. 330 of 1922, Decided on 3rd December 1923, against the order of the Sub-Judge of Dindigul, D/-6th July 1922.

✱ (a) *Impartible estate—Assets.*

In an impartible estate income after his death owing to lease by late Zamindar is not his assets in his successor's hands. [P 707, C 2]

(b) *Impartible Estates, Act S. 4—Money borrowed for benefit of estate binds the estate.*

If a creditor can show that his debt was for a sum of money borrowed for the benefit of the estate under S. 4 it will be binding on the impartible estate but such a question cannot be decided in execution proceedings but can be done only in a separate suit.

[P 709, C 2 & P 708, C]

(c) *Civil P. C., S. 47—Application to be turned into suit.*

A decree holder who applies for attachment of alleged assets of a deceased zamindar cannot ask for converting the application into a suit since he must obtain a declaration that these alleged assets are liable for his decree-debt.

B. Sitaram Rao and *S. R. Muthusamy Iyer*—for Appellants.

T. S. Ramaswami Iyer and *V. Sundara Iyer*—for Respondent.

Krishnan, J.—In this case the question arises in the execution of the decree in O. S. No. 714 of 1911 on the file of the Principal District Munsif of Dindigul. The plaintiff obtained a decree against the then Zamindar of Ayakudi for a certain sum of money. That Zamindar died in 1917 and this is an application made by the plaintiff for attachment of certain sums of money payable to the present Zamindar under a lease which was granted by the previous Zamindar who was the judgment-debtor, but for a period subsequent to the death of that zamindar. The decree is sought to be executed against the present zamindar as the legal representative of the late Zamindar against the assets in his hands. The present Zamindar objected to the attachment and contended that this money could not be treated as assets in his hands as it was his own money and further more that the matter could not be gone into in execution. The Munsif gave effect to the plea that the matter could not be gone into in execution and referred the plaintiff to a suit, but, on appeal to the appellate Court, the learned Subordinate Judge held that the matter should be decided in execution proceedings and has remanded the application to the lower Court for disposal on the merits. The appeal to us is by the present Zamindar who contends that the order of the lower appellate Court is not right.

It is clear to us that the money that has been attempted to be attached in this case cannot be considered to be the assets of the late Zamindar at all, for it is money that has accrued due under the lease of the Zamindari, after the late Zamindar's death and after the estate had passed into the hands of the present Zamindar by right of survivorship. It is true that, if the plaintiff (judgment creditor) is able to show that his debt was for a sum of money borrowed for the benefit of the estate, under S. 4 of the Impartible Estate, Act, his debt would be a debt binding on the impartible estate and he would be entitled to enforce his debt as against the estate in the hands of the present Zamindar; but, by proving that the debt was borrowed for the benefit of the Zamindari, the Zamindari does not become the assets of the late Zamindar in the hands of the present Zamindar. The only thing that results is whether the plaintiff will be able to enforce his debt against the impartible estate in the hands of the present zamindar.

We think that such a question could not be decided in execution

proceedings. The view of the Subordinate Judge that the question is one of determining what are the assets of the late zamindar is not correct. The question is one of enforcing a new liability that would be created against the estate in the present zamindar's hands by proof that the debt was borrowed for the benefit of the estate. The plaintiff's proper remedy is to bring a suit, and, after obtaining a declaration that his debt is binding on the impartible estate and upon the income that has accrued due from the impartible estate in the hands of the present zamindar, to apply then in execution of his decree to have it executed against such property.

An application has been made to us that the execution petition should itself be converted into such a suit and that the respondent (Judgment creditor) should be allowed to go on with his execution application amended into a suit. We think that this cannot properly be done, for what he is applying for in the present application is to attach certain moneys as being the assets of the late zamindar, and after attachment of such moneys to pay them over to him in satisfaction of his decree debt. In a suit such a prayer as that of attachment of moneys, cannot be included. He will have, after obtaining a declaration if he can that these moneys are liable for his decree debt, to put in a fresh application for attachment and payment of those monies in satisfaction of his decree debt.

The order of the lower Court must therefore be reversed and that of the District Munsiff must be restored. The appellant will have his costs of this appeal but we do not interfere with the orders as to the rest of the costs.

Appeal accepted.

✱ 1924 MADRAS 708

KRISHNAN, J.

Abdul Jaffar Sahib and others—Defendants 1 to 3—Appellants.

v

K. Venugopal Chettiar and others—Plaintiffs—Respondents.

S. A. No. 788 of 1922, Decided on 7th January 1924 against the decree of the Court of the Subordinate Judge of Vellore.

✱ *Partnership—On one partner's death if survivors continue business accounts of old partnership can be taken at any time.*

When a partner dies the partnership comes to an end under the Contract Act. But nevertheless if the remaining partners continue the business for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as that for the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. [P. 709 C. 1]

S. T. Srinivasagopala Chari — for Appellants.

N. Swaminatha Iyar and *K. G. Srinivasa Iyer*—for Respondents.

Judgment.—In this case the plaintiff brought a suit for dissolution of partnership, for the taking of accounts and for recovery of money due to him as profits. It would appear that the plaintiff, the 2nd, 3rd and 4th defendants and the 1st defendant's father had a partnership in bamboo trade from 1912 to 1913. The 1st defendant's father died in that year and that of course in law amounted to a dissolution of the partnership. Nevertheless the same bamboo trade was carried on by the 2nd and 3rd defendants along with 1st defendant who was the son of the deceased man and plaintiff was also added as a partner. It is a question in this case whether the plaintiff came in as a partner or only as a sub-partner of defendants 1 and 3 alone. The Subordinate Judge has found that in taking the plaintiff into the firm of defendants 1 to 3, the defendants 1 and 3 who alone entered into the contract with the plaintiff

under Ex. A really acted on behalf of the firm including the 2nd defendant, and I think I must accept that finding as a finding of fact and hold that the plaintiff became not a sub-partner but a partner in the second partnership which continued till 1917. The plaintiff is now suing for the accounts to be taken not only of the trade from 1913 to 1917 but also of the trade in 1912-1913. It is contended before me that the claim to take accounts of 1912-13 partnership is barred by limitation and those accounts should be excluded from the decree. No doubt when a partner dies, the partnership comes to an end under the Contract Act. But nevertheless as was held in the case in *Ahinsa Bibi* v. *Abdul Kader Sahib* (1) if the remaining partners continue the business, for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as that, for the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. In that view there will be no question of limitation preventing the accounts of the old partnership being taken. I think that principle applies to this case. No doubt here one of the partners, 1st defendant in the second partnership, is a newly added partner. Nevertheless he was the son of his father who was the previous partner, and apparently the father's share was treated as the son's in the new partnership. The father's other heirs if any are now barred from claiming any share in the profits of 1912-13 trade and the 4th defendant also, who went out from the partnership in 1913, will be barred from claiming a share in the trade; but as between the various persons who are now members of the new partnership, there will be no bar of limitation for the purpose of taking accounts of 1912-13 partnership. As regards the share itself of the plaintiff, the agreement under Ex. A was that he should be given a two-annas share in the rupee of the profits. It is contended by the learned Advocate for the appellants that it means a two-annas share only in the profits of defendants 1 and 3 and as they are getting only an eight-annas share, it means only one-anna share in the whole of the profits. I do not think that that contention is right, more especially as I find that the plaintiff became really a partner of the firm including the 2nd defendant and as it is clear that what was intended was that out of the total share of the profits the plaintiff should have a two annas fraction, and when accounts are taken and the profits are ascertained the plaintiff will be given that share as decreed by the lower Appellate Court.

It is also contended that there is no finding that the accounts of the previous partnership of 1912-13 was not taken and settled and therefore I should call for a finding on that point before I decide that the case in *Ahinsa Bibi* v *Abdul Kadir Saheb* (1) quoted above applies. I do not think that that is correct, for the Subordinate Judge says expressly in paragraph 3 of his judgment that the plaintiff alleges in his plaint a continuance of the same business and that he and his witnesses prove that plaintiff's accounts of such business were not settled. That, I think, is a clear finding on the point, and it will be erroneous to call for a fresh finding on a point like that. All the points taken in Second Appeal failing, the Second Appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1901] 25 Mad. 26.

✱ 1924 MADRAS 709

OLDFIELD AND DEVADOSS, JJ.

M. Seshadri Reddi— Counter-Petitioner—Appellant.

v.

Putta Venkata Reddy—Petitioner—Respondent.

Appeal against Appellate Order No. 78 of 1922, Decided on 19th April 1923, from the Court of the Subordinate Judge, Nellore D/- 5th January 1922.

✱ *Civil P. C., S. 146—Devolution of interest—C.P.C. O. 22, R. 10,*

The words "claiming under" in S. 146 include a case where the interest of a person has been assigned to or devolved upon another under O. 22, R. 10. [P. 710, C. 1]

A. Krishnaswami Aiyar—for Appellant.

M. Patanjali Sastri—for Respondent.

Judgment.—We think the Lower Appellate Court's order can be justified by reference to S. 146 of the Civil Procedure Code. In accordance with the dictum of Seshagiri Aiyar, J., in *Sitaramaswami* v. *Lakshmi Narasimha* (1) the words 'claiming under' in that section are wide enough to cover even cases of devolution mentioned in O. 22. R. 10.

It is urged that, here the respondent-petitioner is a transferee of property concerned in the decree, which he desires to execute, not of that decree itself. We do not think the distinction substantial. For we cannot understand how one person can be claiming under another, in respect of property, when he does not claim under him, equally in respect of the decree dealing with the property. Taking this view, we dismiss the appeal against appellate order with costs.

Appeal dismissed.

(1) [1918] 41 Mad. 510—48 I.C. 842—8 L.W. 21.

✱ 1924 MADRAS 710

WALLACE, J.

Suppai Goundan and another—Defendants—Appellants.

v.

A. M. R. M. Murugappa Chettiar—Plaintiff—Respondent.

S. A. No. 603 of 1921, Decided on 23rd January 1924, against the decree of the Court of 2nd Additional Subordinate Judge of Coimbatore.

✱ (a) *Hindu Law—Joint family—Suit on pro-note by manager against coparceners lies if debt and legal necessity are alleged.*

A suit upon a promissory note executed by the manager of a joint family and brought against the other members (undivided younger brothers of the executant) after his death is maintainable where the plaint mentions the fact of the loan and alleges that it was incurred for family purposes. [P. 711, C. 1]

✱ (b) *Hindu Law—Joint family—Loan by manager is not presumed to be taken as manager nor for legal necessity.*

There is no presumption in law that a document signed in his personal capacity by one who is the manager of a joint Hindu family is signed by him as such manager. It is essential for the plaintiff to prove that there was necessity for these loans sought to be repaid under the suit promissory notes. [P. 710, C. 2]

Watrap S. Subrahmania Aiyar—for Appellants.

T. Ramachandra Rao — for Respondent.

Judgment. — In this appeal the point argued is whether the plaintiff has adduced any evidence on which the lower Courts could conclude as a finding of fact that there was necessity for the suit promissory notes which could in law render them binding on defendants who are not parties to it. The promissory notes are executed by one Muthuswami Goundan, the elder brother of defendants 1 and 2 and the manager of their joint family, and they are signed by him only in his personal capacity.

It is quite clear that this question of the promissory notes not being binding on the defendants was fully raised in the pleadings at the trial of the suit and that the plaintiff was put to strict proof of such necessity. The lower Courts have found that such necessity existed chiefly on the general ground that the executant was the manager of the joint family and was contracting other debts about this time for the joint family. But that is not sufficient, since there is no presumption in law that a document signed in his personal capacity by one who is the manager, of a joint Hindu family is signed by him as such manager. It was essential for the plaintiff to prove that there was necessity for these loans now sought to be repaid under the suit promissory notes.

I find that there is some oral evidence that there was family necessity for the suit loans; but the lower appellate Court, while holding that the oral evidence is not "such as to be of any real value," whatever that may mean, apparently concludes extraneously, *viz.*, on the documentary evidence that there was such neces-

sity, though it does not say so; for it finds that the suit debt is binding on defendants. This is an unsatisfactory method of coming to its conclusion and I am unable to discover what were the real conclusions on the evidence, to which the lower Court came, before it set out its finding.

I consider it necessary to have a proper judgment written by the lower appellate Court.

It has been argued before me that the suit is, in any event, not maintainable, since it is founded on the promissory notes and not on the debts and the Full Bench ruling in *Govindan Nair* v. *Nana Menon* (1), is relied on. But I think the plaint is sufficient to cover a claim on the debts also and that the case is very similar to a Full Bench case in *Krishna Aiyar* v. *Krishnaswami Aiyar* (2). I overrule this objection.

I reverse the lower appellate Court's judgment and decree and direct the lower appellate Court to re-admit and re-hear the Appeal. Costs up to date will abide the result.

Appeal allowed.

(1) [1914] 27 M.L.J. 595—36 I.C. 750—(1914) M.W.N. 782 (F.B.)
(2) [1900] 23 Mad. 597.

✱ 1924 MADRAS 711

SPENCER, OG. C. J.

Mohamed Esuf Rowther — Defendant—Appellant.

v.

Sultan Abdul Kadar and others—Plaintiffs—Respondents.

S. A. No. 940 of 1921, Decided on 11th January 1924, against the decree of the Court of the 2nd Additional Subordinate Judge of Tanjore.

✱ (a) *Civil P. C., S. 11—Constructive res-judicata.*

Where a person failed to assert in the alternative a claim to share and his claim for the whole is dismissed he or his heirs are precluded from claiming the share. 1923 Mad. 257 Foll. [P 712 C 1]

✱ (b) *Civil P. C., S. 11—Co-defendants.*

Where both defendants claimed property exclusively but both denied plff's claim and plff's claim was dismissed and one of the defendants was declared to be sole owner. *Held*: the decision was not *resjudicata* between the co-defendants as there was no necessary conflict between them nor was the point necessary for disposal of plff's suit. 33 M. L. J. 740 Foll. [P 712 C 2]

K. V. Krishnaswami Iyer and N. Swaminatha Iyer—for Appellant.

A. Krishnaswami Iyer—for Respondents.

Judgment.—This is a suit to recover possession of certain lands. The parties are Muhammadans. It is necessary to make this clear at the outset, because in dealing with the parties' contentions in the Courts below, there has been some confusion of mind caused by reference to self-acquired property and even to *stridhanam* (see paragraph 27 of the District Munsiff's Judgment in O. S. No. 38 of 1915).

The plaintiffs are the widow and children of Sheik Muhammad Bava Rowther. Sheik Muhammad Rowther had one brother, who is the 1st defendant, and four sisters. There has been previous litigation on the subject of the suit property. Sheik Muhammad Rowther brought a suit O. S. No. 15 of 1905, to recover the same lands from the 1st defandant on a plea of trespass in which he alleged that the properties were in plaintiffs' possession but that it was necessary to have them delivered to him through Court to avoid any further dispute. The defendant took oath in that case and the plaintiff's suit was dismissed. Another suit O. S. No. 38 of 1915, was brought by the daughters of Isabibi Ammal, one of the sisters of Sheik Muhammad, and the 1st defendant. That suit was dismissed on a finding that the property was the exclusive property of Sheik Muhammad.

Both the Courts below have held that the result of the second suit was to negative the right of the sisters of any share of the property and to enhance the shares of Sheik Muhammad and the first defendant. The plaintiffs have been given a preliminary decree for partition of the suit properties into two equal shares. I am of opinion that both the judgments are wrong. This suit does not purport to be a suit for partition of property between co-owners. The cause of action is stated to be the

claim of the 1st defendant in O. S. No. 38 of 1915 to absolute right in the suit property, and the relief asked for is that the plaintiffs' 6/8 ths share should be made over to them. It is not alleged that the plaintiffs have obtained possession of the property at any date subsequent to the 10th of November 1905 when the 1st suit (O. S No. 15 of 1905) for possession of this property was dismissed and that they have since been dispossessed. As regards the plaintiff's title to sole possession of the property, the decision in O. S. No. 15 of 1905 is *res judicata* as between them and the defendant Muhammed Esuf. The mere assertion of title in O. S. No. 38 of 1915 by a co-defendant will not give rise to any cause of action if the property was at that time in the defendants' possession. The present suit, if it be regarded as a suit to obtain possession against a trespasser, is barred by reason of the prior suit, O. S. No. 15 of 1905 upon the same title—[vide *Muhammad Rowther* v. *Abdul Rahman Rowther* (1).] If it is to be alleged that in the prior litigation the plaintiff asked for too much and therefore his suit was dismissed and that his representatives are now at least entitled to 6/8ths or some other smaller share of the property, then they are equally barred, because Sheik Muhammad should have pleaded in that suit that, if he was not entitled to a decree for the whole property, he should at least be given a decree for his 6/8ths share. That principle is clearly established by the decision just quoted.

It is argued that the effect of the judgment in O. S. No. 15 of 1905 was destroyed by the judgment in the subsequent suit, O. S. No. 38 of 1915, in which it was held that the property was the exclusive property of Sheik Muhammad. That is not so. The Judgment in O. S. No. 38 of 1915, disposed of a claim made by the daughters of one of Sheik Muhammad's sisters to their share of this property upon partition. The finding that it was the exclusive property of Sheik Muhammad will not operate as *res judicata* between co-defendants, as there was no active contest between them on this point and the decision of the question was not necessary in order to dispose of the suit of these plaintiffs—vide *'Sankaramahalingham Chetti* v. *Muthulakshmi* (2). If the present suit is to be treated as a suit for partition of Sheik Muhammad's share, then it is necessary that the plaint should be amended by properly stating the cause of action as the plaintiff's demand for a partition to be made by their co-owner and his refusal. It will also be necessary to make all the members of the family parties to the suit. One of the sisters of Isa Bivi, Jaleika Bivi, is stated to be dead. The other two sisters Hamida Bivi and Muhammad Bivi are parties in the connected suit for recovery of the house, O. S. No. 511 of 1918 but they have not been made parties to the present suit; nor has any one been put on the record as the legal representative of the deceased sister. The only order that I can make on the present second appeal is that upon the plaintiffs paying all the costs of the defendants up to date within one month, they will be allowed to amend their plaint so as to claim the relief of partition of their share making all the children of Muhammad Bava or their legal representatives parties to the suit within one month of this order, and upon their so doing, the suit will be remanded for retrial permitting the defendants to file fresh written statements to meet the plaintiff's new claim for partition; and upon the plaintiffs' failure to do so, their suit will stand dismissed with costs in this Court and in the Courts below reversing the decisions of the District Munsiff and the Subordinate Judge. This order also disposes of the memorandum of objections which is dismissed.

Appeal allowed.

(1) 1923 Mad. 257—46 Mad. 135—(1922) M. W. N. 845—17 M. L. W. 188—32 M. L. T. 82.

(2) [1917] 33 M. L. J. 740—43 I. C. 860.

✱ 1924 MADRAS 713

ODGERS AND WALLACE, JJ.

Seshamma—Appellant.

v.

Yeeranki Peda Venkata Rao and others—Respondents.

A. A. O. No. 425 of 1922, Decided on 18th January 1924 against the Order of the Addl. Sub. Judge of Cocanada.

✱ (a) *Civil P.C., O. 22 R. 9—Abatement cant be set aside without express prayer.*

An application for a final decree with a note about the death of the judgment-debtor and with his widow as the defendant in the petition, when the judgment-debtor had died even before the passing of the preliminary decree, cannot be treated as an application to set aside the abatement as the Court has no jurisdiction to set aside such an application. [P. 714, C. 1.]

Though Court will not be too scrupulous in enforcing its technicalities where it is necessary in order to do substantial justice to brush them aside and still where the merits are against the party the Court will not go out of its way to clear from his path the technical obstacles. [P. 714, C. 2.]

(b) *Civil P.C. O., 22 R. 9—Revision.*

Though technically an order seems to come under Rule 9 and though the order is not appealable still where the Court has no jurisdiction to pass an order under Rule 9 the order will be set aside in execution. [P. 715, C. 1.]

C. Rama Rao—for Appellant.

G. Lakshmanna and *A. Satyanarayana*—for Respondents.

Wallace, J.—This appeal is against the order of the Additional Subordinate Judge of Cocanada setting aside an abatement of a suit, the order appealed against being passed under O. 22, R. 9. In ordinary circumstances no appeal lies against such an order, but in the circumstances of this case it is contended that the order appealed against was passed without jurisdiction and vitiated by material irregularity.

The plaintiff who is the respondent in this appeal, sued one M. Narayana Rao in the Court of the District Munsif of Peddapur on a mortgage and on 27-11-1918 obtained a preliminary decree. It since transpired that the judgment-debtor died on the morning of 27-11-1918 before the decree was passed. The plaintiff admits that, not long after the decree, he came to know of the fact of the death of the judgment-debtor, but not of the actual date of it and assumed that he had died after the decree and that therefore the decree was valid. He took no steps to bring on the legal representatives until 27-8-1920 when he filed E. A. No. 2411 of 1920 under O. 34, R. 5 wherein, while setting out that the judgment-debtor had died and entering his widow (the present appellant) as the defendant in the petition, he asked merely that a final decree be passed. The present appellant in her counter-petition pointed out that the judgment-debtor had died before preliminary decree was passed, that no petition to bring on the legal representative on record had been put in time, that therefore the suit had abated, and that the date of limitation for bringing on the legal representatives had passed. Even after this allegation the plaintiff did nothing until 23-3-1921 when he put in E. A. No. 911 of 1921 in which he asked that the delay in bringing on the legal representatives be excused, and that a final decree be passed. In his affidavit to that petition, he persisted in saying that the defendant judgment-debtor died after the decree and that the allegation that he died before the decree was not true.

The District Munsif dismissed both the petitions. The Additional Subordinate Judge on appeal held that the application, E. A. No. 2411 of 1920, may be treated as one for setting aside the abatement of the suit and that the excuse for the delay in filing such an application is reasonable and he set aside the abatement of the suit and directed the District Munsif to take it on file and proceed with it.

It is not now disputed that the judgment-debtor died before the preliminary decree was passed, that therefore the preliminary decree was a nullity, and that no steps to bring on the legal representative were taken within six months of 27-11-1918 as required by the Limitation Act then in force. It follows that the suit abated on 26-5-1919. The plaintiff no doubt contends that in O. 22, R. 4 the phrase 'right to sue' does not apply after a preliminary decree is passed and that therefore there is no limitation to the period within which

he was bound to apply to have the legal representative brought on : but, apart from the fact that the law is at present against him on this point. [See *Subbarayudu* v. *Ramadasu* (1)] there is the obvious rejoinder that there was in fact no valid preliminary decree and therefore the suit has not even reached the stage of a preliminary decree. Clearly then the suit abated on 26-5-1919.

The first point to be noted is that, though the plaintiff has never asked that the abatement be set aside, the Lower Court, nevertheless, chose to treat his E. A. No. 2411 of 1920 as a prayer for that relief. That E. A. as already pointed out, was not put in under O. 22 at all but under O. 34. Not only that; when the present appellant's rejoinder to it pointed out that the suit had abated, the plaintiff evidently without asking any enquiry, chose to take the stand-point that the suit had not abated and maintained that standpoint in his second petition E. A. No. 911 and never even then asked for the abatement to be set aside. It is true that E. A. No. 911 purports to have been put in, *inter alia* under O. 22 Rr. 4 and 9, but even then, he did not pray for the abatement being set aside nor does the Lower Appellate Court make any reference to that E. A. in the body of its order. Had it been pleaded before it that E. A. No. 911 impliedly contained a prayer for the abatement being set aside, we cannot see why he should have thought it necessary to fall back on E. A. No. 2411 of 1920 in order to discover such an implied prayer for that relief. Even in his grounds of appeal before the Lower Appellate Court, the plaintiff styles E. A. No. 911 merely as a petition to excuse the delay in bringing the legal representative on record. We must hold that technically there was not before the District Munsif or the Lower Appellate Court any prayer under O. 22 R 2 to set aside the abatement, and therefore the Lower Appellate Court had no jurisdiction to set it aside.

There is a further technical difficulty in the plaintiff's way. E. A. No. 911 was dismissed by the District Munsif under a separate order, and no copy of that order seems to have been put in, in the Lower Appellate Court and no petition asking to excuse the omission to file it has been filed. There was therefore no proper appeal against that order filed in the Lower Appellate Court. This may be the reason why the Lower Appellate Court ignores E. A. No. 911 altogether in its judgment. Here also, we must hold that the Lower Appellate Court had not before it any legal appeal against the order in E. A. No. 911 and had therefore no jurisdiction to set that order aside. Technically it remains in force and is a legal bar to the present appellant being brought on record as the legal representative of the deceased judgment-debtor.

Now, when it is necessary, in order to do substantial justice, to brush aside technicalities, the Court will not be too scrupulous in enforcing them; but when, as we find in this case, there are no merits in the plaintiff's favour and the merits are on the appellant's side, the Court will not go out of its way to clear from the plaintiff's path technical obstacles. As already pointed out, although the plaintiff knew of the death of the judgment-debtor, he did not make any enquiry as to when is had occurred or make any attempt to have the legal representative brought on record within the legal period of six months. He did not even in E. A. No. 2411 ask the legal representative to be brought on record and he did not do so until 23-3-1921, nearly two years after the last day for bringing on the legal representative; and even though it had been pointed out to him on 4-12-1920 by the appellant's counter that the suit had abated, he omitted or refused to make any enquiry, categorically said that that allegation was not true, and refused to believe that there had been any abatement, and that there should be a petition to set it aside, so that even now up to date there is no petition to set aside the abatement. The Lower Appellate Court's reasons for indulging the plaintiff are based wholly on unsup-

(1) 1923 Mad. 237—45 Mad. 872—42 M.L.J. 301—15 M.L.W. 309—(1922) M.W.N. 375—30 M.L.T. 202.

ported surmises; that the plaintiff's pleader might have been ignorant of the law or that the plaintiff had this or that mistaken idea in his head. He announces a general plenary indulgence to parties to take their own time for applying for a final decree and that the "usual procrastination of plaintiffs" is a good ground for calling in aid S. 5 of the Limitation Act. Such a principle is subversive of that Act altogether. We cannot see any ground for granting any indulgence to such a dilatory, negligent and mendacious party and we are not prepared to override the technical difficulties in the plaintiff's way.

We hold therefore that the Lower Appellate Court's order is without jurisdiction, first because it had before it no prayer to set aside the abatement and no substantive motion under O. 22, R. 9, and secondly because that it had no jurisdiction to revise the order on E. A. No. 911 which was not properly before it. It follows that his order, though technically one under O. XXII, R. 9 and technically not appealable under that Order, was not really passed under that order because it was passed without jurisdiction and is therefore appealable or at least open to revision on the ground that it was without jurisdiction. We, therefore, set it aside and restore that of the District Munsif with costs of the appellant throughout.

Appeal allowed.

✱ 1924 MADRAS 715

VENKATASUBBA RAO, J.

Ramappa Chettiar and another—**Petitioner.**

v.

Ekambara Padayachi — **Non-applicant.**

C. R. P. Nos. 843 and 844 of
Decided on 26th February 1924, to revise the orders of the Court of the Small Causes at Kumbakonam.

✱ *Civil P. C., O., 21 R. 58—Claim petition dismissed for default can be restored to file-C. P. C, O. 21 R. 63.*

Where a claim petition under O. 21 R. 58 is dismissed for default of the claimant, the Court has power to restore it to the file. O. 21 R. 63 does not take away the right of the party to have the order of dismissal for default set aside. [P. 715, C. 2]

K. S. Jayarama Iyar—for Petitioner.

K. S. Desikan—for Non-applicant.

Judgment.—A claim was preferred under O. 21, R. 58 C. P. Code and it was dismissed on account of the non-appearance of the claimant. On his application the Subordinate Judge restored the petition. The present revision petitions have been filed challenging the correctness of this order.

O. 21, R. 63 provides that the party against whom an order is made may institute a suit, but subject to the result of such suit the order shall be conclusive. It is said that the words "*the order shall be conclusive*" have the effect of precluding an application of this kind being entertained. No authority bearing directly on the point has been cited and I am not prepared to accede to this contention. If the legislature had intended to lay down such a rule I should have expected to find very clear language employed to indicate that intention. The words in my opinion do not take away the right of the party to have the order of dismissal for default set aside. Full effect can be given to the words "the order shall be conclusive" by holding that an adjudication, finally made after the setting aside of the dismissal, is conclusive subject to the result of the suit mentioned in the rule.

The revision petitions are accordingly dismissed with costs, half of the vakil's fee in the first and half in the second is allowed.

Petitions rejected.

✱ 1924 MADRAS 716

RAMESAM AND JACKSON, JJ.

Ammakannu Ayi—Plaintiff—Appellant.

v.

Murugayya Odayar —2nd Defendant —Respondent.

Appeal No. 160 of 1921, Decided on 6th February 1924, against the decree of the Court of the Subordinate Judge of Mayavaram in Original Suit No. 46 of 1917, D/- 18th December 1920.

(a) *Decree*

A wrong suit followed by a wrong decree does not bar a correct suit. [P. 717, C. 1]

✱ (b) *Election of remedies—After election second remedy is lost*

When a plaintiff has the choice of suing two persons on the same cause of action it may happen that if he elects to sue one and obtain a decree he is estopped from suing the other but if he obtained a decree on a mortgage under the belief that his mortgagor acted in a personal capacity but afterwards finds he was acting in a fiduciary capacity he is not debarred from suing the right person.

[P. 720, C. 1]

C. Krishnaswami Rao and *K. S. Jayarama Iyer*—for Appellant.

A. Krishnaswami Iyer and *V. Sundaram Iyer*—for Respondent.

Ramesam, J.—The facts have been stated by my learned brother whose judgment I have had the advantage of reading and need not be repeated.

A preliminary question of law raised by the defendant in the Court below and repeated here has first to be dealt with. He contends that, as the plaintiff filed her suit against Ratnathayi in 1914 and obtained a decree, she has elected her remedy and the present suit is not maintainable He relies on *Scarf* v. *Jardine* (1); *Moorel* v. *Earl of Westmoreland* (2): and *Moore* v. *Flanagan* (3). He also relies on *Kendall* v *Hamilton* (4). *Scarf* v. *Jardine* (1) is a case of a customer of an old firm of partners selling goods to a new firm consisting of an old partner and a new partner and carrying on business under the old style without notice of the change. In that case, the old firm was liable only on the ground of estoppel and after the plaintiff sued the new firm, it was held that he disavowed the estoppel and could not set it up again (*see* Lord Selbourne, L. C., at 350). It was a case where either firm (but not both) could have been held to be legally liable. The present case is not a case where either Ratnathayi or the present 1st defendant can be legally held to be liable on the mortgage. If Rathnathayi is the owner of the mortgaged properties, only Rathnathayi is liable on the mortgage and not the 1st defendant. If, however, the 1st defendant is the owner of the suit properties, and if it is held that Rathnathayi did not represent him in executing the mortgage bond, she is personally liable and on the mortgage neither is liable If it is held that Rathnathayi represented him in executing Exhibit A, the 1st defendant is liable on the mortgage and Rathnathayi is not liable. Thus, on no version of the facts, do we get a case where plaintiff, at his option, can hold one or other of two persons (but not both) liable. The alternation of the liabilities of Rathnathayi and 1st defendant arises on different views of the facts. I am, therefore, of opinion that the case in *Scarf* v. *Jardine* (1) does not apply. The cases of *Morel* v. *Earl of Westmoreland* (2) and *Moore* v. *Flanagan* (3) are similar. It was held in each of those cases that it was not a case of joint liability but only of alternative liabilities and *Scarf* v. *Jardine* (1) applied.

The other case relied on by the appellant *Kendall* v. *Hamilton* (4) was a case of agent and principal. Under S. 233 of the Contract Act the liability of the principal and agent is joint and several. The question how far the principle of *Kendall* v. *Hamilton* (4) will apply in India has been the subject of difference between the Indian High Courts and cannot be regarded as quite settled [see *Shivlal Motilal* v. *Birdichand Jivraj* (5) and *Kendall* v. *Hamilton* (4) and *Muhammad Askari* v. *Radha Ram Singh* (6)] unless the de-

(1) 7 A.C. 345—51 L.J., Q.B. 612—47 L.T. 258—30 W.R. 893.
(2) [1900] A.C. 11—73 L.J., K.B. 93—89 L.T. 702—52 W.R. 353—20 T.L.R. 38.
(3) [1920] 1 K.B. 919—122 L.T. 739.
(4) 48 L.J., C.P. 705—4 A.C. 504—41 L.T. 418—28 W.R. 97.
(5) [1917] 19 Bom. L.R. 370—40 I.C. 194.
(6) [1900] 22 All. 307—1900 A.W.N. 73.

cision in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (7) can be regarded as settling it. That was a case of an agent and undisclosed principal and the Privy Council reversing the decision in *Bir Bhaddar Sewak* v. *Sarju Prasad* (8), in which the High Court dismissed the suit against the principal following *Priestby* v. *Fernie* (9) and referring to the notes to *Thompson* v. *Davenport* (10) gave an equitable charge against the principal. The fact that *Bir Bhaddar Sewak* v. *Sarju Prasad* (8) was reversed by the Privy Council in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (7) was evidently not noticed by that High Court in *Muhammad Askari* v. *Radha Ram Singh* (6).

The point need not be pursued in this case as it does not arise.

It has been never held that a wrong suit followed by a wrong decree bars a correct suit and we therefore hold the suit is maintainable.

It now remains to find, on the facts, whether Rathnathayi, in executing Exhibit A, intended to act on behalf of the minor or not. The cases cited by the appellant (viz, *Hanuman Persad Pandey* v. *Mt. Baboojee Munraj Koonwaree* 11), *Jadunath Chakerbutty* v. *Mr. James Tweedie* (12), *Makundi* v. *Sarabsukh* (13), *Watson and Co.* v. *Sham Lal Mitter* (14), *Murari* v. *Tayana* (15), *Venkataramanachari* v. *Thirunarayanachari* (16), *Veloyudham Pillai* v. *Perumal Naicker* (17). can help her only if, on the facts of this case, we can find that Rathnathayi did not act in her own right and intended to act on behalf of the minor. *Ammani Ammal* v. *Ramasami Naidu* (18) and *Balwant Singh* v. *R. Clancy* (19).

I may observe that the personal covenant in Exhibit A, by itself, has, in my opinion, no bearing on the matter as that is the form of the document whatever the intention of the document might have been. If the plaintiff was an entire stranger to the family, I would not attach any importance to the allegations in paragraph 11 of the plaint where she denies the adoption. But, seeing that plaintiff, though an assignee from the original mortgagee, is not a stranger to the family, her attitude in the said paragraph throws a good deal of light on that of Rathnathayi and Doraiswami Odayar at the time of the execution of Ex. A. Now, not only is the plaintiff the mother of Rathnathayi, but her husband (who was also her maternal uncle) was a cousin of Doraiswami Odayar, and she was also a sister of Doraiswami's wife. She must have known the transactions of her daughter from the time of the latter's husband's death. On an examination of the prior transactions mentioned in Ex. A it strikes one that, while the first three represented by Exs. B, C & D, are genuine (this is conceded and admitted by defendant whose witnesses D.W.1, 2 & 3 prove them), the rest are all spurious items intended to swell up the consideration of the document to Rs. 3,000 (*see* D. W. 7) for some motive of their own (*see* D. W. 6). What these motives are, it is difficult to determine now. The consideration and motive of Ex. A are shrouded in mystery. Seeing that the deed of adoption Ex. I makes the 1st defendant continue to be the son of Doraiswami (*see* also Ex. CC, the deed of partition in Doraiswami Odayar's family and Ex. EE) it is possible that Ratnathayi entered into Ex. I on the understanding that the adoption of the 1st defendant was to be regarded as sham or bogus. It may be that she was allowed to deal with properties for some time in her own right. But Ex. 11 and the events that have since happened make it too late so far as she is concerned, to question the

(7) [1893] 15 All. 304—20 I.A. 108—6 Sar. (P.C.)
(8) [1887] 9 All. 681—(1887) A.W.N. 329.
(9) 3 H. & C. 977—34 L.J. Ex. 173—13 W.R. 1089.
(10) 9 B. & C. 78—4 M. & Ry. 110.
(11) [1854-57] 6 M.I.A. 393 (P.C.)
(12) 11 W.R. 20.
(13) [1884] 6 All. 417—(1884) A.W.N. 144.
(14) [1887] 15 Cal. 8—14 I.A. 178—5 Sar. 66 (P. C.)
(15) [1895] 20 Bom. 286.
(16) [1914] 2 L.W. 312—27 I.C. 930.
(17) [1915] 2 L.W. 1210—31 I,C. 311.
(18) [1918] 37 M.L.J. 113—10 L.W. 75—51 I.C. 57—(1919) M.W.N. 866.
(19) [1912] 34 All. 296—39 I.A. 109—(1912) M.W.N. 462—11 M.L.T. 344—9 A.L.J. 509—15 C.L.J. 475—14 I,C. 629—14 Bom. L.R. 422—23 M.L.J. 18 16 C.W.N. 577 (P. C.)

adoption though it may still be open to the reversioners of her husband, if any, to question it within 12 years after Rathnathayi's death. In 1908, Rathnathayi dealt with the properties thinking they were her own (Ex. W.) In 1909, misunderstandings seem to have arisen between Doraiswami Odayar and Rathnathayi (*see* D.W. 6) and possession of the properties of Thambuswami was obtained by the minor in 1910 (Ex. X &c.). In 1914, the plaintiff filed her suit on Ex. A (O. S. No. 37 of 1914) (Ex. XV). It is obvious this suit was a freindly suit so far as she and Rathnathayi were concerned but their attitute was adverse to the minor and Doraiswami contested the suit. That plaintiff and Rathnathayi continue to be on friendly terms is clear from the fact that the latter has been examined as P. W 3 in this case. Rathnathayi admits that she, her brother P. W. 1 and plaintiff are living together. In her examination, she was not asked a single question to show that she executed the document on behalf of the 1st defendant nor was Doraiswami (D. W. 6) cross-examined on the matter. It is clear that the adverse attitude of Rathnathayi continues to this day and this explains why plaintiff made the allegations in para. 11 of the plaint. I therefore agree with my learned brother that Rathnathayi never intended to execute Exhibit A on the minor's behalf nor can any decree be given against the minor on any other ground in the circumstances of the case.

The appeal fails and is dismissed with costs.

Jackson, J.—Suit for a declaration that defendant is bound to pay plaintiff Rs. 7,237-9-9 both under the decree obtained by plaintiff in O.S.No. 37 of 1914 on the file of the Court of the Subordinate Judge of Mayavaram against one Rathnathayi and also as being due under a hypothecation bond executed on plaintiff's behalf. The lower Court dismissed the suit and plaintiff appeals.

The facts are as follows :—Thambuswami Odayar (*vide* genealogy Ex.M.) died on 2nd August 1905 leaving a widow Rathnathayi. On 23rd August 1905 (Ex. I) she adopted Palani Odayar, a son of her husband's uncle Doraisami Odayar. On 5th August 1906 she hypothecated property belonging to her late husband to this same Doraiswami (Ex. A.). On 3rd January 1907 he transferred this deed of hypothecation to his wife's sister Ammakannu Ayi, who is also the mother of the mortgagor, Rathnathayi. In 1914 Ammakannu Ayi sued Rathnathayi and Doraisami on this deed. In the plaint Ex. XV she recites that Thambusami died leaving no heir whatsoever. For discharging his debts and necessary expenses Rathnathayi hypothecated certain property of his. If she should fail to recover the amount claimed from Rathnathayi, Doraisami should be made responsible. She obtained preliminary and final decrees against Rathnathayi alone, Exs. G, and G 1, on the 15th September 1914 and 15th November, 1916. The plaint in the present suit is dated 13th August 1917. It sets forth how Rathnathayi hypothecated her husband's property and how plaintiff obtained a decree. Execution was pending and plaintiff, when about to bring the property to sale, learnt that for some time past it had been in the possession of Paiani, the present defendant, who was adopted as son of Thambusami by registered deed in August 1905. This deed was executed without Thambusami's permission, and the adoption was not really made (paragraph 11 of plaint). Palani, however, is bound to satisfy the decree obtained against Rathnathayi, since she *bona fide* executed the hypothecation in order to pay off her husband's debts, and Palani has enjoyed the benefit of her action.

On these pleadings the Subordinate Judge framed among other issues, Issue U, whether the suit mortgage bond is supported by consideration, and is true, valid and binding on the defendants. He found (paragraph 16) that the suit document was genuine and supported by consideration, and was not binding on the defendants. Accordingly he dismissed the suit.

Plaintiff urges that, although the suit hypothecation deed contains no recital that Rathnathayi was acting as guardian of her adopted son, she

must nevertheless be presumed to have so acted. The question for determination is whether there is any ground for making such a presumption. Rathnathayi has consistently ignored the adoption. It is evidenced by the registered deed Ex. 1, dated 23rd August, 1905, and Palani was admittedly in enjoyment of Thambusami's estate. Yet on 26th November 1905, Ex. F, Rathnathayi executed a pro-note for discharging a debt of her husband's with no mention that she was acting as guardian of her adopted son. In the present suit document Ex. A. dated 5th August 1906, there is not the smallest indication of the existence of an adopted son and Rathnathayi acts entirely in her own right. It cannot even be said that the husband's debts exhaust the consideration, for Rs. 301-1-0 is received for Rathnathayi's domestic expenses and Rs. 283 6-9 for her prospective journey to Benares. More over she makes a personal covenant to pay interest.

In June 1908 Rathnathayi leased out property as belonging to herself alone, (Ex. W.). In June 1914 when she was sued on Ex A. her obvious defence would have been that she acted merely as guardian of her adopted son, but so far from raising this plea, she remained *ex parte* and admitted the mortgage sued upon. (*Vide* Ex. G2). She has been examined as plaintiff's witness 3 in the present suit, and if plaintiff wished to establish that she acted on behalf of her adopted son something might have been elicited about this adoption. No such question was put and at this stage of the case plaintiff seems to have been relying solely on the alternative plea that irrespective of the adoption the bond is binding on the defendant inasmuch as it was executed *bona fide* and for proper consideration (paragraph 13 of plaint). If some stranger to the family had *bona fide* advanced money to discharge the father's debts under a misapprehension of Rathnathayi's title and in ignorance of the adoption a Court might be justified perhaps in not demanding very rigid proof that the bond was actually executed on the adopted son's behalf. But in this case the parties were alive to all the facts. The original mortgagee is the adopted son's natural father and his transferee, the present plaintiff, is mother of the mortgagor and sister of the mortgagee's wife. Nobody could have been deceived as to the facts. Besides, however much a Court may feel constrained to help a *bona fide* mortgagee for consideration, there must be some ground upon which to base the presumption that a document executed in the sole name of the mortgagor is really executed in a fiduciary capacity. In *Watson and Co* v. *Sham Lal Mitter* (14) it was urged that a widow had not professed to act as guardian of her son, but it was found that after her name in the document where these words " mother of Sham Lal Mitter minor " which were held to justify the view that she was acting as the guardian of her son. *Murari* v. *Tayana* (15) affords stronger support to the plaintiff because the document in question contained no mention of the minor and was an outright sale by the widow in order to discharge her husband's debts. But there it was found that the widow had the intention to sell qua-guardian, and a case was cited where it was held that a manager may sell without necessity and be accounted manager even though he has not described himself as such: *Jadunath Chakerbutty* v. *Mr. James Tweedie* (12). In the present case such intention can hardly be presumed because as set forth above Rathnathayi has consistently exhibited the contrary intention to deal with the property in her own right and to ignore the adoption, which intention both plaintiff and Doraiswami assumed as a fact in O. S. No. 37 of 1914 when the hypothecation deed was first brought to Court. And even if it were established that the husband's debts were discharged from pressing necessity, there still remains that part of the consideration which was entirely personal to Rathnathayi herself. " In each case the language of the deed and the circumstances in which it was executed have to be considered." *Murari* v. *Tayana* (15). Here neither the language nor the circumstances warrant any presump-

tion that Rathnathayi acted as guardian. Therefore the latter part of issue 5 has been correctly decided by the lower Court, and there is no necessity to go into the question in issue IV whether if plaintiff had established that Rathnathayi executed Ex. A as guardian of Palani he would be estopped from suing Palani by the judgment obtained in O. S. No. 37 of 1914 againsd Rathnathayi in her individual capacity.

When a plaintiff has the choice of suing two persons on the same cause of action it may happen that if he elect to sue one and obtain a decree he is estopped from suing the other. If the present plaintiff had sued Rathnathayi as agent of Palani and had obtained a judgment it might be argued that he was estopped from suing Palani. But when in the belief that Rathnathayi had executed the hypothecation in her own right plaintiff has obtained a judgment against her, and has then learnt that Rathnathayi could only have executed it as guardian of Palani there is no question of estoppel. It is simply as if she first sued the wrong person and subsequently sued the right person.

The bare facts that there was full consideration and *bona fides* cannot make the defendant liable.

The appeal accordingly fails and is dismissed with costs.

I agree with my learned brother as regards the memorandum of objections.

Appeal dismissed.

✱ 1924 MADRAS 720

WALLACE, J.

Aiyisa Bivi Ammal—Plaintiff—Appellant.

v.

Kalandarsa Rawther and another—Defendants 1 and 3—Respondents.

S. A. No. 18 of 1921, Decided on 17th January 1924, against the decree of the Court of the Subordinate Judge of Mayavaram.

✱ *Adverse possesion—Mortgagee being purchaser.*

Character of possession of a usufructuary mortgagee under a void mortgage by a person who is not the guardian is altered when the same property is sold to him by the same mortgagor. [P. 721 C. 1.]

V. Narasimha Iyengar—for Appellant.

K. Sankara Sastri—for Respondents.

Judgment—The ruling in *Imambandi* v. *Mutsaddi* (1) which was relied on by this Court in its judgment of 10—2—1920 for holding that the sale Exhibt III is not binding on the plaintiff is equally in point to hold that the mortgage Exhibit I is not binding on the defendants. Both transfers being by a person not guardian of the minors, are equally void.

So that the position is this: 1st defendant was admitted into possession in 1893 under a void mortgage. The nature of his possession after that was nevertheless that of mortgage and not absolute trespasser—see *Gopala Dasu* v. *Ramu* (2) and he began then to prescribe by adverse possession for the legal status of mortgagee which, if his possession was not altered or disturbed, he would acquire, after twelve years of such possession, *i. e.*, the plaintiff would after such a period of 12 years be barred by limitation from contending on the ground that the mortgage was a void one, that 1st defendant was not even mortgagee. But while the 1st defendant was thus prescribing for a legal mortgage title, the same mortgagor on behalf of the plaintiffs, chose to sell the property to him in 1900 under Exhibit III. This sale no doubt was equally void as the mortgage was. But it had the legal effect of altering the nature of the possession which 1st defendant had in the property. He began in 1900 to prescribe by adverse possession for a vendee's title, just as in 1893 he had begun to prescribe for a mortgagee's title, and that the manner

(1) [1918] 45 Cal. 878—45 I. A. 73—9 L. W. 518—35 M. L. J. 422—16 A. L. J. 800—24 M. L. T. 330—28 C. L. J. 409—47 I. C. 513—23 C W. N. 50—5 Pat. L. W. 276—20 Bom. L. R. 1022—(1919) M. W. N. 91 (P. C.)

(2) [1921] 44 Mad. 916—41 M. L. J. 194—(1921) M. W. N. 385.

of his possession was prescribing for full ownership was clearly known to the party who had deliberatel y converted the mortgage into a sale.

It seems to me, therefore, quite clear that after 12 years from 1900, 1st defendant had prescribed by adverse possession for a full vendee's title, *i. e.*, absolute ownership, and that it is not open to plaintiff now to contend that the mortgage title emerges again when the sale is held void, and the defendants must therefore prescribe for 60 years. The plaintiff's guard an converted the possession of 1st defendant as mortgage into that of vendee.

If it should be argued that the adverse possession as vendee vanishes when the sale is held void, it must in the circumstances of this case equally follow that the adverse possession as mortgagee vanishes when the mortgage is held void. The plaintiff would then be in a worse case, since then 1st defendant would have been an absolute trespasser since 1893, and the suit would be long barred by limitation.

The Lower Appellate Court's decision is correct and I dismiss this appeal with costs.

Appeal dismissed.

✱ 1924 MADRAS 721

WALLACE, J.

A. V. Gurwanaha Rama Seshayya—Plaintiff—Appellant.

v.

Sri Tripurasundara Cotton Press, Bezwada—2nd Defendant—Respondent.

S. A. No. 593 of 1921, Decided on 14th February 1924, against the decree of the Sub-Judge of Bezwada.

✱ *(a) Limitation Act, Art 116—Purchaser of shares.*

Purchaser at Court auction sale of some shares in a Company, whose transfer is not recognised is not a share-holder and therefore he cannot take his stand on the registered contractual relation which is the foundation for any claim to call in aid Art 116. [P. 721, C. 2.]

✱ *Company—Dividends.*

A Company does not hold its dividends as a trustee for the share-holders. [P. 722, C. 1.]

T. S. Raghunatha Rao and T. S. Srinivasa Rao—for Appellant.

P. Satyanarayana Rao—for Respondent.

Judgment.—The only question urged in this appeal is one of limitation.

The plaintiff had purchased in Court auction some shares which the judgment-debtor held in the second defendant company, and some dividends on those shares which had fallen due before the date of his purchase. The company refused to pay him the dividends, and he has filed a suit for this. His suit was in 1917. One of the dividends namely that for 1912, fell due on 11—4—1913 and the lower Courts have held that the plaintiff's suit was barred as regards this dividend, since he had not sued within three years of the dividend falling due. The plaintiff appeals.

The plaintiff relies chiefly on a ruling reported in *Ripon Press and Sugar Mills, Ltd.* v. *Nama Venkat rama Chetty* (1), which lays down that a suit by a share-holder to recover dividend is covered by Art. 116 of the Indian Limitation Act, that is, a share-holder gets six years within which to sue for payment of dividend which has fallen due. The rejoinder to this contention is that the plaintiff is not a share-holder, since the company has refused to register him as such. The plaintiff appeals to the ruling in *Nagabhushanam* v. *Ramachandra Rao* (2) but, though that ruling no doubt lays down that a court-auction purchaser, such as he, is entitled to be registered as the owner of the shares purchased, the company still retains full discretion to refuse such registry. The plaintiff then is not a share-holder and connot therefore take his stand on the registered contractual relation which is the foundation for any claim to call in aid Art. 116 of the Indian Limitation Act.

The plaintiff however, argues tha the defendant company holds divi-

(1) [1918] 42 Mad. 33—35 M. L. J. 253—48 I. C. 903—24 M.L.T. 246—8 L. W. 354.
(2) 1923 Mad. 241—45 Mad. 537—42 M.L.J. 449—15 M. L. W. 470—(1922) M. W.N. 331—30 M.L.T. 231.

dends for share-holders in trust for them, and that, therefore, there is no period of limitation at all: but the case he himself relies on, namely, *Ripon Press Sugar Mills, Ltd* v. *Nama Venkatarama Chetty* (1) clearly negatives this view.

He next claims that the company's accounts will show that the dividends were due and that the company has thus acknowledged its debt to his judgment debtor, but he has not chosen to file these accounts to show in what form they run or in what form the acknowledgment is embodied. The balance sheets, Exs. E-series, were filed for a different purpose, namely to show when the dividends were due, and do not contain any acknowledgment specific enough to save limitation.

There is thus no proof of any acknowledgment sufficient to save limitation. The plaintiff's cause of action for the receipt of the dividend arises, in the absence of any acknowledgment, on the date on which it fell due for payment. He cannot add to that any extended period of limitation which is applicable only to persons of a specific class as share-holders to which his judgment debtor belonged. The plaintiff takes his assignment subject to all the laws of limitation. I agree therefore that the decision of the lower Court is correct and dismiss the appeal with costs.

Appeal dismissed.

✱ 1924 MADRAS 722

WALLACE, J.

Periasami Muthiriyan and another—Defendants 1 and 2—Appellants.

v.

Anandayi Ammal and others—Plaintiff & Defendants 3 & 4—Respondents.

Second Appeal No. 788 of 1921, Decided on 19th February 1924 against the decree of the District Court of Trichinopoly in A. S. No. 52 of 1920.

✱ *Possessory title—Entitles plaintiff to an injunction against threatened possession by a person who is not owner.*

A person in peaceful possession has a right to remain in possession against the whole world except the true owner and a suit for an injunction by such a person against any person, except the true owner, who threatened to dispossess him is maintainable. 26 Mad. 514; 20 Cal. 834 P. C. Foll. 1 M. L. W. 853, 31 Mad. 531, Dist. [P. 723, C. 2.]

S. Subramania Aiyar—for Appellants.

N. Rajagopalachariar—for Respondents.

Judgment.—The Original Suit was by plaintiff for a declaration that the plaint nanja land belongs to her and for permanent injunction, restraining defendants from interfering with her enjoyment. It was admitted that the melwaram in the land belongs to plaintiff. First defendant claimed that he owns the kudivaram. The first Court decreed the suit and the Lower Appellate Court concurred. Defendants appeal.

The first point taken is that there is no evidence on which the Lower Courts' findings that the plaintiff has title to the land can be based. This, I think, must be allowed. Ex. C, the inam register, does not make a definite statement as to the particular details of the grant. Exs. A and B are only comparatively recent title deeds and do not recite that the Kudivaram was sold. The mere fact that they are more than 3 years old, and purport to have been attested by one Kathaperumal, paternal uncle of first defendant, cannot be any evidence that the kudivaram also was sold. There is no other evidence on the point.

On the other hand first defendant also has not proved title. There are concurrent findings on this point, and there is no evidence to prove his title.

There are also concurrent findings that first defendant has never been in possession of the land: and plaintiff was in possession on the date of suit. The Lower Appellate Court holds further that plaintiff has been in possession of both varams for over 40 years, but, since to prove possession further back than 12 years from 16th October 1919 (the date of plaintiff's first witness's deposition) it relies solely on exhibits A and B, mere recitals in which cannot prove the fact of possession, I must take it that its real finding is, relying as it

does on plaintiff's first witness, that plaintiff has been in possession for 12 years prior to 16th October 1919. The suit was filed on 17th September, 1918. So the position is this :—neither party has established title; plaintiff was in possession on date of suit and for 11 years previously, and first defendant has never been in possession. In such circumstances, is plaintiff entitled to a decree maintaining her possession by grant of the declaration and injunction she prays for?

It is argued for first defendant that to allow plaintiff to rely now merely on possessory title is to fundamentally alter the nature of the suit. But this I do not agree with. The plaint sets out clearly plaintiff's possession since 1877, and denies that defendants ever had possession. The written statement countered with a denial that plaintiff ever had possession, and assertions that the first defendant was in possession on the date of suit, and that defendant and his predecessors in title were as occupancy tenants, paying melvaram to plaintiff. On these pleadings issues (2) and (3) were framed, raising the question whether plaintiff was in possession, and the parties went to trial with that issue clearly before them. It was incumbent on first defendant to produce any evidence he had that plaintiff was never in possession and that he or his predecessors in title were in possession.

I think this is clearly a case where if plaintiff had actually been dispossessed by first defendant, she could have successfully maintained a suit for possession against him under S. 9 of the Specific Relief Act. It is quite plain on the findings that plaintiff was in long, anterior and peaceable possession at the time of the threat of dispossession. A person in such peaceable possession is, until the contrary is shown, presumed to be the owner and is entitled to maintain his possession against all but the true owner. See *Narayan Row* v. *Dharmachar* (1), *Ismail Ariff* v. *Mahomed Ghous* (2). The case reported in *Somasundaram Chetty* v. *Vadivelu Pillai* (3) is a case where the plaintiff having failed to prove lawful title, relied on legal possession by prescription, *i. e.*, again attempted to prove a title legal though not lawful and was non-suited because he had not put forward such a title in the plaint. The present case is not similar. The case reported in *Maikal Servai* v. *Thamabaswami Servai* (4) is also hardly in point since there plaintiff was seeking for possession as against a party already in possession. In such a suit, based on title, plaintiff must fail when the title is not proved. The present suit is by a party in possession to be maintained in possession against one having neither title nor possession. Such a suit by its very nature relies not on title only but on possession also, and defendants, as I have held, clearly realised the importance of attacking plaintiff's plea so far as it was founded on possession also. The ruling of the Privy Council in *Ismail Ariff* v. *Muhomed Ghous* (2), and illustration (g) to S. 42, Specific Relief Act, are direct authorities for the maintainability of the suit and for the correctness of the decree of the Lower Appellate Court.

I see no reason to interefere and dismiss this second appeal with costs.

Appeal dismissed.

(1) [1903] 26 Mad. 514.
(2) [1893] 20 Cal. 834—20 I. A. 99—6 Sar. 305 (P. C.)
(3) [1908] 31 Mad. 531—4 M. L. T. 344.
(4) [1914] 1 L. W. 853—25 I. C. 934—(1914) M. W. N. 4.

✱ 1924 MADRAS 723

OLDFIELD AND VENKATASUBBA RAO, J.J.

Si Potti Nayaker—Petitioner.

v.

Suppammal and another—Respondents.

Civ. R. Petition No. 757 of 1920, Decided on 3rd March 1922 from the order of the Court of S. J. at Tuticorin, D/- 19th August 1920.

Civ. P.C., O. 21 R. 89—Trespasser in possession prior to Court sale can set aside sale. (Nature and incidents of possessory title discussed.)

Per Venkatasubba Rao, J.—(Oldfield, J. contra.)—A trespasser who is in possession of property sold in a Court auction prior to the execution sale, is a person holding an interest in the property sold by virtue of a title acquired before such a sale within rule 89.

[P. 726, C. 2 and P. 729, C, 1]

K. S. Sankara Aiyar for *T. R. Venkatarama Sastri*—for Petitioner.

K. V. Sesha Aiyangar—for Respondents.

Oldfield, J.—The first question in this case is whether any of the conditions specified in S. 115 of the Civil Procedure Code, for the exercise of our revisional powers, are established. We can, of course, proceed only on the facts, as found by the lower Court; and shortly the decision, on the facts found, is that a trespasser, who enters on possession of property, sold in Court sale, before the sale took place, "holds an interest in that property, by virtue of a title acquired before the sale" and is entitled to apply under O. 21 R. 89. If, as petitioner contends, the lower Court has used the powers conferred by the Rule on the application of a person, who has not the legal character specified therein such use of powers would be the exercise of a jurisdiction not vested in it by law. The present case in fact closely resembles in this respect *Sundaram* v. *Mausa Mavuthar* (1). Following that authority, I hold that petitioner's contention, if established, will justify interference in revision.

It is said next that the Lower Court reached its finding in favour of the respondents' possession, in the absence of, or without considering, evidence. This is incorrect, since there is evidence on the point on record and the judgment contains a reference to it.

Turning now to the question, which arises with reference to the Lower Court's jurisdiction, whether a trespasser in possession, who has not completed his prescription, has an interest in property, in virtue of a title acquired before the sale, I hold that he has not. We have been shown several authorities for holding that persons possessing various legal characters have been rocognised as entitled to apply under R. 89, or under S. 310-A of the former Code. But it is useless to refer to them in detail, since none deals with the case of a mere trespasser, or lays down any general principle by which claims to the application of Rule can be tested. Other cases relied on by respondents, as for example *Narayan* v. *Amgauda*(2) and *Narayan Kutti Goundan* v. *Pechaiammal* (3) are irrelevant, since they deal either with the right to reimbursement, under S. 69 of the Indian Contract Act, for a payment actually made, or with the nature of the interest contemplated in S. 91 of the Transfer of Property Act.

The case being bare of direct authority, its difficulty is enhanced by the fact that the words of the Rule under construction are very general. Respondents argue that the right of a trespasser in possession is usually and no doubt conveniently described as a possessory title and that to adopt one out of many descriptions of it "he has the right to maintain his possession against all the world, except the rightful owner; he can sue in ejectment and recover possession, not merely in trespass from, any person who subsequently dispossesses him, unless the latter is the real owner or claims under him, or justifies under his authority; proof by the defendant that the real title is outstanding would be no defence. In fact, the prior possession is itself a root of title and the prior possessor has all the rights of a true owner except against the owner himself. *Subbaiya Pandaram* v. *Mahamad Musthapha Maracayar* (4). These dicta may be accepted as founded on *Asher* v. *Whitlock* (5) and the extract from Pollock and Wright on possession quoted with approval therein by Lindley, J. But in that case the con-

(1) [1921] 44 Mad. 554—13 L.W. 498—40 M.L.J. 497—29 M.L.T. 269—63 I.C. 937—(1921) M.W.N. 272 (F.B.)

(2) [1921] 45 Bom. 1094—62 I.C. 104—23 Bom L.R. 255.

(3) [1913] 36 Mad. 426—22 M.L.J. 364—11 M.L.T. 174—15 I.C. 206—(1913) M.W.N. 353.

(4) [1917] 5 L.W. 690—32 M.L.J. 85—40 I.C. 50—21 M.L.T. 62.

(5) [1865] 1 Q.B.D. 1—35 L.J.Q.B. 17—11 Jur. ns. 925—13 L.T. 254—14 W.R. 26.

flict was between persons successively in possession and throughout the title was referred to as valid only against others than the real owners. In a case, at first sight, of conflict between a person in possession and the real owner, *Ex parte Winder* (6) the representatives of the former no doubt established their claim against the representative of the latter to the purchase money of the land, which was in Court, under the Land Clauses Consolidation Act, 1845, S. 79. But it is material firstly that they did so only after the real owner had been out of possession long enough to lose high rights, although no doubt their own prescription was not complete when the company acquired the land and took possession; and secondly that S. 79 of the Act provides, the person in possession is, until the contrary is shown, to be deemed the person entitled to the money. On the other hand, at an earliar stage in the same transactions, when the statutory period had not elapsed and the real owner was not represented on the record, the former's title was regarded in *Ex parte Hollingsworth*(7), as only inchoate and as conferring no right to the purchase money. These cases accordingly give no countenance to the claim of a trespasser with an incomplete prescription, when the title of the real owner is in question, as it is under R. 89 for the purpose of the present case. For the proceedings between the parties to the decree and the purchaser are on the footing that it is the right, title and interest of the judgment-debtor that are being sold. That is subject no doubt to any derogation from full ownership due to encumbrances or the like, but not to the recognition of a claim which the law had always refused to recognise as valid against one party concerned, the debtor. Some attempt was made in argument to meet this by the suggestion that a person able to establish against the debtor, is entitled to apply under the rule. But if that is so (a point, on which I offer no opinion) and such a person is entitled not only to proceed under O. 21, R. 58, or 100, or generally by suit, but also to pay the decree amount, nothing applicable to the facts before us follows. For such a claimant must be allowed to pay, because in the words of R. 89 "he owns the property" and his claim is of a different kind from that now under consideration.

In *Sundaram* v. *Mausa Mavuthar* (1), an attempt was made with reference to previous decisions to explain the necessity for adoption of the wider language used in the present Code, and by me, to suggest its origin. But none of those decisions justifies any application of that language as wide as that now proposed. The rule being one of procedure some weight may be given to the considerations that it can be of no advantage to the debtor, if the Court recognises a person who is prescribing against him and cannot be supposed to be offering to pay for his benefit, much less in virtue of any arrangement with him; and that it would deter bidders and enhance the uncertainty to which Court sales are at present subject if the purchaser were liable to be deprived of the benefit of his purchase or could obtain it, only after a lengthy and expensive enquiry into so indefinite a matter as bare possession.

I would accordingly allow the Civil Revision Petition, setting aside the lower Court's order and dismissing the petition before it with costs throughout.

Venkatasubba Rao, J.—The properties in dispute were attached by the petitioner before us, who was the decree-holder, who brought them to sale and purchased them. The daughters of the judgment-debtor, who are the counter-petitioners, applied under O. 21, R. 89, to have the sale set aside and they deposited in Court the requisite amount. They claimed that their father, the judgment debtor, had become a *sanyasi* and that they took the property as his heirs: or in the alternative that their father had made an arrangement in pursuance of which he gave his properties to them before he left his house and disappeared.

The Subordinate Judge found on the evidence that the case of the daughters on these two points was

(6) [1877] 6 Ch. D. 696—46 L.J., Ch. 572—25 W.R. 768.
(7) [1871] 24 L.T. 347—19 W.R. 580.

not made out but, he regarded the daughters as trespassers who took possession of the property, prior to the execution sale and he held that the daughters as trespassers had sufficient interest in the property to entitle them to make an application under O. 21 R. 89. It is contended on behalf of the petitioner, who is the decree-holder and auction-purchaser, that on the finding of the Subordinate Judge the daughters had no right to make an application under O. 21, R. 89.

Under this rule, the application may be made by a person either owning the property or holding an interest in the property by virtue of a title acquired before the execution sale. Do the petitioners hold such an interest in the property as to entitle them to the benefit conferred by this Rule? R. 89 corresponds to S. 310 (A) of the Civil Procedure Code, Act XIV of 1882. The words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" have been substituted for the words "any person whose immoveable property had been sold." The terms of the present rule are much wider than those of S. 310 (A) and no useful purpose will be served by referring to the decisions passed under the Civil Procedure Code of 1882. The object of the legislature was certainly to widen the class of persons on whom this right is conferred. In the first place, it is evident that it is not only the judgment-debtors who are sought to be protected by this rule. It has been argued on behalf of the auction-purchaser that S. 310 (A) and O. 21, R. 89 were introduced in the interest of the judgment-debtors, with a view to afford them protection against loss of their properties at Court sales for inadequate prices, and the observations of Sir John Wallis, the late Chief Justice in *Sundaram* v. *Mausa Mavuthar* (1) have been relied upon. As a rule, there can be no doubt that this provision will be greatly taken advantage of by judgment debtors; but there is nothing in the rule to limit its application to them. Some cases were cited to us by the petitioner's Vakil for the purpose of showing that an owner of property, who does not derive a title from the judgment-debtor, has a right to apply under R. 89. As this proposition has not been seriously disputed, it is unnecessary to refer to the authorities. It is also well established that a person having a lesser interest than full ownership, such as a mortgagee, is also entitled to apply under this rule. The interest of the applicant may be that of a lessee, and cases may be conceived where the applicant may possess other kinds of interest.

The question, however, is :

"Is the interest possessed by a trespasser such as to entitle him to take advantage of this provision?"

I am satisfied that such interest comes clearly within the terms of this rule. The words "holding an interest therein by virtue of a title acquired before such sale" would seem to be equivalent to "holding an interest therein acquired before such sale." It is difficult to imagine what the significance of the words "by virtue of a title" is in connection with the portion of the rule which refers to the applicant holding an interest in the property. If the words "by virtue of a title" were absent in the section, very little difficulty would exist in holding that the rule would cover the case of a trespasser. The question then is, is the position altered by reason of the words' by virtue of a title" appearing in this rule?

In *Ex parte Winder* (6) a possessor without title agreed with a railway company for the sale of land, which he had occupied for a time, short of the period of limitation. He failed to show a good title. The money was paid into Court under the Lands Clauses Consolidation Act and the company executed a deed-poll under the same Act to vest in themselves all the estate and the interest of the vendor. After the expiration of the statutory period, the representative of the true owner claimed the purchase money. Hall, V. C., held that the money represented the actual right and interest of the vendor and as against the representative of the true owner, persons claiming under

the vendor were entitled to the amount paid into Court, by the company. The Vice-Chancellor refers to the person who had possession without title, as being interested in the property and as having acquired a title by possession. I give the following passages from his judgment :

"As a reasonable foundation for dealing with the case we must, I think, start with this principle, that, as far as we can in applying these sections, we must not let the compulsory taking of the land by the company do injustice to any person who may be interested in the property which the company is authorised to take."

"In this case the party who claims to have the fund paid out had acquired a title by possession of this property for nearly the time which would have operated as a bar to a claim by anybody else."

The right of a possessor is referred to as " a most valuable right and interest, which could have been sold in the market, although he had not yet the full statutory title." In this judgment the expression " possessory title" is also used and in negativing the contention of the representative of the true owner, the vice-chancellor observes as follows :

"The argument which has been addressed to me involves this, that because he (the possessor without title) had not, at the moment the company took possession, got a complete title by reason of the period of twenty years not having then expired, the effect of the Act of Parliament was summarily to deprive him of that which certainly was his property, subject to the contingency of the real owner turning up and making claim within half a year from the period when the company intervened and took the property."

In *Asher* v. *Whitlock* (5), it was held that :

"A person in possession of land without other title has a devisable interest ; and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot show title or possession in any one prior to the testator."

Cockburn, C. J., says ;

"But I take it as clearly established, that possession is good against all the word except the person who can show a good title, and it would be mischievous to change this established doctrine."

Again referring to the interest of the person in possession he says :

"All the old law on the doctrine of disseizin was founded on the principle that the disseisor's title was good against all but the disseizee. It is too clear to admit of doubt, that if the devisor had been turned out of possession he could have maintained ejectment."

Having thus dealt with the devisor himself, the learned Chief Justice deals with the position of the devisee.

" What is the position of the devisee ? There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner.

Dealing with the heir-at-law of the devisee, the learned Chief Justice observes :

" The devisor might have brought ejectment, his right of possession having passed by will to his daughter, she could have maintained ejectment and so, therefore, can her heir, the female plaintiff."

He concludes his judgment with the observation :

" On the simple ground that possession is good title against all but the true owner, I think the plaintiff is entitled to succeed and that the rule should be discharged."

In the two cases referred to by me, the word " title " is used to describe the interest of a possessor of land, who is not the owner. Pollock in " Possession in the common Law " speaks of possession as a substantive right in the nature of property, valid against all merely extraneous intrusion and he says :

" that a possessor acting as owner has not only a personal interest, but a title which is effective against all outsiders, and enures to the benefit of all who may hereafter be able to show a title derived from it, by any form of bequest, devolution, or conveyance, appropriate to the nature of the subject-matter." (Edition of 1888, p. 23).

Referring to the rights *inter se* of successive independent occupiers, who are all wrong-doers, as against the true owner, Pollock says :

" possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruders, has all the incidents and advantages of a true title."

and he comes to the conclusion that the first possessor has a better title than a subsequent possessor and observes :

" Possession is good title against all but the true owner." (See pagss 95 and 96).

Pollock speaks of a " possessory title " and also uses the expression " possessory interest." I may quote another passage from the same learned writer :

" It seems to me that there is not any real authority for allowing a mere wrong-doer to set up an extraneous title paramount against a possessory title prior to his own entry."

This view has been taken by this Court in *Subbaiya Pandaram* v. *Mohamad Musthapha Maracayar* (4).

There is no mention in the rule in question, either of the judgment-debtor, or of persons deriving title from him. If an applicant under this rule has disputed the judgment-debtor's title to the property, that will not be a ground. in my opinion, to disentitle him to relief. If the judgment-debtor takes no steps to save the property and if the party who is disputing his title thinks it worth his while to apply, will the Court refuse to recognise his right, on the ground that by doing so, it will be recognising a claim against the judgment-debtor? Whatever the relations between the judgment-debtor and the applicant *inter se* may be, so long as the latter is able to satisfy the Court that he fulfils the conditions laid down by the Rule, it seems to me that he is entiled to invoke this provision for his benefit.

Again, can it be said that the legislature intended to exclude, for instance, a person who has been in possession of the property, by virtue of a purchase or a gift from the judgment-debtor, but who is unable to make out a title against the latter, by reason of the purchase, or gift not having been by a registered instrument? If the vendee or donee is in possession for the full period of limitation, he becomes the owner, not because of the sale or the gift, but by reason of his adverse possession, for the statutory period. Will it be said that he cannot apply under this rule before he obtains the full statutory title?

We have not been referred to any case, which has decided the point under consideration, either under the old Code, or under the present Code. None of the cases cited before us seems to give us any assistance in deciding this question.

Narayan v. *Amaguda* (2) and *Narayana Kutti Gounden* v. *Pachiammal* (3) which were relied upon by the petitioner, have very little bearing upon the point, as they are cases which deal with the expression "interested in the payment of money", occurring in S. 69 of the Contract Act.

Having held that, in my opinion, as a matter of construction of this rule, a trespasser can invoke for his benefit the provision contained in R. 89, I shall proceed to examine the objections suggested to the applicability of this rule to the case of a trespasser, on the ground that by permitting him to avail himself of this benefit, a hardship will result to decree-holders and auction-purchasers and also on the further ground that dishonest trespassers will be encouraged to make applications under this Rule and defeat the rights acquired under Court sales. The answer seems to be simple. Under the rule, it is only persons fulfilling certain conditions that can make an application and further the applicant must deposit in Court for payment to the decree-holder the amount specified in the proclamation of sale and for payment to the auction-purchaser a sum equal to 5% of the purchase money. There is thus a sufficient safe-guard provided in the interest of decree-holders and auction-purchasers. As a pre-requisite to the obtaining of an order under this rule, the applicant must deposit in Court not only the entire decree-amount, but also a sum to be paid to the disappointed purchaser. Unless the interest which the applicant possesses in the property is at least equivalent to what may be represented by the amount he is required to deposit into Court, it is not likely that he will seek to avail himself of the benefit conferred by this provision. It has been suggested, that if a man has possession. before the sale of the property even for a day, he will be entitled to apply under this rule, if the view that I have taken is correct. But every occupier is bound to satisfy the Court that he has an interest, by virtue of a title acquired before the sale; and whether the occupation of the applicant amounts to possession is a question of fact to be decided in each case. *Ex hypothesi*, the applicant is a trespasser, with a possessory title, which the statute of limitation has not operated to make absolute, and the title of the owner is not extinguished but is outstanding and an order made under R. 89 does not profess to adjudicate upon the adverse claims to the property in question. If, therefore, a person who has been in adverse possession as against the

true owner, say for only a month, considers that the interest he possesses in the property warrants his depositing into Court the amount specified in the Rule and applying for the setting aside of the sale, although he runs the risk of being turned out by the true owner, the day after the sale has been set aside, I fail to see why such an applicant should not be able to avail himself of this rule. As against the case of a person who, having been in wrongful possession only for a day, or a month, applies under the rule, there is the case of a party who has acquired a title by possession for almost the statutory period, subject to the contingency of the real owner turning up and making a claim say within 3 months from the period when the sale in execution of the decree takes place. The hardship that will be occasioned to such trespasser by negativing his right to apply under this rule will be very much greater than the hardship that may result to a disappointed auction-purchaser who loses the property purchased at the instance of a person who has been in possession for a short period.

I would for these reasons hold that the order of the subordinate judge is right and dismiss the Civil Revision petition with costs.

Oldfield, J.—As however my learned brother would confirm the lower Court's order, the Revision Petition must, under S. 98, Civil Procedure Code, be dismissed with costs.

Petition dismissed.

✱ 1924 MADRAS 729

VENKATASUBBA RAO, J.

Chinniah alias *Krishnaswami Naidu*—In Re

Cr. Rev. No. 382 of 1923, Decided on 23rd November 1923, from the judgment of Court of 1st Class Magistrate of Chittoor Town in Bench Case No. 69 of 1923.

✱ *Madras Act (III of 1889) S. 6—Common gaming house need not be open to all.*

The term 'common gaming house' must at least imply that the house was one used as a place of public resort. A common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming and it makes no difference that the house was not open to all persons who might be desirous of using the same for gaming. [P. 729, C. 2.]

V. Viswanatha Sastriar—for Petitioner.

K. N. Ganapathi for *Public Prosecutor*—for the Crown.

Order.—The offence with which the accused is charged is that of keeping a common gaming house, punishable under S. 6 of Madras Act III of 1889. A common gaming house is defined thus in 15 Halsbury 217:

"It is one in which a large number of persons are invited habitually to congregate for the purpose of gaming."

In *Jenks* v. *Turpin* (1), Hawkins, J., says:

"Neither do I think that it makes any difference that the use of the house and the gaming therein was limited to the subscribers and members of the club and that it was not open to all persons, who might be desirous of using the same. If this could be set up as a defence to an indictment, any indictment for keeping a common gaming house might be defeated."

I am willing to accept this statement of the law and I do not think that this is at variance with that contained in *Srinivasachari* v. *Rex* (2), where the learned judges, Sir Arthur Collins, C. J., and Parker, J., observe:

"In the absence of any technical definition, the term 'common gaming house' must at least imply that the house was one used as a place of public resort."

They do not say what a place of public resort is and, in the circumstances, I am not prepared to hold that the definition given in the Madras case is necessarily opposed to that given in the English case and in Halsbury.

The next question is, has the evidence in this case established that the accused keeps a gaming house in this sense? P. W. 3, a dismissed and disreputable police constable, no doubt says:

"The accused is the owner of the house. The accused collects the pool for himself for every 'rung' or 'run' for the use of his house and for the cost of the cards. The accused benefits up to Rs. 12 a day, never less than Rs. 5."

It is extremely unsafe to act upon the uncorroborated testimony of a

(1) 13 Q. B. D., 505.
(2) 1 Weir 917.

witness of this sort. He admits that he was himself taking part in the game and then turned an informer at the request of the Police. The only independent witness, who speaks to the transaction from personal knowledge, is P. W. 4 and he hopelessly contradicts P. W. 3; because, according to the former the accused was himself a player and he took money from the pool whenever he happened to be the winner. P. W. 4's station in life is not such as to inspire confidence, and I am not prepared therefore to act upon evidence of this kind and convict the accused.

It is somewhat remarkable that the police should have attempted to prove a case of this nature by such worthless evidence, when, according to them, it is a notorious fact that the accused keeps a common gaming house, several persons have from time to time complained and the gaming house has been kept for about 10 years previous to the prosecution.

In the circumstances, I set aside the conviction and direct the fine, if it has been collected, to be refunded to the accused. The order as to confiscation is also set aside.

Conviction set aside.

1924 MADRAS 730

KRISHNAN, J.

Public Prosecutor—Appellant.

v.

Mari Mudali and others—Accused.

Cr. App. No. 438 of 1923, Decided on 4th September 1923, from the 2nd Class Magistrate of Perundurai, in C. C. No. 710 of 1922.

(a) Criminal P. C., S. 195 (1)—Complaint by Village Magistrate requires no sanction.

Sanction under S. 195 is not necessary where the public servant against whom the offence has been committed is himself the complainant. [P 730, C 2]

(b) Criminal P. C., S. 1— Village Magistrate can complain under Cr. P. C.

S. 1 of the Code merely means that Village Magistrates are not with reference to the proceedings before them as such magistrates governed by the provisions of the Criminal Procedure Code and not that they cannot complain. [P 730, C 1]

A. S. Sivakaminathan for Public Prosecutor—for Appellant.

P. Markandeyulu—for Accused.

Judgment.—This is an appeal by the Government against the acquittal of the accused of an offence, under S. 245, Criminal Procedure Code by the Sub-Magistrate of Perundurai. The acquittal is based on the ground that no sanction had been produced under S. 195, Criminal Procedure Code, from the District Munsif, the complainant being the Village Munsif whose superior is the District Munsif. The complaint that he brought forward against the accused was for an offence under S. 183, Indian Penal Code. The Magistrate overlooked the fact that under S. 195, Criminal Procedure Code, sanction is not necessary, when as here the public servant against whom the offence has been committed is himself the complainant. In such cases as that, no sanction is necessary at all, under S. 195 sub sect. (1) cl. (*a*).

An argument has been put forward by the learned Vakil for the accused, with reference to S. 1 of the Criminal Procedure Code. That section says *inter alia* that nothing contained in the Criminal Procedure Code shall apply to heads of villages in the Presidency of Fort St. George. This is sought to be read, as meaning that the Village Magistrates could not complain or be tried under the Code, because this section excludes the applicability of the Code to heads of villages. Obviously this is not the meaning of the provision at all. It simply means that in his official capacity, as Village Magistrate, that is in the proceedings he takes as village Magistrate, he is not governed by the Criminal Procedure Code. This has nothing to do with his coming forward in any criminal case as a complainant, as in this case he has done.

The order of acquittal must be set aside and case sent back to the 2nd Class Magistrate, Perundurai, for disposal according to law.

Acquittal set aside.

1924 MADRAS 731

SCHWABE, C. J. AND WALLACE, J.

P. Kanniappa Chettiar and others—Defendants—Appellants.

v.

K. Ramchandraiyar and another—Plaintiffs—Respondents.

City Civil Appeal Nos. 51 to 57 of 1921 and Civil Mis. Petition Nos. 900, 902, 904, 905, etc., Decided on 7th December 1922.

Madras City Tenants Protection Act (III of 1922), Ss. 9 and 10—S. 9 applies to pending suits but not where decrees are executed—During appeal application lies to appellate Court—Scope of S. 10 considered.

A trustee of a temple can validly grant a lease of temple lands for building purposes for a term of 31 years with an option for the tenant to renew it for the life period at an enhanced rate. [P 735 C 1]

S. 9 was intended to apply to cases in which the suits were pending and also where suits have resulted in decrees but not where decrees have been executed. (46 Mad. 836 Diss.) An appeal is really continuation of proceedings in the suit and is only a further stage in the same and therefore an application under S. 9 would lie during the pendency of the appeal to the appellate Court. [P 731 C 2, P 732 C 1, 2]

S. E. Sankara Ayyar—for Petitioner.

K. Ramachandra Ayyar

1st Respondentin Person.

Schwabe, C. J.—These are appeals from the decrees of the City Civil Court for ejectment and mesne profits. The plaintiff is a lessee from the trustees of a temple of the lands in question which have been sub-let to the defendants in smaller portions. Several grounds of appeal were raised in the notice of appeal, but they have all been abandoned before us except one ground, namely that amount awarded for mesne profits was awarded without any evidence before the Court to justify the amount. The plaintiff had alleged in his plaint that the proper rent of the land is so much. The defendants in their written statements had not admitted that that figure was correct. Without hearing any evidence, the learned Judge accepted the figure as given in the plaint. In my judgment there was no justification for that, and in the absence of evidence to the contrary, he ought to have taken not that figure but the figure of the rent actually being paid by the various defendants. We are told that nothing was said about the matter in the Court below, and that the plaintiff does not accept the view that the rents actually payable are the proper rents. In the circumstances of the cases I think it is right that these cases should be sent back to the Judge, City Civil Court, for an enquiry into, and on proper evidence to decide, the proper amount payable for mesne profits.

But the important question before us is rather raised by petitions presented to this Court by the various defendants under the Madras Act III of 1922. That Act came into operation after the decrees in these suits but before the execution of those decrees, which, in fact have never been executed, this Court having granted a stay pending the hearing of these appeals. The applications are under S. 9 of that Act, which section provides in certain cases for the purchase by a tenant of his landlord's interest in the land. It is contended on behalf of the plaintiff that that section has no application to a case where a decree for ejectment has been made, as I understand the argument, whether an appeal is pending from that decree or not or whether a deceee has or has not been executed. The argument is mainly based on the decision in A. A. O. No. 182 of 1922, *Latifa Bibi* v. *Mottai Ammal* (1). In that case, the decree for ejectment had been passed, had come up to this Court on appeal and had, on appeal, been confirmed: but the decree had not been executed when the petition for leave to purchase under S 9 was made. It was held that, the decree having been passed and confirmed, the Court had no jurisdiction to grant the petition. That these suits are pending in this Court, I think, is clear from a series of decisions, which decide that in this country an appeal is really a continuation of the proceedings or, as it has been put, is a stage in and part of the proceedings in a suit. *vide* *Kristnamachariar* v. *Mangam-*

(1) 1923 Mad. 320—46 Mad. 836—44 M.L.J. 271—17 M.L.W. 341—(1923) M.W.N. 233—32 M.L.T. 290.

mal (2), *Settappa Goundan* v. *Muthiah Goundan* (3), *Kamayya* v. *Papayya* (4), and particularly the very learned Judgment of Mookerji, J., in *Rai Charan* v. *Biswanath* (5). See also the decision of the Privy Council in an appeal from Ceylon, *Ponnamma* v. *Arumugam* (6). In *Latifa Bi* v. *Mottai Ammal* (1), the Court based its Judgment mainly on the view that, because S. 10 in terms applied the provisions of this Act for compensation for tenants to cases where there had been decrees for ejectment which had not been executed, it followed that S. 9 was not applicable in such cases. But, it is to be observed that S. 10 also applies the compensation sections to cases in which suits are pending, and on the same argument, it would follow that S. 9 need not apply to cases where suits for ejectment are pending, whereas in fact S. 9 applies principally to such cases. The answer, in my judgment, is that S. 10 is dealing with compensation cases, and S. 9 is dealing with cases of purchase and is in itself a complete Code for those cases; and on an examination of S. 9, it is clear that it is intended to apply to cases in which suits are pending and cases in which suits have resulted in decrees but such decrees have not been executed, because in sub-section (3), it says that on an order for conveyance of the land after payment of the price fixed by the Court being made, "any decree or order in ejectment that may have been passed but which has not been executed shall be vacated," and there would be no meaning to be attributed to those words at all if it was not contemplated by that section that application could be made in cases where a decree had been passed, but had not been executed.

In my judgment all these cases come directly under S. 9. The tenants are persons who would be entitled to compensation under S. 3. They have made their applications within 15 days after the date of the coming into force of the Act, and they have made their applications to the proper Court, namely, this Court, in which the suits were then pending. In my judgment, if there had been no appeal pending, they could properly have made their applications to the City Civil Court, because in my view, it was the intention, and must have been the intention of this Act that, after the decree but before the execution at any time, application could be made to the Court having had control of the suit.

It follows from what I have said that I do not agree with the decision in *Latifa Bi* v. *Mottai Ammal* (1)—I do not think that it makes any difference that the decree of the City Civil Court in that case had been affirmed by this Court, so long as the decree had not been executed.

Under S. 9 we have to fix the price according to the market value of the land on the date of the order and for this purpose "land" means "the interest in the land and all other interests which the landlord can convey under any power." For the assistance of the Court in fixing that value, this matter must be referred to some suitable person. The principle of the valuation in such a case will be to ascertain the market-value of the plaintiff's interest in the land as on the date of the order, that is, to day. In arriving at that market-value, he will have to take a reasonable rent from the day of the expiration of the notice to quit until to day, and then to capitalize the value of the rent for the remainder of the plaintiff's term, less, of course, the amount of rent for the balance of the term which the plaintiff had to pay to his superior landlord and which will now become payable by the tenants. He will take into account any enforceable power to renew that the plaintiff may have.

The question of mesne profits which we propose to remit to the City Civil Court will become unnecessary for decision in the event of the price fixed for the land being paid, and therefore the further hearing before the City Civil Court must be stayed pending the final disposal of the petitions under S. 9.

(2) [1902] 26 Mad. 91 (F.B.)
(3) [1908] 31 Mad. 268—4 M.L.T. 77.
(4) [1916] 40 Mad. 259—32 M.L.J. 477—21 M.L.T. 82—(1917) M.W.N. 217—37 I.C. 414—5 L.W. 588 (F.B.)
(5) [1914] 20 C.L.J. 107—26 I.C. 410.
(6) [1905] A.C. 383—74 L.J., P.C., 102—92 L.T. 740—21 T.L.R. 524.

The appellants have succeeded in this appeal. It is true that the main part of the argument has turned on the petitions, but they were entitled to come here and complain that an order for mesne profits was made against them which was wrong, and the usual result will follow that the first respondent must pay the costs of the appellants—one set. It might have been a case where we should order less cost to be paid but for the fact that the first respondent has refused to admit the right of the appellants under S. 9, and it is by reason of that refusal that this appeal has really been substantially fought.

The appellants have brought the superior landlord before the Court quite unnecessarily and quite wrongly, and they must pay for having done so his costs—one set.

The further consideration of the petitions will be adjourned until Monday the 8th instant. The question of costs on the petitions is reserved.

Wallace, J.—I agree. I only wish to say a word or two on the interpretation of Ss. 9 and 10 of Act III of 1922. S. 10, as I read it, is intended to introduce into the obligation for compensation by landlords to tenants, a similar species of relief proceeding parallel with the trial of the suit and postponing the obtaining of a decree or preventing its execution when obtained, as S. 9 applies to the privilege granted to tenants to purchase the landlord's right. S. 9 obviously applies to pending suits, otherwise a reference to a summons is unmeaning, and it also applies to suits in which decrees have been passed but not executed, as sub-S. (3) clearly indicates. It therefore applies to both the stages of suit which are contemplated also by S. 10. I therefore must disagree with the Judgment of Spencer and Venkatasubba Rao, JJ., in *Latifa Bi* v. *Mottai Ammal* (1) in so far as they interpret the omission of S. 9 in S. 10 as implying that S. 9 cannot apply to suits in which a decree has been passed before the Act came into force, although not executed. The whole object of S. 9 appears to me to be to allow the tenant who is liable to ejectment, whether under a decree or not, purchase the landlord's right. So long as the decree for ejectment has not been executed, whatever the reasons for non-execution may be and whether or not they were due to an application by the tenant himself for stay of execution do not matter and cannot affect the applicability of the section.

In the present case, S. 9 in terms applies. There are suits instituted against the defendants and decrees which have not yet been executed; and there are applications put in by them, within 15 days of the coming into force of the Act, to the Court, that is this Court, before whom the suits (in their stages as appeals) were then pending. Therefore the defendants are fully entitled to take advantage of S. 9 and have their applications under S. 9 heard and determined.

I therefore fully agree with the order proposed by the learned Chief Justice.

[These Petitions came on for final hearing after submission of the Official Referee's report on 14th December, 1923.]

[These Petitions coming on for further hearing on Monday, the 8th January 1924 the Court made the following]

Order.—The parties having failed as to price of the lands, we refer the matter to the Official Referee to fix the price of the lands, on the principles laid down in this judgment and to report to us accordingly.

Schwabe, C. J. — These appeals were remanded, for a finding to the Official Referee and they come to us on report. The relevant facts are that the trustee of a temple granted a lease to the 1st respondent of certain building lands, and he sub-let part of these lands to the petitioners. On an attempt to eject the petitioners by the respondent, the petitioners under the Madras Act, III of 1922, which had come into operation meanwhile, claimed to purchase the Respondent's interest and the matter was referred to the Official Referee to determine what the value of the Respondent's interest in the land was.

The Official Referee has reported and he has fixed the proper annual rent of the property; he has deducted

therefrom what he considers a proper proportion of the rents, rates, etc., payable to the superior landlord, the trustee of the temple, appropriate to the petitioners' portions of land; he has capitalized the amount payable on a 7½ per cent. basis. In respect of the last I do not agree with the basis on which he has capitalized. I think that in a matter of this kind, a 6 per cent. basis is quite sufficient, as the amount of the Court interest allowed is about the amount that can be obtained by investing in Government securities and I see no reason at all why in arriving at a figure in a case of this kind we ought to assume that the person receiving money will invest it at a higher rate of interest in some speculative form of investment. As regards the deduction of amount for rents, rates, etc., payable to the superior landlord, it is not at all clear that it is a proper deduction to make, because there is no provision in the Act under which the superior landlord can be made to look to the sub-tenant who is taking over part of the interest of the tenant and, in the absence of an agreement by the superior landlord, the tenant would be left to pay him at any rate the rent in respect of those portions. This is merely a matter of adjustment. If that liability is to be left totally on the shoulders of the tenant, it is obvious that the sub tenant cannot, in arriving at the amount payable by him for compensation, have the sum worked out on the basis that these amounts would be payable by him. However, we are informed that it is possible that the superior landlord will come to terms with these tenants under which he will take the rents, rates, and such like payments from them and relieve the tenant *protanto*. This case had better, therefore, be adjourned to Monday next to see if any and what terms could be come to in that respect.

That leaves an important question and that is whether the lease by the temple trustee being for 21 years with an option to the tenant to renew it at the end of the 21 years at an enhanced rent is good or bad. It has been held by the Official Referee that the second 21 years, that is to say, the option period, is not to be taken into consideration in arriving at the compensation, because in his view that option is bad in law on the ground that the trustee had no power to enter into a lease for that period, as he looks upon it as a lease for a period of 42 years with liberty to the tenant to determine it at the expiry of 21 years, and holds that the lease is void. I do not agree with him. The question to be determined in such cases is whether it is a lease that a prudent man would make under the circumstances in the interests of himself if it were his own property, or in the interests of others if he was doing his best for them. The Indian Trusts Act provides in the case of ordinary trustees for the length of lease which they may grant and this lease is for a period longer than would be allowable under that Act, but that Act expressly does not include trusts like the present trust. It may be a very good guide in arriving at the answer to the question whether this was a proper agreement to enter into because one would assume that the legislature in fixing a period as between an ordinary trustee and a *cesti qui trust* was considering what was reasonably a prudent thing for a trustee to do with trust property. But in this case there is an element which comes into consideration which does not appear to have entered into the consideration of the legislature in passing the Indian Trusts Act and which, in my Judgment, removes this case outside any consideration based on that Act altogether and that is that the lease in question was a building lease. The whole object of the lease was to turn agricultural or undeveloped land into building land, that the tenant under the lease should build upon the land and pay an enhanced rent over and above the agricultural rent because he was going to build upon it, and that at the determination of the tenancy the structure should fall in to the landlord at a valuation. It is obvious that no one is going to enter into an agreement of that kind unless he has a reasonable time before him to make it remunerative; and so we find in England that it has been held

as regards trustees who are letting any land for building purposes on a ground rent that the minimum period is 60 years and the maximum 99 years. Here where we are dealing with town property we find that the trustee enters into an agreement for 21 years with an option of renewal at an enhanced rent for 21 years, I can find nothing unreasonable or unlawful in the transaction at all, and I am quite clear that the option that he has granted in this case is perfectly valid, and that being so, it is necessary that the option of 21 years should be valued. In arriving at that valuation I think we must first enquire what the rental value of the land is. With some hesitation I have come to the conclusion that the Official Referee's figure is the right one. The matter was before him; he saw this land and enquired into the matter; and though I am clear that he has not erred on the side of liberality, I think there is not enough for us to disturb his finding in that respect. Therefore we must take the same rate as he has taken for the period down to the end of 21 years for the option period. Then again, that will be subject to the question which is still left open as to whether it is to be reduced or not by reason of the amounts for rents, rates, etc., which are payable to the landlord and that will again have to be capitalized on the same basis that I have held is right in respect of the other sum, that is, 6 per cent. As, however, this decision is not binding upon the supperior landlord and it will be open to him, if he is so advised, notwithstanding this judgment to litigate the question as to whether this option is good or bad, it has been agreed between the parties that the amounts found due for the 21 years period shall be paid into Court and invested, that the income thereof shall be paid to the 1st respondent until the renewal has been granted, or it has been finally decided that the trustee is not bound to grant it, and that the amount shall be paid out to the 1st respondent or in proper proportion to the petitioners if and when that course becomes possible by reason of the final determination of that matter. By reason of this amount remaining in Court there must be liberty to apply to City Civil Court. The compensation for the other period will, of course, be paid to the 1st respondent. No order as to costs.

Wallace, J.—I agree.

The Court made the following

Order.—The parties have now come to an agreement on the basis for our preliminary judgment of December the 14th. That agreement signed by the vakil for the appellant and by the 1st respondent with the statement of account annexed will be filed and the decree drawn up accordingly. There will be liberty to apply to the City Civil Court in respect of this matter generally.

✱ 1924 MADRAS 735

WALLACE, J.

Muthiah Chetty, In Re.—Petitioner.

Cr Rev. Case No. 636 of 1923 and Cr. Rev. Pet. No. 506 of 1923, Decided on 11th December 1923.

✱ *Criminal Procedure Code, S. 256—Accused is entitled to cross examine prosecution witnesses even before charge.*

Even before charge is framed an accused is entitled to cross examine the witnesses for the prosecution. Refusal to allow such cross examination is in contravention of the law and is illegal. [P 735 C 2]

K V. Krishnaswamy Aiyar—for Petitioner.

V. L. Ethiraj for *Public Prosecutor*—for the Crown.

Order.—No Magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses, before charge is framed, and the Magistrate's procedure in refusing to allow such cross-examination was most irregular and in contravention of the law. Without going into the larger question whether that procedure has rendered illegal, the charge framed, on evidence so irregularly taken, I consider that the fairest course to the accused is to cancel the charge and direct that the cross-examination of the witnesses be now permitted. I direct accordingly.

Petition allowed.

✱ 1924 MADRAS 736

KUMARASWAMY SASTRI, J.

Agnes Isabella Campbell and another —Plaintiffs.

v,

C. Audikesavula Nayudu and others —Defendants.

Civil Suit No. 257 of 1921, Decided on 2nd April 1924.

(a) *Limitation Act, Arts, 147 and 148.*

The period of limitation for a suit for foreclosure or sale, or for the redemption of an English mortgage is 60 years under Arts. 147 and 148 respectively.

(b) *Mortgagor and mortgagee—English mortgage—Mortgagee is ordinarily entitled to* post diem *interest after the due date but not compound interest—Mortgagee even entitled to power of sale contained in the mortgage does not disentitle mortgagee to* post diem *interest.*

The mortgagee of an English mortgage is entitled to *post-diem* interest up till the date of redemption at the same rate as that provided for in the document for the period fixed for payment unless the terms of the document show that the parties intended that no interest should be paid subsequent to the date when the mortgage-money falls due. (Case law reviewed). The mortgagee is however not entitled to compound interest. A power of sale to the mortgagee on failure of the mortgagors to pay the amount with interest on the due date does not impliedly destroy right to subsequent interest.

✱ (c) *T. P. Act—Applicability.*

T.P. Act 1882 only codifies the general principles of equity. Where an English mortgage executed, in 1874 was sought to be redeemad in 1921 *held* the manner in which accounts are to be taken is that contained in Sect. 76 (b) of the Act. [P. 741, C. 1.]

I. V. Ramanuja Rao—for Plaintiffs.

Messrs V. Radhakrishnayya, S. Alasingarachari and V. S. Govinda Chari—for Defendants.

Judgment.—The plaintiffs sued to redeem the property mentioned in the plaint, which was mortgaged on the 17th July, 1874, to secure the sum of Rs. 8,450 with interest at 12 p. c. per annum. The mortgagee was in possession of the property. A decree was passed on the 2nd of March, 1922 declaring that the plaintiffs are entitled to redeem the mortgage and directing accounts to be taken of the amount due to the defendants for principal and interest, of the rents and profits of the mortgaged property, of the sums paid for rates, taxes and other public charges, of the sums paid by the defendants for the due management of the property and of the sums paid for necessary repairs. The matter was referred to the Official Referee who has submitted a report. Objections have been taken by the plaintiffs; but the defendants have filed no objections. The objections pres- before me are that, as there was no provision for payment of interest after July 1879, the Official Referee was wrong in giving *post diem* interest, at the bond rate, and the defendants are only entitled to interest by way of damages, at 6 per cent. for six years, and that instead of applying the income received by the mortgagee, first in reduction of public charges, repairs and then of the interest payable, the Official Referee has taken an account of each year, adding up the total charges and the interest etc., deducting from the amount so arrived at, the income for the year, leaving a balance against the mortgagors and has allowed upon that balance 12 per cent. per annum. This is in effect giving compound interest.

The first objection relates to *post diem* interest and this turns upon the terms of the mortgage. The deed of mortgage recites that the mortgagors grant and convey the property specified in the mortgage to the mortgagee, " to have and to hold the said premises unto and to the use of the mortgagee," his heirs and assigns subject to the following proviso :—

" provided always that if the said John William Coxe, E. W. Coxe, J. H. Coxe, T. P. Coxe and Agnes Isabella Coxe, their heirs, executors' administrators, representatives or assigns shall pay unto the said Canckoo Iyaloo Naidu his executors, administrators, representatives or assigns the sum of Rs. 8,450 on or before the 1st day of July, 1879, together with interest for the same in the meantime after the rate of 12 per cent, per annum. without any deduction, then the said Canckoo Iyaloo Naidu, his heirs or assigns, will, upon the request and at the cost of the said John William Coxe..... their, or any of their heirs, executors, administrators, representatives or assigns reconvey the hereditaments, hereby granted to the use of the said John William Coxe..... their, or any of their heirs and assigns or as they, or he shall direct; but if default shall be made in payment of the said sum of Rs. 8,450, or the interest thereon in the manner aforesaid, or any part thereof respectively, on

the 1st day of July' 1879, it shall be lawful for the said Canckoo Iyaloo Naidu, his heirs, executors, administrators, representatives, or assigns, without any further consent, on the part of the said John William Coxe..... .....their, or any or either of their heirs, or assigns, to sell the hereditaments, hereby granted together or in parcels and either by public auction or private contract with power upon any such sale to make any stipulations as to title or evidence of title, or otherwise, which the said Canckoo Iyaloo Naidu, his heirs, executors, or assigns shall deem proper and also with full power to buy in, or rescind, any contract for sale of the said premises and to resell the same, without being responsible for any loss occasioned thereby."

The deed goes on to provide that the mortgagee, his executors,.administrators representatives, or assigns:

"shall hold the monies to arise from any such sale upon trust in the first place thereout or to reimburse himself, or themselves, or pay and discharge all the costs and expenses attending, incurred in or about such sale or otherwise in respect of the premises and in the next place to apply such monies in or towards satisfaction of all and singular the monies for the time being, owing on the security of these presents and to pay the surplus (if any) of the said premises unto the said John William Coxe, E. W. Coxe, J. H. Coxe, T. P. Coxe and Agnes Isabella Coxe, their or any or either of their executors, administrators, representatives, or assigns."

The deed goes on to state that the mortgagors will pay the mortgagee the sum of Rs. 8450 together with interest for the same in the meantime, after the rate of 12 per cent. per annum on the 1st day or July, 1879, without any deduction.

The deed is thus a deed of English mortgage falling within the definition of S. 58 (e) of the Transfer of Property Act, which runs as follows :—

"Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgage property absolutely to the mortgagee but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage."

In cases of English mortgage, the article of the Limitation Act, which is applicable to suits on the mortgage is Art. 147, which runs as follows :—

"By a mortgagee for foreclosure or sale—60 years—when the money secured by the mortgage becomes due".

The period of limitation prescribed, under Art, 148, which relates to suits against mortgagees to redeem or to recover possession of immoveable property mortgaged is also 60 years. Art. 132 which applies to mortgages other than English mortgages provides for period of 12 years.

If therefore, the mortgagee's heirs filed a suit against the mortgagor's heirs for the sale of the property, 60 years would be the period of limitation and not 12 years, under Art 132. There is therefore, no force in the contention of the vakil for the plaintiffs that assuming that *post diem* interest can be granted and it is a charge on the property, interest cannot be given, for more than 12 years, as the remedies on the mortgage would become barred by that date under Art. 172.

The contention of the vakil for the plaintiffs is that the mortgage money was repayable on the 1st of July 1879, that in default, the remedy given to mortgagee is to sell the property, by public auction or private contract, that the preamble to the mortgage shows that there was a previous mortgage which gave the right of sale and the mortgagee was going to exercise that right, that the mortgage in question was executed *inter alia* to prevent the sale, that part of the consideration was the giving up of the right to bring the property to immediate sale by the mortgagee, that the power of sale is not an ordinary incident, attached to every mortgage, but an extra power conferred and that where such a power is conferred, it must be taken that the parties provided a remedy to be enforced at once, if the mortgage money be not paid. He referred to *Chajmal Das* v. *Brij Bhukan Lal* (1), *Mathura Das* v. *Raja Narain Bahadur* (2) *Bindesri Naik* v. *Ganga Saran Sahu* (3) and *Badi Bibi Sahiba* v. *Sami Pillai* (4). It is argued that there is no presumption that *post diem* interest is to be paid in all cases, that where from the express terms of the document it is clear *post diem* interest is not payable, it cannot be granted by the Court except by way of damages for breach of con-

(1) [1895] 17 All. 511—22 I. A. 199—6 Sar. 624 (P. C.)
(2) [1897] 19 All. 39—23 I. A. 138—1 C.W.N. 52—6 M.L.J. 214—7 Sar. 88 (P. C.)
(3) [1898] 20 All. 171—25 I. A. 9—2 C. W. N. 129—7 Sar. 273 (P. C.)
(4) [1895] 18 Mad. 257.

tract to pay which damages could not form a charge on the property and would be subject to the usual rule of limitation applicable to suits for damages and that it is only when the document is not clear and two views are possible, Courts can follow the rule, which gives the lender interest on his money.

The contention for the defendants is that where a person promises to pay on a certain date and fails to do so, there is a presumption that the parties intended that interest which was payable till that date should continue to run till payment, that where a power of sale is given a mortgagee exercising it after the date of default would be entitled to retain in his hands interest, up till that date, even though his remedy by way of a suit on the mortgage may be barred, that the mortgagor who seeks to redeem cannot be in a better position, that so far as limitation is concerned, *post diem* interest, whether given as interest or damages, should be paid until at least the right to sue on the mortgage is barred and that in the present case the mortgagee is entitled to *post diem* interest, as allowed by the Official Referee and reference has been made to *Ghantayya* v. *Papayya* (5), *Moti Singh* v. *Ramohari Singh* (6), *Daudbhai Rambhai* v. *Daudbai Allibhai* (7), *Motan Mal* v. *Muhammad Bakhsh* (8) and *Dingle* v. *Coppen* (9) and Fisher on Mortgages Chapter IV.

So far as *post diem* interest is concerned, though there is a conflict of authority, as regards the earlier Madras cases, I think the later decisions lean in favour of granting *post diem* interest, unless the terms of the document show that it was the intention of the parties that no interest should be paid subsequent to the date when the mortgage money falls due.

In *Chajmul Das* v. *Brij Bhukan Lal* (1), their Lordships of the Privy Council were not prepared to dissent from the view of High Court that *post diem* interest was not payable, in respect of the mortgage sued on and that damages could be awarded "at the rate which could *prima facie* be the same as that provided by the bond during the two years, although there is no rule of law making the rate necessarily the measure of damages."

In *Mathura Das* v. *Raja Narain Bahadur* (2), the deed of mortgage dated the 17th of January 1880 provided for payment of the principal within one year, with interest at Rs. 0-1-6 per mensem. The borrower agreed that he would not transfer the mortgaged property, until payment of both the principal and interest and that the amount paid should be first credited to the payment of interest and the balance, after that, should go to reduce the principal. A suit was filed in 1891. The defendant contended that interest was not payable after the expiry of one year and that in any event such interest was not chargeable on the property and could not be claimed for more than six years, for breach of promise to pay. The Subordinate Judge awarded only one year's interest and held that the claim for interest, by way of damages for breach of promise to pay would be barred within six years. The Allahabad High Court affirmed this decree. On appeal, their Lordships of the Privy Council reversed the decree of the High Court and held that the mortgagee was entitled to *post diem* interest, at the bond rate and observed:—

"The provision for applying payments to reduction of interest points strongly to the expectation of the parties that the transaction will not be closed when the fixed day of payment arrives. The construction of the High Court ascribes to the parties an intention that, however, payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract but shall be driven to treat the contract as broken and to seek for damages, which lie in the discretion of a Jury or a Court, and are subject to a different law of prescription."

They were of opinion that in the contract sued on, the words 'the amount' in the clause 'that if the mortgagor fails, the mortgagee may proceed to realise *the amount*, obviously meant the amount of principal and interest up to the time of realisation.

(5) [1900] 23 Mad. 534.
(6) [1897] 24 Cal. 699—1 C.W.N. 437 (F. B.)
(7) [1890] 14 Bom. 113.
(8) 1922 Lah. 251—3 Lah. 200—42 P. L. R. 1922 (F B.)
(9) [1899] 1 Ch. 726—68 L. J. Ch. 337—79 L. T. 693—47 W. R. 279.

In *Bindesri Naik* v. *Ganga Saran Sahu* (3), the suit was on two deeds of mortgage. The first provided for the repayment of the debt in two years, with interest at Rs. 1-8-0 a month and the second provided that the debt should be repaid, on the day when the first loan would become due and at same rate of interest. Both the mortgages were by conditional sale. The High Court held that *post diem* interest was not payble under the terms of the documents; but their Lordships of the Privy Council were of opinion that the clause, that in default of punctual payment, at the end of each year, the mortgagees were to be at liberty to treat the unpaid interest as principal and to recover it from the mortgaged property, showed that the parties contemplated *post diem* interest, as being chargeable. Both these cases proceeded on the construction of a particular document and I can find no general rule enunciated, which would apply to all cases of *post diem* interest.

In *Badi Bibi Sahibal* v. *Sami Pillai* (4), the deed of mortgage was executed in 1875. Interest was to run, at 7 per cent. per annum, and the sum was payable on the 30th of October, 1878. It was held by Muthusami Aiyar and Best, JJ., relying upon *Cook* v. *Fowler* (10), *Gudri Koer* v. *Bhubaneswari Coomar Singh* (11) and *Mansab Ail* v. *Gulab Chand* (12), that since the instrument did not provide for interest *post diem*, any claim in the nature of a claim for such interest could be allowed, by way of damages only, and was not a charge on the land and that it was barred by limitation.

In *Thayar Ammal* v. *Lakshmi Ammal* (13), Best and Subramania Aiyar, JJ., held that *post diem* interest was only claimable as damages and that it was barred by limitation. The suit was on a mortgage dated 16th February 1880, and it was filed in 1893. Subramania Aiyar, J. in an elaborate judgment, held that where a mortgage document does not provide for *post diem* interest, the plaintiff can only claim it as damages, for withholding the money and that such a claim would be barred, under Sect. 116 of the Limitation Act, if the suit is filed more than six years after date, when the principal money became payable. The later decisions of Subramania Aiyar, J., which I shall refer to, however, show that the learned Judge changed his view on the question.

In *Pedda Subbaraya Chetti* v. *Ganga Razulungaru* (14), the suit was on a mortgage and the principal amount was payable on the 24th of July 1886. The amount secured by the mortgage was arrived at, by calculating the principal and interest due on previous loans and the mortgage was expressed to be for securing the payment of that principal, together with subsequent interest, that may accrue annually. It also provided for compound interest. The learned Judges Shephard and Davies, JJ, after referring to the above facts observed:

> "These provisions are more consistent than otherwise with an intention, which in itself is the most probable one, when, to use the language of the Judicial Committee, regard is had to the ordinary expectations of persons entering into a mortgage transaction,"

and *post diem* interest was allowed.

In *Jivanna Panditha*r v. *Appalu* (15) the suit was on a bond executed in December, 1881, which provided that interest should be paid every year and that the principal should be paid in December, 1884. Shephard and Subramania Aiyar, JJ., were of opinion that *post diem* interest should be allowed, on the ground that the stipulation for payment of interest annually showed that it was not intended that interest should cease, when the principal amount became payable.

In *Ghantayya* v. *Papayya* (5), the amount due on the mortgage was payable, with interest at 12 per cent. in three annual instalments and on failure of one instalment, the whole amount was to become due. There was no provision for *post diem* interest. It was held by Subramania Aiyar and Moore, JJ., that *post diem*

(10) [1874] 7 H L 27—43 L. J. Ch. 855
(11) [1892] 19 Cal. 19.
(12) [1888] 10 All. 85—1887 A W N 292.
(13) [1895] 18 Mad. 331.
(14) [1897] 20 Mad. 149—7 M L J 18
(15) [1899] 22 Mad 339.

interest was payable so long as the principal sum was improperly withheld and that it was certainly more reasonable to hold that the promise to pay interest in a document, like the one they were considering, was a promise to pay interest, so long as the principal sum was improperly withheld and it does not raise any legal presumption in such cases, but that it was only the adoption of a rule of construction. The learned Judges were of opinion that the decision of the Privy Council in *Mathura Das* v. *Raja Narain Bahadur* (2) supported their view and were disposed to follow the view, taken by Trevelyan and Banerjee, JJ., in *Moti Singh* v. *Ramohari Singh* (6).

In *Narasimhayya* v. *Srinivasayya*(16) Sadasiva Aiyar and Spencer, JJ., held that *post diem* interest was recoverable in cases of mortgages, where a definite term is fixed in the bond for repayment, on the general promise of the debtor to be liable for interest. The learned Judges were of opinion that they were bound by the decision of the Privy Council in *Mathura Das* v. *Raja Narain Bahadur* (2) and *Bindesri Naik* v. *Ganga Saran Sahu* (3) and by the decisions of the Madras High Court in *Ghantayya* v. *Papayya* (5) and *Ramanathan Chetty* v. *Nur Muhamad Maracayar* (17) to hold:

"That *post diem* interest is payable, on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond, for repayment of the principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking (which may be called appurtenant to the principal undertaking) to pay interest upon arrears of interest and which further undertaking is found in the same document following the provision to pay interest, it is difficult to hold that the parties intended that only the principal undertaking should apply to the question of the liability for *post diem* interest and not the appurtenant undertaking also."

In *Thathothathil Poker* v. *Ramchandra Shenoy* (18), it was held by Sir John Wallis, O. C. J., and Seshagiri Aiyar, J., that *post diem* interest may be granted by way of damages, but that compound interest is not chargeable, after the date mentioned in the document.

In *Daudbhai Rambhai* v. *Daudbhai Allibhai* (7), a suit was filed in 1882, to redeem a mortgage effected in 1833. There was no period fixed for payment and the first Court decreed interest, from the date of the document to the date of redemption. On appeal, the District Judge held that interest could only be awarded for a period of six years. In the course of the argument, it was contended that the mortgagee could not claim interest, for more than 12 years under Art. 132 of the Limitation Act. Scott and Jardine JJ., held that interest was payable till the date of redemption.

In *Motan Lal* v. *Muhammad Bakhsh* (8) a Full Bench of that Court held that where a mortgage contains no express provision, for payment of interest, after the due date, there is no presumption, one way or the other, as to payment of *post diem* interest, that the determination of the question must depend entirely upon the interpretation of the document, that the mortgagee is however, entitled to damages on account of the failure to pay the debt, at the stipulated time, the measure of damages *prima facie* being the same, as the interest agreed upon and that in cases where the mortgagee is the plaintiff he can sue to recover *post diem* interest, only for the period prescribed by the law of limitation, applicable to a suit for compensation, for breach of contract, but that if the mortgagee is a defendant in an action, he is entitled to recover damages for the entire period, during which the principal sum remained unpaid.

I am unable to find anything in the mortgage document now in question which necessarily indicates that the parties did not intend to pay *post diem* interest. The granting of the power of sale is only a remedy, which is usually given, and the mortgagee is not bound to exercise the power, any more than he is bound to sue on the expiry of the due date, under penalty of his losing subsequent interest.

I think that the plaintiffs, who want to redeem the property mortgaged, are bound to pay interest

(16) [1919] 36 M. L. J. 118—52 I. C. 313.
(17) [1901] 11 M. L. J. 183.
(18) [1915] 16 M.L.T. 478—26 I.C. 124.

post diem, up to the date of redemption, credit of course being given to any sums, which the defendants got from the mortgaged property, during the period they were in possession.

The next question relates to the manner in which accounts are to be taken. The mortgagee being in possession, S. 76 of the Transfer of Property Act applies to the period between 1882, when the Act was passed, and the date of the decree. As regards the period prior to that, the Transfer of Property Act only codifies the general principles of equity in such cases and the same principle would apply. Cl. (h) of S. 76 of the Transfer of Property Act, after providing for the expenses incurred by the mortgagee, enacts that the receipts from the mortgaged property, after deducting the expenses mentioned in Cls. (c) and (d), which relate to taxes and necessary repairs, should be debited against him, in reduction of the amount (if any), from time to time, due to him, on account of interest, on the mortgage money and that any surplus should be appropriated towards the reduction of the principal. In the present case, I think accounts are to be taken, in the manner prescribed by the section. There is no warrant for compound interest being allowed. The expenses should be deducted from the income of the property, which is found by the Official Referee to have accrued and the balance should be appropriated first towards the interest due and if there is any surplus, towards the principal.

The report of the Official Referee will be modified and a final decree will be passed in the light of my above observations. The accounts will be taken till this date. Time for redemption 4 months. In default of redemption, the plaintiffs will be foreclosed. Costs reserved.

Suit decreed.

✱ 1924 MADRAS 741

OLDFIELD AND RAMESAM, JJ.

Venkatarama Iyer — Defendant—Appellant.

v.

Subramania Sastry and others—Respondents.

S. A. No. 73 of 1920, Decided on 7th April 1923, against the decree of the Court of the Temporary Subordinate Judge at Tanjore.

✱ (a) *Co-sharer — Adverse possession by transferee from co-sharer with notice of nature of joint property begins only on exclusion but not where there is no notice.*

For establishing title by prescription in one co-owner under the strict rule to which co-owners are subject, there should be evidence of exclusion of the other co-owners from possession or of assertion of exclusive title. The rule applies equally to a transferee from a co-sharer with actual or constructive notice of the fact that his alienor was only a co-sharer. However where such a transferee has neither actual nor constructive notice of the common character of the property, he will be on the same footing as any ordinary transferee with an independent but invalid title or without none and need not prove exclusion or denial of title of the other co-sharers 23 Bom. 137 Not Foll. 18 Cal. 10 (P. C.); 19 Cal. 253; 43 Mad. 244 Foll. [P. 746, C. 1]

Prescription for part of tenancy in common property is not impossible but must be established by evidence not only of adverse possession in the ordinary sense of that term but further of assertions of title and exclusion irreconcilable with the existence of any tenancy in common. [P. 747, C. 2]

(b) *Land-tenures — Somudayam and Karaiyeedu tenures — Suit for partition of village lands lies.*

Samudayam tenure is a holding in common by the village community known as the mirasidars.

Karaiyeedu tenure consists in a system of shifting severalty of ownership, the village lands being redistributed among the mirasidars at intervals. A suit brought for the partition of the village lands and for change to individual ownership lies whether the tenure of the village is Samudayam tenure or the Karaiyeedu tenure. [P. 742, C. 2]

T. Narasimha Aiyangar and *K. R. Narayanaswami Aiyar* — for Appellant.

S. Swaminadhan, K. V. Krishnaswami Aiyar, S. Varadachariar, S. Rangaswami, N. Kunjitapatham Aiyar and *M. S. Venkatarama Aiyar*—for Respondents.

Judgment.—This appeal is by the 117th defendant and it is opposed mainly by the 22nd defendant. The hearing has taken a considerable time, but the issues, now that the facts are ascertained, are clear.

The suit was brought for the partition of the *Samudayam* land of a village in the Tanjore District, the *Samudayam* tenure, as explained in the District Manual, being a holding in common by the village community known as the mirasidars. It is not disputed that the land, of which partition is claimed, was and is *Samudayam* land; nor has any serious attempt been made to dispute here that it has never been divided and that it is now partible. On this point, it may be observed that the 22nd defendant no doubt set up a previous partition in his written statement; but it is clear that the matter is *res judicata*, against him, in consequence of Exs. T. A and R. the judgments in O. S. No. 367 of 1900. The lower appellate Court held that the parties before it had established their right to a certain number of shares in the *Samudayam*, of 30-59/64 shares, and, in a portion of its judgment which has formed the principal subject of discussion, it allowed the 22nd Defendant to retain as his share the plots in item No. 1., of which he is already in possession, item No. 1 being 4½ velis in extent and the most valuable plot of the property in dispute and consisting in *padugai* land. The question argued first has accordingly been whether the 22nd defendant has a right to retain, in a division, the plots in item No. 1, of which he is in possession.

Prima facie, of course, the finding, which has already been referred to, in favour of the partible character of the land, entails that no share has been localized so far, since localization could only take place, on the ascertainment of shares on partition. The lower appellate Court has however supported the claim of the 22nd defendant in two ways: firstly, on the ground that he has prescribed for the ownership of the plots he is in possession of and secondly, on certain equitable considerations. It has no doubt not distinguished these two grounds very carefully in its judgment but we think that its decision is based on both of them.

Before dealing with the law, regarding the question of prescription, we may observe that something has been said as to the *Karaiyeedu* tenure of the village. This tenure was not referred to at all in the pleadings and it appears to have attracted very little, if any, attention before the District Munsif. More, however, was said of it in the lower appellate Court, though it is not clear that any finding was reached, as to the existence in the village of the tenure. The tenure we may observe, as the District Manual defines it consists in a system of shifting severalty of ownership, the village lands being re-distributed among the mirasidars at intervals. It is clear that when a suit is brought for the partition of the village lands and for change to individual ownership, it cannot affect directly the sustainability of such a suit, whether the tenure of the village is ownership by the community, that is ordinary *Samudayam* tenure, or whether it is the shifting severalty of the ownership, of which the *Karaiyeedu* tenure consists; and accordingly the only importance for our present purpose of the allegations as to *Karaiyeedu* is that they may, if they are established, afford an explanation of the origin and character of the separate possession, on which the 22nd defendant would establish his prescription.

To turn to the direct consideration of that plea, we find the District Munsif dealing at some length with the 22nd Defendant's title to the different portions of item No. 1 and with his enjoyment; but the lower appellate Court has not considered the evidence relating to that part of the case in any detail. It has contented itself with a general statement that it thinks that the prescription is made out. Even if the plea of prescription could be accepted at once, with direct reference to the evidence as to the 22nd Defendant's possession, the lower appellate Court's consideration of that evidence would be inadequate.

The next material objection to the lower appellate Court's judgment in that it has dealt with the 22nd Defen-

dant's possession on the basis that it was the possession of a stranger to the co-tenancy, to which the other parties at least belong. It has done this, because there are in various places in the pleadings and evidence general statements that the 22nd Defendant is not a mirasidar. The exact meaning of such statements is not clear. It is no doubt shown that the 22nd Defendant does not claim his mirasi right, in virtue of any lineal descent from a previous holder of mirasi right; but that is probably the case with very few of the mirasidars of the present day. Certainly it is not the case with all the others, who are accepted by the lower appellate Court, as co-sharers in the suit village. The 22nd defendant however acquired his mirasi right, in virtue of his acquisition of particular properties, which were in fact part of the *Samudayam*, but are not described with regard to shares in it. It is of course conceivable that such acquisitions of *Samudayam* properties may import an implied denial that they were part of the common property; but it will be for the lower appellate Court to consider whether that is so, or whether the terms of the sale-deeds simply correspond with the current methods of expression, regarding the common property and are consistent with the acquisition of the lands specified in them as parts of the common property and with the 22nd defendant's acquisition of the character of a co-owner or mirasidar.

The importance of this is that a very different measure of proof of prescription will be required, according as the 22nd defendant claims to have prescribed as a stranger to the co-tenancy, or as a mirasidar or co-tenant. It is possible, although we express no final opinion on the point, that the facts found proved by the District Munsif might be sufficient to justify a plea of prescription by a stranger; but, if prescription by a mirasidar or co-tenant were in question, it might then be necessary for us to consider, and the lower appellate Court will have to consider, whether those facts included such evidence of exclusion of other co-sharers from possession, or of assertion of an exclusive title, as would be necessary under the strict rule, to which co-owners are subject. We must accordingly call on the Additional Subordinate Judge, Tanjore, to whom the jurisdiction of the lower appellate Court has now been transferred, to submit findings on the following issues: —

Firstly —Has the 22nd defendant acquired the character of a mirasidar, in virtue of the purchases relied upon by him, or is he for the purpose of his plea of prescription to be regarded as not one of the co-tenants against whom he is prescribing?

Secondly.—Whether the 22nd defendant has completed any prescription for ownership appropriate to the character, which he is found to possess?

As we are calling for a finding, with reference to adverse possession, we do not at the stage deal with the lower appellate Court's alternative ground of decision, *viz.*, the claim of the 22nd Defendant, on equitable considerations. For the moment, we would only observe that such considerations will be relevant, in connection with the distribution of the shares, as ascertained in a proper scheme, after the preliminary decree has been passed and in order to and before the passing of the final decree. We shall, if necessary, point out in eventually remanding the case for the passing of a final decree one or two respects, in which we think that the lower appellate Court's statement of law is open to question. When findings on remand are received we shall also deal with the claim to reduction of the 22nd defendant's share, on the ground that no reduction from it has already been made, to correspond with the increases allowed to the shares of other parties.

At this stage, the only remaining matters for consideration are certain claims relating to particular items or cases of particular parties, which have been put forward in the Appeal and the Memorandum of Cross-objections. In the appeal, there is firstly a claim based on the words alleged to be a proper interpretation of Exs. 83 and 49. Before us, that claim has not been disputed and we must therefore

modify the Lower Appellate Court's judgment by adding a ⅓rd to the 1-15/16 share already allowed by the Subordinate Judge to the 117th Defendant.

Next, the 22nd Defendant, in his Memorandum of Cross-objections, has claimed an addition of 1/32 to his share, on the ground that Ex. N. has been misread. This is not disputed. His share will be increased by 1/32.

The other ground in the Memorandum which is argued relates to the share of the 6th Plaintiff. This has eventually not been pressed before us.

The other claim made by the 117th Defendant is that the ⅜th share awarded by the Lower Appellate Court to the 65th Defendant should have been deducted from the share given to the 22nd Defendant. The only facts which it is necessary to mention at this stage are that the 65th Defendant's title is based on a sale-deed, Ex. 103, to his father by Namasivaya Pillai, in 1875, whereas the 22nd Defendant's title is based on the sale-deed, Ex. 150 (*b*), by Namasivaya, in 1883. *Prima facie*, the sale-deed of 1875 would take precedence over that of 1883, though it is of course possible that Namasivaya Pillai may have had properties, sufficient to satisfy the claims of both the purchasers. The Lower Appellate Court has not dealt with this aspect of the case and has not mentioned the dates of the two sale-deeds, and in the absence of such mention, we cannot consider its discussion satisfactory.

There are no doubt arguments which Mr. Krishnaswami Ayyar on behalf of the 22nd Defendant has placed before us, and in particular the plea of *res judicata*, which may be decisive; but in the absence of any consideration given to the relative dates of the sale-deeds, on which the titles rest, we cannot accept the Lower Appellate Court's judgment regarding this matter. We must therefore ask the Lower Appellate Court to submit a finding on the issue:—

What are the shares which the 22nd and the 65th defendants are respectively entitled to, in respect of the purchase from Namasivaya Pillai?

The findings are to be submitted on the evidence already on record and are due in this Court, on or before the 30th August, and seven days will be allowed for objections.

[The Additional Subordinate Judge of Tanjore submitted that (1) the 22nd defendant acquired the character of a co-owner or mirasidar, in virtue of the purchase relied on by him; (2) that he has, as such co-owner, acquired a title by prescription and (3) that the 65th and 22nd defendants were respectively entitled to 3/8 Pangus and 113/16 Pangus respectively.]

Judgment.—The finding of the lower Appellate Court on the first question remanded, that the 22nd Defendant acquired the character of a mirasidar or co-owner, in virtue of the purchase relied on by him, must be accepted, since no objection is taken to it. To the correctness of the argument based on it by the Lower Appellate Court further reference will be made.

The second finding of the Lower Appellate Court is that the 22nd defendant has completed a prescription for ownership appropriate to his legal character; and this cannot be accepted, if only because it is based on five considerations, of which three possess no substance. For the issue by the melwaramdars of pattas to the 22nd Defendant alone, the making of improvements by him on the land in his occupation and the language used by the 1st and 2nd defendants in their written statement as to their possession of land, with which he is not concerned, afford no evidence of the nature of his enjoyment, or that it has been adverse to his co-owners, since the latter would not be bound by the conduct of the melwaramdars, or of the 1st and 2nd defendants and had no reason for objecting to improvements, which would pass with the land and, if it ever had to be surrendered, it would have to be surrendered with it. The two other grounds, on which this finding is based, the attitude of the 22nd defendant's father in his litigations with all or some of the mirasidars and that of the 22nd defendant and his vendor, Velayudha Chetti, to them in respect of part of item No. 1 of the suit property, no doubt might legitimately have been considered by the Lower Appellate Court. But they are not conclusive; and, although it could have reached its finding with regard to them alone,

there is nothing to show that it would have done so. For these reasons, therefore, the finding cannot be accepted.

In remanding the case a second time, for a finding in the light of the foregoing, we take the opportunity to deal with two other points, on which argument has been based. Firstly, the Lower Appellate Court has observed that the documents evidencing enjoyment under *Karaiyeedu* tenure range down to 1894 and its further statements suggest that it held in favour of the cessation of that tenure in that year. But firstly, the documents, in fact, range down to only 1884 and next, it is a question, whether tenure ceased with them or later; for it does not follow that it ceased, when they were executed. The date of its cessation is clearly most important, since, if the tenure was in force, at the date of the 22nd defendant's entry or his vendees', that fact would be material to the decision as to the character of his possession, as supporting the plea of prescription.

Lastly, it is urged that the special rule as to the evidence, necessary to establish prescription between co-owners is not applicable to the 22nd defendant, who is not a co-owner, but only a transferee of some co-owners' interests and that it is unnecessary for such a transferee to establish the exclusion, or denial of title to the knowledge of his opponents, which would, as between co-owners, ordinarily be essential. This is supported by reference to *Bhavrao* v. *Rakhmin* (1) and the conclusion that the possession of a purchaser from a co-sharer of only the qualified right to an assignment of the land in his vendor's possession, if that be possible at a partition, will prescribe in virtue of his bare possession:

> "Adverse possession depending on the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested, whether in a single person or in many jointly."

And the opinion was expressed later, that it did not matter whether the transferees in possession, who were before the Court, knew of the property being held in co-ownership or not, although the fact that they were transferees had been regarded in the judgment, as important, with reference to their knowledge of their real rights. This is no doubt stated generally, but it is possible that it was influenced by the local considerations, which also are referred to. Certainly, it goes beyond the earlier authority relied on in *Ganesh* v. *Ramchandra* (2), since there the entry into possession was under a purchase in a Court sale, of which the other co-sharers were presumably aware and the impossibility of harmonious relations between the parties is expressly referred to. *Bhavrao* v. *Rakhmin* (1) was accepted as good law by Beaman, J., in *Bhaiji Shamrao* v. *Hajimiya Mahamad* (3). But it was construed by Hayward, J., as deciding only that a transferee's knowledge of the defect in his title did not prevent his prescribing for the right conveyed by his transfer and as raising no question, as to the necessity for knowledge on the part of the true owner, that his right was denied or interfered with. That, however, is not enough to explain the case or the statement in connection with an assumption that the transferees knew of the co-parcenary character of the property that:

> "A person coming in under a title, which he knows to be defective, is not by reason of his knowledge deprived of the benefit of the law of prescription."

the general rule requiring twelve years possession of the ordinary character being apparently in question. For that statement, if it is to be understood, as generally as its wording involves, is clearly opposed to decisions of the Judicial Committee, which are not referred to, in any of the Bombay cases, *Watson & Co.* v. *Ramchund Dutt* (4) and *Lachmeswar Singh* v. *Manowar Hossein* (5), as well as *Varada Pillai* v. *Jeevaratnammal* (6), the two first defining the point, at which the Court will

(1) [1899] 23 Bom. 137 (F.B.)

(2) [1896] 20 Bom. 557.
(3) [1912] 14 Bom.L.R. 314—15 I.C. 500.
(4) [1891] 18 Cal. 10—17 I.A. 110—5 Sar. 535 (P. C.)
(5) [1892] 19 Cal. 253—19 I.A. 48—6 Sar. 133 (P. C.)
(6) [1920] 43 Mad. 244—46 I.A. 285—38 M.L.J. 313—27 M.L.T. 6—22 Bom.L.R. 144—18 A.L.J. 274—53 I.C. 901—24 C.W.N. 346—(1919) M.W.N. 724—10 L.W. 679 (P.C.)

restrain the enjoyment of one co-sharer, as interfering with the rights of the others and the last dealing directly with prescription. It is to be observed that in each of these cases, the prescribing party was the transferee of a co-sharer, not a co-sharer, or his descendant, being in the first a lessee, in the second a purchaser and in the third a beneficiary under a will, and that, although this was not stated expressly, his knowledge of his rights and those of the other co-sharers was assumed. But the material fact, and it is irreconcilable with the decision in *Bhavrao* v. *Rakhmin* (1), is that not only a possession by one co-sharer, but also an exclusion of the others, or a denial of their title to their knowledge, was held essential, before such possession could be restrained, or regarded as adverse. There is accordingly no justification for the general statement that a transferee in possession of common property is subject to no special restriction in prescribing against co-sharers other than his transferor. It can be said only, that if he prescribes as a co-sharer, a matter to be decided with reference to the terms of his transfer and the circumstances, he must prove exclusion or denial of title; but that in the event of his having neither actual nor constructive notice of the common character of the property, he will be on the same footing, as any ordinary transferee, with an independent, but invalid title or with none. It will be for the Lower Appellate Court, in dealing with the 22nd defendant's case of prescription, to decide to which of these alternatives it is subject.

We accordingly remand the case for a rehearing and submission of revised findings, in the light of the foregoing. Findings will be submitted in six weeks. Seven days will be allowed for filing objections.

[The Additional Subordinate Judge of Tanjore submitted the following findings; *viz.*, that the 22nd. defendant has completed prescription for ownership, against all the mirasidars.]

Oldfield, J.—The Lower Appellate Court's finding is in 22nd defendant's favour, and in accepting it, we need deal in detail with one question only, that of *res judicata*, since no objection of any weight has been taken to it, on other grounds.

The previous adjudication relied on is evidenced by Exs. T., A. and R the judgments in O. S. No. 367 of 1900 and in first appeal therein and the decree in second appeal; and no doubt in our first order of remand, we said that the plea of a previous partition was concluded by them against 22nd defendant. We did not, however, refer to the plea of prescription, which is now in question. That plea is, it is said, now inadmissible, because 22nd defendant's prescription according to the finding before us was complete in 1883 and could have been, but was not, relied on by him, in the previous proceedings. The answer is that, whatever the effect of Exs. T., A and R. on 22nd defendant's right to plead a title, acquired before the beginning of that litigation, they do not affect his right to rely now on a subsequent period of adverse possession, which was then incomplete, or debar him from proving what happened before that period, as explaining the nature of his connection with the property during it.

The remaining argument for consideration should have been advanced, before the finding was called for, and can be considered now, only with reference to the facts found and as raising a question of law. It is that 22nd defendant cannot, as a co-owner, claim part of the estate in co-ownership, in virtue of prescription for that part alone. This is argued, on the strength of the decision in *Kumarappa Chettiar* v *Saminatha Chettiar* (7), and particularly the dictum of Seshagiri Aiyar, J., therein, "possession of part of the property" by some of its co-owners "would save limitation as regards the rest of the property" as against the others, that of course stating the law from the standpoint of the then defendants, who correspond with the present appellants. As this dictum is the sole support of the argument attempted, it is necessary to ascertain its exact scope, by reference to its context. The plaintiffs in *Kumarappa Chettiar* v. *Saminatha Chettiar* (7) claimed in

(7) [1919] 42 Mad. 431—36 M.L.J. 612—52 I.C. 470—(1919) M.W.N. 328.

the alternative, (1) possession of certain items, on the ground that their vendors, 1st and 2nd defendants, had either obtained them in partition, or been in exclusive and adverse possession of them, for more than twelve years, or (2) partition and delivery of their vendors' share in them. In appeal, however, nothing was said of 1 and 2 defendants' title under the partition. The other defendants, representing other branches of 1 and 2 defendants' family, admitted plaintiffs' right to division and delivery of shares in the items; but on the remaining question, as to plaintiffs', or 1 and 2 defendants' prescription, for the whole of those items, they pleaded Art. 127, Sch. I of the Limitation Act. It was in discussion of this plea that the dictum of Seshagiri Ayyar, J., now relied on, occurred and that Wallis, C. J., said:

"If the property was undivided and Art. 127 is applicable to bar the plaintiff, there must be exclusion from the whole of the joint family property and exclusion from the suit property only will not do."

With that part of the decision, however, we are not concerned, and it is unnecessary for us to express an opinion regarding its correctness, or the extent to which it is really entailed by the authorities relied on, by the learned Judges. For in the present case, the suit property is not and never was the joint family property, to which alone, Art. 127 statedly applies. In fact, in *Kumarappa Chettiar* v. *Saminatha Chettiar* (7), the argument was conducted on the assumption, that the joint family in question had become divided in status and that the judgments dealt also with the alternative that, although the property had belonged to a joint family, the defendants' interest in it was at the date of suit that of tenants-in-common. On that alternative, the learned Judges did not decide whether Art. 127 would apply, holding that, even if (as 22nd defendant now contends) the proper Article was No. 144, the plaintiffs' claim to possession of the whole items must fail. But, and this is the important point for our present purpose, Wallis, C. J., reached that conclusion, not on the short ground, which would have been open to him, if appellants' contention here were sustainable, that prescription for a part only of the common property was useless, but because "there was no sufficient evidence of ouster" meaning evidently no evidence of such aggravated exclusion, as is required between cotenants; and, although Seshagiri Ayyar, J., referred directly only to the effect of the decisions he had considered, not to any finding of fact to which he applied them, this part also of his judgment is reconcilable with the interpretation now suggested of the case. Shortly, the learned Judges, so far as their dicta support the present appellants, were dealing with what is not at present in question, property which was, or had been that of a joint family; and there is nothing in their judgments to impair, the application to the common property, in dispute before us, of the principle, on which the leading cases of *Watson & Co.* v. *Ramchund Dutt* (4) and *Lachmeswar Singh* v. *Manowar Hossein* (5) were decided, that prescription for a part of such property is not impossible, but must be established by evidence, not only of adverse possession, in the ordinary sense of that term, but further of assertion of title and exclusion, irreconcilable with the existence of any tenancy-in-common. We are accepting the finding that such denial of title and exclusion is proved in the present case. The appellants' objections failing, the conclusion must be in 22nd defendant's favour.

Ramesam, J.—The appellant has filed objections to the finding recorded by the Subordinate Judge (on 25th August 1921), on the third of the issues sent down by him. He says the Subordinate Judge omitted, by a slip, to deduct half a pangu out of Namasivayam Pillai's share. This is not admitted by the other side and it is not clear that any slip was made by the Subordinate Judge. The finding is one of fact and is accepted.

It now remains to settle the shares of the contending parties.

The 22nd defendant now claims that he is entitled to retain all the lands in his possession (2 velis, 5 mahs and 56½ kulis), on the ground that he has acquired a title to them by adverse

possession. Before the Munsif, he claimed these lands as corresponding to 16-15/16 pangus. The Munsif found that he was entitled to 13⅛ pangus only and disallowed the claim to the rest. He also found that the 22nd defendant was entitled to retain 1 veli, 16 mahs and 44 kulis, as corresponding to 11-13/16 pangus and towards the rest of his pangus he should get them, in a general partition of the remaining lands. In appeal, the 22nd defendant filed a Memorandum of Objections, which the Lower Appellate Court states (in paragraph 27 of its judgment) as referring to paragraphs 141 to 147-A, of the Munsif's judgment. Some of these grounds were not pressed and others were disallowed. As we understand these grounds, they raise the question of plaintiff's title to 2-11/16 pangus and were not intended to urge the right, to retain any lands beyond the 1 veli, 16 mahs and 44 kulis, allowed by the Munsif, by adverse possession. The result is that the 22nd defendant is not entitled to urge, in Second Appeal, that he is entitled to retain any lands, beyond the lands allowed by the Munsif towards the 11-13/16 pangus. The total pangus he is entitled to are 13⅛ plus 1/32, allowed by us in Second Appeal.

The total number of shares is therefore 30-59/64 plus ⅓ plus 1/32. Towards 11-13/16 of these, specific lands (*i.e.*, 1 veli, 16 mahs and 44 kulis), already in the 22nd defendant's possession are allotted. The remaining shares are 19-91/192 pangus. Therefore, the rest of the lands will be divided into 19-91/192 shares. The 22nd defendant is entitled to 13⅛ plus 1/32 minus 11-13/16 or 1-11/32 shares of these.

The decree of the Lower Appellate Court will therefore be modified as follows:—

1. The appellants will be entitled to ⅓rd pangu, in addition to the pangus allotted, in the Lower Appellate Court.

2. That the 22nd Defendant be, and hereby is, allowed to retain the lands (1 veli 16 mahs and 44 kulis), decreed in O. S. No. 388 of 1884, O. S. No. 456 of 1892 and O. S. No. 126 of 1891 in satisfaction of 11-13/16 pangus

3. That the 22nd defendant is entitled to 1-11/32 pangus, in addition, to be allotted to him, in general partition.

4. That the remaining lands (the lands other than the 1 veli 15 mahs and 44 kulis), should be divided into 19-91/192 shares and the shares to which the parties are found entitled, are to be allotted to the respective parties.

In the Second Appeal, the appellants will pay the costs of the 22nd defendant. In the Memorandum of Objections, each party will bear its own costs, except that the 22nd defendant will pay the costs of the 8th respondent.

[This Second Appeal, and the Memorandum of Cross-Objections filed by the 13th respondent, came on for being spoken to, on the 24th and 27th days of April 1923, before Oldfield and Ramesam, JJ.]

Judgment—The case has been set down, to be spoken to, on the objection of the appellant that the decree is not in accordance with our judgment. He points out that the District Munsif's decree allots to defendants 117 to 120, 3, 5, 6, 9, 10, 88 and 108, a specific plot of 1 veli, 4 mahs, on the western side of item No. 1, in their possession, for 7⅞ pangus. He claims that the Subordinate Judge's decree has not altered this and he also urges that in awarding a specific plot of 1 veli, 16 mahs and 44 kulis to the 22nd defendant, we construed the Subordinate Judge's decree, in such a way, as to leave the Munsif's decree regarding specific plots undisturbed.

The respondent argues that the defendants 117 to 120, when they appealed to the Subordinate Judge, were not satisfied with the Munsif's decree for a specific plot and w nted a general partition of item (1) (see his grounds 6 and 8). In the light of these grounds of appeal, we construe the Subordinate Judge's decree, not as allotting the specific plot to the 117 to 120th and other defendants, and to the 22nd defendant, but as giving an equitable direction that in the general partition, the share allotted may consist (as far as possible), of the plots already in their possession. Our difficulty in construing the Subordi-

nate Judge's decree, in the manner desired by the appellant, is that the extent owned by the defendants 117 to 120, and others as found by the District Munsif is not 7⅞ but 7 15/16, the District Munsif's 7 ⅞ being an arithmetical error and the Subordinate Judge awarded an additional 1-14/16 share, as to which there is no direction in the Subordinate Judge's decree, on the construction of it claimed by the appellant.

As to the 22nd defendant, we will only say that whatever remarks we might have made, in the course of the argument, there is nothing in our judgment, construing the Subordinate Judge's decree, in the way claimed by the appellant. Before us, the 22nd defendant repeated his claim to a specific plot (see grounds 2 and 3 of his Memorandum of Objections) and did nothing in the Lower Appellate Court to give them up (see his Memorandum of Objection there). The appellant not only repudiated in the Appeal before the Subordinate Judge, the allotment of specific plots to him, but also did not show his change of mind in the Grounds of Appeal here. We therefore direct that the decree as drafted will stand, but a direction that, as far as possible, properties already in the possession of parties (22nd defendant or defendants 117 to 120 and others) will be allotted in making the allotments in general partition, will be added.

The Vakil's fee for 22nd defendant in the Second Appeal will be Rs. 100.

Appeal dismissed.

✱ 1924 MADRAS 749

PHILLIPS AND VENKATASUBBA RAO, JJ.

Visvanatha Aiyar — Plaintiff—Appellant.

v

Vengama Naidu and others—Defendants—Respondents.

Appeal No. 290 of 1920, Decided on 18th July 1923, against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 64 of 1918.

✱ (a) *Benamidar — Admission by benamidar of ownership of third person does not pass title to that person.*

A statement by the benamidar in a compromise in a suit that certain properties standing in his name belong to a person other than the true owner of those properties has not the effect of conveying their interest to the person in whose favour the admission is made.

Assuming that the admission could have the effect of a conveyance, such a conveyance being a transfer of the office of the trustee is invalid in operation. [P 752 C 1]

✱ (b) *T. P. Act, S. 82—For contribution equities must be equal.*

Where an assignment of part of a mortgaged securities is made free from encumbrances the assignee is not liable to contribute as against the assignor to the payment of the mortgage debt. An assignee of a part of the mortgage security is not liable to contribute as against the mortgagor to the payment of the mortgage debt. To entitle one to contribution from another, the equities must be equal. If for instance, there was any obligation on the person who paid the encumbrance to discharge it as a debt of his own, he cannot claim anything from that other; and similarly if a mortgagor sells a part of an encumbered estate with a covenant against encumbrance, he cannot claim contribution from the purchaser, because he is himself liable for the whole debt. [P 753 C 1]

A. Krishnaswamy Aiyar and *C. Sankararama Sastri*—for Appellant.

C. V. Ananthakrishna Aiyar and *K. V. Sesha Aiyangar*—for Respondents.

Venkatasubba Rao, J.—The plaintiff alleges that in pursuance of a mortgage decree his properties were sold, that a certain amount was realised and credited towards the decree, that the 1st defendant was the owner of some of the other properties also included in the mortgage and that the amount paid towards the mortgage by the 1st defendant was less than what he would be liable to pay, having regard to the value of those items. The plaintiff therefore claims in the present suit contribution from the 1st defendant, being the difference between the amount rateably due in respect of the latter properties and the amount actually paid by him.

The plaintiff's right to maintain the suit is questioned and to deal with this objection it is necessary to set forth a few facts.

One Krishnaswamy Aiyar had two sons, Seshasayi and Lakshmikantham, and they formed members of a joint Hindu family. On the 11th September 1890, they mortgaged the

properties described in Schs. A to F of the plaint to certain persons for a sum of Rs. 17,000 (Ex. K.). On 15th December 1894, the amount due on the mortgage was Rs. 21,000, and Krishnaswamy having died, his sons sold F schedule properties to one Sundaracharulu for a sum of Rs. 12,500 (Ex. 1) and mortgaged the properties in Schs. A to E to the same person for Rs. 8,500 (Ex 2). Sundaracharulu was directed to pay the two sums of Rs. 12,500 and 8,500, which made a total of Rs. 21,000 in discharge of the Original mortgage (Ex. K). On the 8th May 1899, there was a partition between Seshasayi and Lakshmikantham. The properties described in Schs. A and F fell to the share of Seshasayi and those in Schs. B, C and D to the share of Lakshmikantham. On 6th November, 1899, Seshasayi sold to the 1st defendant the properties in Schs. A and E (Ex. B). On the 15th September, 1902, Sundaracharulu executed a reconveyance in respect of the properties in Sch. F in favour of Seshasayi (Ex. IV). On the 11th October 1902, Seshasayi sold the properties in Sch. F to the plaintiff (Ex. A). On the 1st July 1905, the properties in Sch. E were conveyed by the 1st defendant in favour of the 12th defendant. On the 2nd September 1909, the plaintiff sold back the properties in Sch. F to Seshasayi (Ex. A-2). On the 13th September 1909, a suit was instituted on the footing of the original mortgage, Ex K. which will be referred to as 49 of 1909. On the 20th September, Seshasayi sold the Sch. F properties to one Pitchandi, who is said to be a servant of the plaintiff, and on the 27th September 1909, Pitchandi in turn sold the said properties to one Venkatachalapathi Naidu. In 1913, the final decree was passed in the mortgage suit 49 of 1909 and on the 9th February 1917, the properties described in Schs. B, C and D were sold by the representatives in interest of Lakshmikantham to the 1st defendant.

From the facts stated above, it will be seen that the owners of the various properties with which we are concerned were as follows :

A to D properties were owned by the 1st defendant. E properties were owned by the 29th defendant.

F properties were owned by Venkatachalapathi Naidu. But in this connection, it is necessary to notice certain facts having a bearing upon the ownership of the properties in Sch. F. Subsequent to the passing of the final decree in 49 of 1909, the present plaintiff filed a suit for a declaration that, although the properties in F Sch. ostensibly belonged to Venkatachalapathi, he was in truth the owner thereof ; and on the 4th November, 1915, a Razinamah was entered into between the widows of Venkathachalapathi and the plaintiff, which contains an admission of the plaintiff's title to the said properties. The material portion of the Razinamah is this :

" In respect of the suit which the plaintiff instituted against us for a declaration that the sale deed executed in the name of our husband was executed only nominally on behalf of the plaintiff and that we have no right whatever therein * * * as it is learnt that the sale deed was as alleged by the plaintiff executed nominally on behalf of the plaintiff, it is settled that the plaintiff shall get a declaration that he himself is entitled to the said properties * * * *.

In virtue of this Razinamah, the plaintiff asserts that he is the owner of the F schedule properties and that he is entitled as such owner to contribution.

In paragraph 7 of the 1st defendant's written statement in the present suit, the following plea was raised :

" The plaintiff further, in the dealings relating to the F schedule properties was a mere name-lender and *alias* of Seshasayi whose friend he was throughout."

The learned Subordinate Judge on this plea raised the issue " was the plaintiff the real owner ? " and recorded a finding adverse to the plaintiff. With this finding of fact I entirely agree. On behalf of the plaintiff (appellant), no motive was suggested for the numerous dealings with the properties described in the F schedule. As already observed they were sold on the 15th December 1894, to Sundaracharulu and Sundaracharulu reconveyed them to Seshasayi on the 15th September 1902, and on the 11th October 1902. Seshasayi sold them to the plaintiff. This sale in favour of the plaintiff is ad-

mitted to be merely nominal. In fact in a deposition given by the plaintiff, he said that the properties were not his and that he was supervising them on behalf of Seshasayi. It is also not disputed that Seshasayi and the plaintiff were on very intimate terms. We have not been referred to the circumstances in which the sale was made in favour of the plaintiff in 1902, or to the motive for the transaction. Whatever be the reason, the sale was fictitious and the plaintiff himself had to admit that it was so. Presumably to get over the effect of this admission another sale deed was executed by Seshasayi in favour of the plaintiff (Ex. A 1) on 17th April 1906. If the plaintiff was already the owner, there was no need to have a second sale deed in his favour. It seems to me therefore that the second sale deed was got up merely with a view to keep up the pretence that the plaintiff was the real owner of the property, although in fact he was not. This view receives support from Ex. XIX dated 7th August 1909, a letter addressed by the plaintiff to Seshasayi. He says :—

"As you ask me to execute a sale deed for the resale of the properties for which you have executed a sale deed to me, I have no objection to so execute a sale deed for the resale."

It is in pursuance of this letter that the plaintiff reconveyed the properties to Seshasayi on 2nd September 1909 (Ex. A-2). The appellant's learned vakil has not been able to tell us why the properties were reconveyed to Seshasayi. But it is clear from Ex. XIX that the plaintiff was never the owner of them and that the properties were ultimately conveyed to the man to whom they belonged, namely, to Seshasayi. The fact that the plaintiff remained in possession of them is of little importance, because as the plaintiff admitted in a previous deposition, he was supervising the properties on behalf of the true owner, Seshasayi. If so far therefore Seshasayi continued to remain the true owner of the properties notwithstanding the fact, that they stood sometimes in the name of the plaintiff, did anything that happened subsequently have the effect of transferring the ownership to the plaintiff? The reconveyance in favour of Seshasayi was on the 2nd September 1909; eleven days later, the Suit 49 of 1909 was filed. A week subsequent to the filing of the suit, Seshasayi sold the properties to Pitchandi, and a week later again Pitchandi sold the properties to Venkatachalapathi Naidu. In the course of less than a month, the properties were thus transferred thrice. The plaintiff asserts that the sales in favour of Pitchandi and in favour of Venkatachalapathi were benami for himself. The plaintiff was made a party in 49 of 1909. He did not set up in the written statement filed in that suit, that he was the owner of the properties. Although there was an interval of about 5 years between the institution of the suit and the final decree passed in it, during that period the plaintiff never asserted that he owned the properties. It is is now argued on his behalf that in 1915 Venkatachalapathy's widows having admitted his ownership, his title to the properties cannot be questioned. This argument is clearly untenable. The parties who made the admission may be estopped from denying the plaintiff's title but the 1st defendant is not bound by the proceedings which culminated in the Razinamah.

The compromise between the widows of Venkatachalapathi and the plaintiff is clear evidence of the fact that the former were not the owners of the properties. On the evidence in the case, I am clearly of the opinion that on the date of the compromise Seshasayi or his representative was the beneficial owner. What then is the position of affairs? Seshasayi on our finding was the beneficial owner. Venkatachalapathy's widows were benamidars and the plaintiff got them to admit that he was the real owner. Does any interest in these circumstances pass to the plaintiff? I am clearly of the opinion that the plaintiff has acquired no interest in the properties. It has been strenuously argued by Mr. Alladi Krishnaswamy Aiyar for the appellant that on our finding Venkatachalapathy's widows, being bena-

midars for Seshasayi, were in the position of trustees and that the legal ownership was by the Razinamah transferred from the widows of Venkatachalapathy to the plaintiff. In the first place, there was no conveyance at all. There was merely an admission by benamidars, that a person, who was not the true owner, was the true owner. I fail to see how such an admission can give a stranger to the properties any right over them. The widows did not profess to deal with the legal (as distinguished from the beneficial) ownership, which they possessed and there was no attempt to convey this legal ownership. The mere fact that the widows admitted that the plaintiff to be the beneficial owner, which he was not, cannot have the effect of conveying to the plaintiff the interest of Venkatachalapathy's widows in the properties.

In the second place, granting that the transaction amounted to a conveyance, what is the legal effect of the transaction? Venkatachalapathy's widows being benamidars were merely possessed of the legal ownership in the properties. They were the trustees in respect of the properties accountable to Seshasayi. There could not be an effectual transfer of the Trust. The office of trustee is incapable of transfer. See *Raja Vurmah Valia* v. *Ravi Vurma Kunhi Kutty* (1) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (2). It was impossible to dissociate the office of trustee from the possession of the properties. The widows of Venkatachalapathy were bound to preserve the properties and to render an account in respect of them to Seshasayi. The parting with the properties virtually amounted to parting with the office and such an alienation cannot be recognised. Moreover the plaintiff knew that Seshasayi was the owner. The essence of the transaction was the recognition of the plaintiff as the owner, while as a matter of fact he was not the owner. The clear object of the transaction was to make out that a party who was not entitled to the properties was the real owner thereof. It is fraudulent and the Courts will refuse to give recognition to the transaction. If Seshasayi or his representative was not a party to the transaction, it was clearly a fraudulent attempt by Venkatachalapathy's widows and the plaintiff to create a title in the plaintiff to the detriment of Seshasayi. If on the other hand Seshasayi or his representative was also a party to the transaction, it should undoubtedly have been brought about with the fraudulent object of making it appear, that the plaintiff was the owner while he was not, in order to enable him to file this suit. In my view, therefore, the plaintiff is not a benamidar for Seshasayi. I have found that Seshasayi is the owner of the properties in the F schedule, and I am also clear that the plaintiff has no interest whatsoever in the properties. He is neither the beneficial nor the legal owner.

It has been argued on behalf of the appellant on the strength of *Gur Narayan* v. *Sheolal Singh*, (3) that a benamidar can successfully maintain a suit. But this argument is of little avail in view of the finding that the plaintiff is not even the benamidar for Seshasayi in respect of the suit properties. Granting for a moment that the plaintiff is the benamidar for Seshasayi, the further question arises, is the suit for contribution at the instance of Seshasayi mainatainable? If Seshasayi cannot bring the suit, his benamidar cannot equally maintain it. The appellant's learned vakil relies upon S. 82 of the Transfer of Property Act. The material portion of the section is as follows:—

"Where several properties whether of one or several owners are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage."

(1) [1876] 1 Mad. 235—4 I. A. 76—3 Sar 687 (P. C.)

(2) [1900] 23 Mad. 271—27 I.A. 69—4 C.W.N. 329—10 M. L. J. 29—2 Bom. L. R. 597—7 Sar. 671. (P. C.)

(3) [1919] 46 Cal. 566—46 I. A. 1—9 L. W. 335—17 A.L.J. 66—36 M.L.J. 68—49 I.C. 1—23 C.W.N. 521 (P. C.)

So far as contribution is claimed against the A schedule properties, it must be remembered that the first defendant became the owner of them, in virtue of a sale in his favour by Seshasayi himself. In regard to those properties the position is this. The mortgagor, Seshasayi who was the owner of the properties in A and F schedules sold the properties in A schedule to the first defendant. Can he then as owner of the properties in F schedule claim that A schedule properties are liable to contribute to the mortgage debt? The answer is furnished by *Re Darby's Estate, Rendall* v. *Darby* (4). It was held in it that an assignee as a party of the mortgage security was not liable to contribute, as against the mortgagor to the payment of the mortgage debt. An assignor having executed a deed of charge to his bankers in respect of various items of property, assigned by a voluntary deed one of those items to his wife. The latter deed contained no reference to the charge. The assignor died and his executors paid off the debt to the bank. The question arose whether the widow as assignee of the items was liable to contribute to the payment of the debt. It was held that the widow was under no liability to contribute Warrington, J., says:

"The assignor owed a sum of money charged on certain property, what equity would he have had in his life time to call upon an assignee from him to pay any part of that debt? I can seen none, unless he assigned the property subject to the debt. If, then, the assignor would have had no such equity, I fail to see what greater right his executors can have to call upon the assignee to contribute."

To entitle one to contribution from another, the equities must be equal. If, for instance, there was any obligation on the person who paid the encumbrance to discharge it as a debt of his own, he cannot claim anything from that other; and similary if a mortgagor sells a part of an encumbered estate with a covenant against encumbrance, he cannot claim contribution from the purchaser, because he is himself liable for the whole debt. See Halsbury Vol. 21, p. 306, and Ghose on Mortgages, 4th Edn. Vol. 1. p. 374.

In the sale deed by Seshasayi, conveying the A schedule properties to the 1st defendant, the former makes a distinct allegation that the debt under Ex. K. was discharged and that the sale was not subject to the encumbrance evidenced by the said document. In the face of this, it is impossible to hold that Seshasayi is entitled to contribution from the 1st defendant so far as the A schedule properties are concerned. The principle underlying the decision in *Re Darby's Estate Rendall* v. *Darby* (4) is recognised in S. 56 of the Transfer of Property Act. It runs thus:—

"Where two properties are subject to a common charge and one of the properties is sold, the buyer is as against the seller, in the absence of a contract to the contrary entitled to have the charge satisfied out of the other property, so far as such property will extend."

It has been contended by the appellant's learned vakil that, as on the date of the conveyance in favour of the 1st defendant of A schedule properties, Seshasayi was not the owner of the properties described in F schedule, the section has no application. Whether the terms of S. 56 are literally applicable or not, there can be no doubt that the general rule enacted in S. 82 is subject to the exception that a mortgagor is not entitled to contribution when he has assigned the property with an express covenant as against encumbrances. In *Ker* v. *Ker*, (5) Christian, L. J., says:

"The conclusions which I gather from *Harberr's case* (6) are the following. First that the origin l principle of the common law was *equality*, that is to say, contribution in the ratio of value, wholly irrespective of priority of dates of purchase; second, that the case of the debtor himself and his heir-at-law, in respect of retained lands was an exception to that principle by reason solely of his personal liability and that to such exception it mattered not whether the purchasers were such, with consideration or without it."

The Transfer of Property Act enacts the rule in S. 82 and the exception in S. 56. I am of the opinion that Seshasayi could not have successfully maintained a suit for contribution against the 1st defendant. It follows that even if the plaintiff was benamidar of Seshasayi his suit would fail.

There is only one further matter to consider. If the 1st defendant as owner of the properties in schedule A is not liable to contribute, the question still remains, is he bound to contribute by

(4) [1907] 2 Ch. 165—76 L. J. Ch. 689—97 L. T. 900.

(5) Ir. 4 R. Eq. 15.

(6) [1584] 3 Rep. 11.

reason of his being the owner of the properties in B, C, and D schedules? It is agreed on both sides that if the valuation adopted by the Subordinate Judge is accepted, no liability to contribution can arise: in other words, that the properties in B, C, and D schedules have paid their share of the mortgage debt. But it is said that the valuation is not correct, that the Subordinate Judge did not decide the issue relating to valuation in the judgment under appeal and he postponed the consideration of it to be disposed of in C. S. No. 17 of 1919. It is then argued that the learned Subordinate Judge did not try the issue in the second suit, but that the valuation was fixed by the consent of certain parties and that the plaintiff is not bound by it. There is no force in this contention as the plaintiff did not offer to give evidence in the second suit on the point and as he was not prevented from placing such materials as he could before the Court. There is no reliable affirmative evidence upon which we can act and disturb the finding of the learned Subordinate Judge. It is not seriously contended that there is material on the record which would justify a different finding.

In the result, the appeal fails and is dismissed with costs.

One set to be divided among the respondents that have appeared in the proportion of their interests in the properties in A to D Schedules.

Phillips, J.—I agree and am of opinion that the decision may also be based on the short ground that all the dealings with the F schedule properties by Seshasayi from 1902 onwards were purely nominal and that the conveyances to plaintiff, Pitchandi and Venkatachalapathi Naidu, (Ex. A series) were never intended to take effect, the property remaining all along in the ownership of Seshasayi. As plaintiff has no interest in the mortgage property he cannot claim contribution from defendant, since the payment on account of schedule F, if really made by plaintiff, must have been made by him as a volunteer for he had no interest in schedule F.

Appeal rejected.

1924 MADRAS 754

SPENCER, OG.C.J. AND DEVADOSS, J.

Best & Co. Ltd (*Agents of the Nobel's Explosives Co. Ltd.*)—Appellants.

v.

The Corporation of Madras—Respondent.

Ref. Case No.1 of 1923, Decided on 7th February 1924.

Madras City Municipal Act, (IV of 1919 S. 110 and Sch. IV R. 7, Proviso—"Gross income received in or from the City" of Madras does not include income received in Madras from outside business.

The expression "gross income received in or from the City" in the proviso to Rule 7 of Sch. IV does not include income arising out of business transacted outside Madras though the proceeds are transmitted to and received by the agents of the incorporated company in Madras. The income of a trade or business arises or accrues in the place where its contracts are made or its goods are sold. The mere fact that the money for which the goods are sold passes through Madras on its way to England will not involve any liability to pay the municipal tax on companies in Madras, The expression "gross income" means the total sum by which the sale price of all goods sold exceeds their cost price at the place of sale when that sum is received.

[P 755 C 2 P 756 C 1; P 759 C 2]

R. N. Ayangar and O. T. Govindan Nambiar—for Appellants.

P. Doraiswami Ayyangar—for Respondent.

Spencer, Og. C. J.—The Full Bench having decided that an English incorporated company is not exempt from the tax on companies imposed by S. 110 of the Madras City Municipal Act IV of 1919 by the mere reason of its capital being expressed in sterling, we have now to determine the third question referred to us, which is whether income derived from the transaction of business outside the City of Madras which is transmitted to Madras to the agents of an English firm for being converted into sterling and remitted to England is part of the gross income of the company upon which the tax is leviable. The same question was raised once before in the *Sun Life Assurance Company* v. *The Corporation of Madras* (1) but was left undecided.

(1) 1922 Mad. 85—46 Mad. 10—42 M. L. J 283—15 L. W. 330—(1922) M. W.N. 155—31 M. L. T. 271.

The proviso to rule 7 of schedule IV, Part 11 of the Act provides a scale for assessing the gross income of Companies the head office or a branch or principal office of which is not in the City, and whose gross income "received in or from the City" has not in the preceding year exceeded 25,000 rupees.

The answer to the question referred to us depends on the meaning to be attached to the words "gross income received in or from the City."

Mr. Aiyangar contended that the sales of the explosives on behalf of Nobel's Explosives Company, Limited, at Saidapuram and Bangalore, were not received by Messrs. Best & Co., Ltd., as income when they were sent to Madras for being remitted to the Head office in England.

In *The Secretary, Board of Revenue* v. *Ripon Press.*(1*a*). Coutts Trotter, J., observed that a person could not receive the same sum of money qua income twice over. In *Sundar Das* v. *Collector of Gujarat* (2), Sir Shadi Lal, C. J., was of opinion that a person could not receive a thing from himself and therefore a contractor who earned money in Baluchistan and brought it with him into the Punjab was not liable to be assessed to income-tax on it. That case was decided upon the language of the Income-tax Act (VII of 1918), and the decision might have been different if the same question of liability of an individual to pay income-tax on income earned outside and brought into British India had come up for determination under the Income-tax Act of 1922, which provides in S. 4 for taxing the profits and gains of a business arising outside British India and received or "brought in" within three years of the end of the year in which they arose.

In *Narasammal* v. *The Secretary of State for India* (3) I held that an individual, who resided in British India and received there instalments of an annuity payable in Mysore and remitted to her by an agent, was liable to be assessed to income-tax on those sums which were "received in British India." On the same line of reasoning it might be argued that income received in the City of Madras from an agent stationed outside must come within the words "income received in or from the city." as it is received in the City, if not from the City.

But it must be remembered that we are not now considering the liability of an individual to pay income-tax on his total assessable income whether derived from a British Indian source or received by a resident in British India, but we are interpreting a local Act which authorizes a particular Municipality or Corporation to levy a tax upon business transacted within the City for profit by incorporated companies.

The income of a trade or business arises or accrues in the place where its contracts are made or its goods are sold. This is made clear from *Smith & Co.* v. *Greenwood* (4.) The question whether the profits sought to be assessed were profits arising from any trade exercised within the United Kingdom of Great Britain was there answered by finding out where the operations took place from which the profits in substance arose. Again in *Municipal Council of Cocanada* v. *The Clan Line Steamers Ltd.* (5), the trade of a shipping company was held to be exercised and its business carried on in the place where its freight earning contracts were entered into.

Following the principle of these decisions, there can be no doubt that Nobel's Limited, are not transacting business within the City of Madras in respect of the sales of explosives which take place at the magazines in Bangalore in Mysore State and at Saidapuram in Nellore District. The fact that Nobel's, Limited, employ Messrs Best and Co., Ltd., as agents in Madras for the purpose of collecting the profits made at Saidapuram and Bangalore and of remitting them to England is not a circumstance from which it can be deemed that Nobel's Limited transact business in Madras City as explained in

(1.a) 1923 Mad. 574—46 Mad.706—44 M.L.J. 523—17 M.L.W. 584—32 M.L.T. 106—(1923) M.W.N. 321 (F. B)
(2) 1923 Lah. 14—3 Lah 349 (F. B.)
(3) [1915] 39 Mad. 885—18 M. L. T. 524—31 I.C.404—2 L.W. 1124—(1916)I.M W.N. 122.
(4) [1921] 3 K. B. D. 583.
(5) [1918] 42 Mad 455—36 M. L. J. 226—25 M. L T. 192—51 I.C. 692—10 L. W.15.

the explanation to S. 119, even though accounts of the transactions are kept in Madras and though Messrs. Best deduct their commission for acting as agents for the English company. The mere fact that the money for which the goods are sold passes through Madras on its way to England will not involve any liability to pay the Muncipal tax on companies in Madras, because in converting the profits into English money and obtaining bills of exchange on England Messrs. Best and Co. are doing no more than what might be done through any broker or Bank.

By the expression "gross income" I understand to be meant the total sum by which the sale price of all goods sold exceeds their cost price at the place of sale when that sum is received.

Davadoss, J.—Of the three questions referred for the opinion of the High Court by the Chief Judge, Small Cause Court, the first question has been answered and the second follows the opinion on the first. The third question is "what is the meaning of the expression 'gross income received in or from the City' in the proviso to rule 7? Does the latter expression include income arising out of business transacted outside Madras the proceeds whereof are transmitted and received by the agents of the incorporated company in Madras where they have their head office?" The answer to this depends upon the construction of S. 110 and Rule 7 of schedule 4 of the Madras City Municipal Act IV of 1919. The section makes "every incorporated company transacting business within the city for profit or as a benefit society" liable for the tax. The explanation to it makes such company liable if it has an office, agent or firm to represent it for the purpose of transacting business in the city. There is no difficulty in construing S. 110. All that is required under S. 110 is that the company should be an incorporated company and that it should transact business within the city for profit or as a benefit society, and by the explanation it is sufficient if it has an office, agent or firm to represent it for the purpose of transacting business in the city. Schedule 4, rule 7 is also clear, but the difficulty arises in construing the words "its gross income received in or from the city.'

The Nobel's Explosives Company, Limited, is an English Company which carries on business through its agents Messrs. Best and Co., Madras. It has three magazines, one at Madras, one at Saidapuram and one at Bangalore. Messrs. Best & Co. are remunerated by commission on the sales in the three places and are paid Rs. 300 a month for watching and other charges incurred in the three places. The Corporation of Madras assessed the Nobel's Explosives Company, Limited, on the basis of the gross income from the three places and the latter objected to the assessment. Hence the reference.

It is contended on behalf of the Nobel's Explosives Company, Limited, that, in computing the gross income, the amounts realised by sales at Saidapuram and Bangalore should no; be taken into account. The argument is (1) the income was derived from sales outside the city; (2) the contract of sales was not made in the city (3) sale-proceeds were received at Saidapuram and Bangalore and (4) Messrs. Best and Co. received the sale-proceeds from the two places only for transmission to their principals. It is argued on behalf of the Corporation that the agents of the Nobel's Explosives Co., Ltd., namely Messrs. Best and Co. are in Madras. (2). The sale-proceeds are received in Madras (3) the accounts are kept in Madras and credits and debits are made in the Madras account (4) the salesmen at Saidapuram and Bangalore are not independent agents of the Nobel's Explosives Limited, but are only the servants of Messrs. Best and Co. and that under the proviso to rule 7 and schedule 4, the income should be considered to have been received in the city, if not from the city and therefore the Standing Committee of the Corporation was right in assessing the company on the basis of the gross income from the three places.

That the company is liable to taxation is not disputed. The company has an agent in the city and it transacts business in the city. Therefore the conditions required by S. 110 are fulfilled. Schedule 4, rule 7 gives the basis of taxation or the rates at which the companies are to be taxed. If a company has the head office or a branch or principal office in the city, it is assessed on the basis of capital alone, but if it has not the head office or a branch or principal office in the city it is assessed on the basis of the gross income received in or from the city. The Nobel's Explosives Company, Limited, not having the head office or a branch or principal office in the city, comes within the proviso to rule 7 of schedule 4. It is contended by Mr. R. N. Aiyangar for the Nobel's Explosives Company Limited, that the words "received in or from the city" mean the same thing. I do not think that the words "received in or from the city" mean the same thing. To give an example, if goods are sent by V. P. P. to mufassal, the value of the goods is received in the city; but where the sales are effected locally, the sale-proceeds are received from the city. A contract for the supply of goods may be made in the city and the price of the goods may be paid here but delivery may be made out side. In such a case the expression "received in the city" would apply to the income which is paid to the agent who is in the city though the amount is sent in from outside the city. But the necessary condition for assessment is that the business must be done in the city. It matters not whether the sale-proceeds are received from the city or received here from outside. The expression "received in" used in taxing statutes is a well-known one and is intended to reach the income received from outside. The tax that is leviable under S. 110 is not an income-tax but is a tax for carrying on or transacting a business, in the city and the question is therefore whether the income which is not derived from the transaction or business in the city is liable to taxation under S. 110 and rule 7 of schedule 4 of the Act. It is admitted that sales were effected at Saidapuram and Bangalore and deliveries of the goods were made at the two places and the sale-proceeds were also received in the two places. All that Messrs. Best & Co. have done was to receive the proceeds, enter them in the accounts, and give credit to their principals and remit the amount that remained after meeting the commission and other charges. The real question therefore is, whether that amounts to transacting business in the city in regard to the sales at Saidapuram and Bangalore. A number of cases have been quoted by Mr. R. N. Aiyangar who appears for the Nobel's Explosives Co., Limited, and by Mr. Duraiswami Ayyangar, who appears for the Corporation. Before considering the cases it is necessary to bear in mind the distinction between an Act like the Income-tax Act and a Local or Municipal Act like the Madras City Municipal Act. The object of the Income-tax Act is to tax all the income which a person makes or receives and it is worded so as to reach all the income it possibly can. But an Act which taxes a profession, calling or trade, carried on in any particular city or locality, does not attempt and cannot hope to attempt to bring within its scope professions, callings or trade exercised or carried on outside such city or locality. With these remarks I will consider the cases quoted by both sides.

In *F. L. Smith & Company* v. *Greenwood* (4) the facts were:—A Danish firm had an agent in London for advising prospective purchasers and taking samples of earth and sending to Copenhagen, etc. Contracts were finally concluded in Copenhagen. The goods were delivered F. O. B. The Commissioners of Income-tax held that the firm exercised a trade within the United Kingdom and was assessable to Income-tax. Rowlatt, J., held that the firm was not assessable to Income-tax as it did not carry on any trade within the United Kingdom. The Court of appeal affirmed the decision of Rowlatt, J. Lord Sterndale, M. R. observes with regard to the contention, that the firm exercised trade within the United Kingdom:—
"Such help as was given here in the

negotiation of contracts and their execution by Mr. Robinson is not enough to justify a finding that the rospondents exercised a trade within the United Kingdom within the meaning of the Income-tax Act." Atkin, L. J., observes that canvassing for orders and supervising the successful adapting of the goods bought for the purpose of buyer's business do not amount to an exercise of trade.

In *the Board of Revenue* v. *The Madras Export Company* (6), the learned Chief Justice and Wallace, J., held that in the case of a firm in Paris which purchased goods and sold them in Paris, the profits accrued solely in France and the firm's income was not taxable in British India. A mufassal firm buying goods in Madras for sale in the mufassal was held not assessable under the old City Municipal Act—vide *Meera Rowther* v. *The President of the Corporation of Madras* (7). In the light of the above decisions, it cannot be successfully contended that the Nobel's Explosives Conpany, Limited, exercises a trade or transacts business in the City by the mere fact of its agents keeping an account of the amounts realized by the sales at Saidapuram and Bangalore.

The next question is whether the sale-proceeds which are received by Messrs. Best & Co., in the city are income received in or from the city. In construing these words considerable help is derived from the cases which have been decided under the Income-tax Act both here and in England. Mr. Aiyangar urges that the income is made at the place where the sales are effected. The income or profits being the difference between the cost price and the sale price, the income is derived at the place where the sales take place and the income or profits made at places outside the city cannot be income received in the city by the fact of its being forwarded to Messrs. Best & Co., for transmission to England. In support of his contention he relies upon *Sundar Das* v. *Collector of Gujarat* (2). The Full Bench of the Lahore High Court held that the income which accrued due and which was received in Baluchistan and which was subsequently brought into British India was not assessable under the Income-tax Act of 1918. The Learned Chief Justice held that what was received once in Baluchistan cannot be received again in British India. In that case a considerable sum of money which was probably the savings of several years was brought into British India. There is nothing to show that the amount was the income of any particular year. If a person makes a fortune in a foreign country and returns to India, his fortune is not assessable, for it cannot be said to be the income of any particular year, but it may be the savings of a life time. S. 4, clause (2) of the Act of 1922, makes the income made outside British India assessable to income-tax provided such income is brought into British India within three years of its receipt. The decision in *Sunder Das* v. *Collector of Guzarat* (2) was under Act VII of 1918 in which there was no provision corresponding to that contained in the second clause of S. 4. In *The Secretary, Board of Revenue (Income-tax), Madras* v. *Ripon Press and Sugar Mills Company Limited* (8) the facts were: A company had its office in Bellary, but it carried on all its business in Raichur in the Nizam's Dominions. The Company directed the management and distributed the dividends. Some money was received at Bellary for meeting the cost of the establishment there. The Full held Bench that the Company was not liable to assessment under the Income-tax Act. In that case it was found that the dividends were payable only from the treasury at Raichur which is outside British India. The Learned Chief Justice remarked that even with regard to the amounts received at Bellary, the firm was not assessable under the Income-tax Act in respect of such amounts. There are some observations in *Sun Life Assurance Company* v. *The Corporation of Madras* (1) which support the contention of Mr.

(6) 1923 Mad. 422—46 Mad. 360—17 M.L.W. 161—44 M.L.J. 290—32 M.L.T. 37.

(7) [1909] 33 Mad. 82—5 I.C. 744—7 M.L.T. 80.

(8) 1923 Mad. 574—46 Mad. 706—44 M.L.J. 523—17 M.L.W. 584—32 M.L.T. 306—(1923) M.W.N. 321 (F. B.)

Aiyangar but the point was not expressly decided and it is unnecessary to refer to that case in detail. In *Municipal Council of Cocanadn* v. *The 'Clan' Line Steamers, Limited*, (5) it was held that the 'Clan' Line Steamers, Limited, were not liable to pay profession tax under S. 53 of the District Municipalities Act because the freight earning contracts with the shippers were not entered into at the port of Cocanada. It was found in that case that the shipping contracts were made with Messrs. Godin Woodrooffe & Co. at Madras and not with the local Agent Messrs. Ripely & Co. who forwarded the applications of such contracts to be dealt with by Messrs. Gorden, Woodrooffe & Co. If the shipping contracts had been made at Cocanada, then the company would have been liable. It may be observed in passing that it was evidently in view of this decision that the words "whether or not such office, agent or firm has power to make binding contracts on behalf of the Company" were enacted in explanation to S. 110.

In this case if the contracts for sale were made with Messrs. Best & Co. in Madras, and goods were delivered at Saidapuram or any other place outside the city, the Company would be liable to pay tax under S. 110 of the Madras City Municipal Act. As I have already observed, it is not disputed that the contracts of sale were made at Saidapuram and Bangalore and the price of the goods sold was received there. Considering the object and scope of the proviso to rule 7 of schedule 4 of the Act, it would be doing violence to its language to hold that the income earned outside the City is income received in the City. The well known rules of construction that Taxing Statutes should be strictly construed and that no one is to be taxed except by express words should not be departed from in construing the City Municipal Act. The words of S. 110 being quite clear that companies transacting business within the city are liable for the tax, it is opposed to the scheme of the Act and the wording of the section to tax a company for business transacted wholly outside the city. No doubt, if the company had the head office or a branch or principal office in the city, the question of the amount of income would not arise and it would be taxable on the basis of its capital. My answer is "the gross income received in or from the city" does not include the income arising or accruing from the business outside the city.

The expression "gross income" used in the proviso to rule 7 cannot be said to be "net income." The expression "net income" is used in rule 9. Rules 8 and 9 apply (1) to persons holding an appointment upon a monthly salary and (2) to persons exercising any profession, art, trade or calling or their agents or servants in their absence. Rule 7 applies to incorporated companies. The basis of assessment under rule 9 is the net income of the person liable to be assessed. The words "net income" in rule 9 must be held to mean income which a person gets after deducting legitimate charges and expenses from the gross income. Mr. Aiyangar contends that the expression "gross income" is a contradiction in terms and should be held to mean net income. The expression "gross profits" is defined in Cotter's Advanced Accounts as meaning excess of selling price over cost price. The expression "gross income" has the same meaning as the expression "gross profits." If gross income be held to mean net income it would not only be imputing absurdity to legislature, but would also be doing violence to plain English words. Reading the proviso to rule 7 carefully, it appears that the legislature advisedly used the expression "gross income," for, a company which has an agent and does immense business in the city may not earn any net income owing to losses in another part of the world, say South America or Australia. The object of S. 110 is to assess the incorporated company which is transacting business in the city, and it is immaterial whether the business yields a net profit or not. Relief, is given to such companies by the proviso to rule 7 in cases in which there is no head office or a branch or principal office in the city. Surely the Corporation of Madras cannot be asked to wait for the dec-

laration of dividend by a foreign company to see whether the company is liable to pay a license fee for carrying on or transacting business within the city. The words "gross income" mean the difference between the cost price and the sale price of the goods sold. If a company makes a very large income by the sale of goods in the city, it cannot escape taxation by saying that it has sustained loss in another place. I have no hesitation in holding that the expressions "gross profits" and "gross income" mean the difference between the price at which the goods are sold and the cost price of the goods at Madras without making allowance for commission and cost of establishment and other charges.

1924 MADRAS 760

VENKATASUBBA RAO, J.

Gottumukkula Narayana Raju and another—Petitioners—Accused.

v.

King Emperor—Opposite Party.

Cr. Rev. Case No. 727 of 1923 and Cr. Rev. Petition No. 584 of 1923, Decided on 6th March 1924, from the judgment of the Court of the Sub-Divisional Magistrate of Bhimavaram.

Penal Code, S. 186—Closing door of a room entered into by police for search and threatening him amounts to obstruction.

Where a Constable entered a house and found in a room three articles alleged to have been stolen, but before the constable could remove them the accused caused the door of the room to be shut and also threatened to kill the constable if he removed the articles.

Held: the acts constitute obstruction of a public servant in the discharge of his public functions. 15 Mad. 221 Dist. [P 760, C 3]

V. Suryanarayana—for Petitioner.
Public Prosecutor—for the Crown.

Order.—The Head Constable entered the house in question and found in a room three of the articles alleged to have been stolen. Before the constable could remove them the accused caused the door of the room to be shut. The accused also threatened to kill the constable if he removed the articles. In these circumstances, the question to be decided is whether any offence has been committed under S. 186, I. P. C. In other words, do the acts proved constitute obstruction of a public servant in the discharge of his public functions? I have not the slightest doubt that the offence has been committed. The learned vakil for the accused relies upon *Queen Empress* v. *Somanna* (1) and argues that the closing of the door does not amount to an obstruction. I do not think this case is an authority for this proposition. Whether there is an obstruction is a question of fact. What was held in that case was that failure to open a door to let a public servant in was not an offence under the section. The learned Judges say.—The use of the word "Voluntarily" seems to us to indicate that the Legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct. It was not asserted that petitioner barricated his doors or assaulted the commissioner, or took any active step to oppose the execution of the commission. He merely shut himself up in his house and took no notice of the commissioner." It is assumed in the judgment that the accused in that case were guilty merely of a passive act, namely, of not opening the door to enable the officer to get into the house. The facts proved in this case are very different. By the physical act of shutting the door and by the threat referred to above which the accused were in a position to carry out, they prevented the constable from discharging his public duties. I think the conviction must stand. Having regard however to all the circumstances, the sentence imposed appears to be excessive. I reduce the fine to Rs 50.—in the case of each of the accused and direct that the excess fine if it has been paid shall be refunded. In default of payment of fine each will undergo rigorous imprisonment for a week.

Sentence reduced.

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(1) [1891] 15 Mad. 221—2 M. L. J. 120.

✱ 1924 MADRAS 761

RAMESAM AND JACKSON, JJ.

Kanniappa Mudali and others—Appellants.

v.

P. V. Raju Chettiar and others—Respondents.

A. S. No. 51 of 1921, Decided on 9th January 1924, against the decree of the Sub-Judge of Vellore.

✱ *Prov. Ins. Act, (III of 1907) Ss. 16(5) and 31—Silence of mortgagee in reply to notice by the official receiver will not extinguish his security.*

The whole property of the insolvent cannot be sold free from encumbrances even with the consent of the incumbrancers who as secured creditors can realise or otherwise deal with the security as if the section had not been enacted. Therefore a mortgagee cannot be said to relinquished the security witnin S. 31 by his silence in reply to a notice by the official receiver stating that he proposed to sell the property free from his mortgage and that in case the mortgagee kept quiet he would take it that he consented to the proposal. Even assuming that the official receiver stood in the position of the mortgagor a sale by a mortgagor without relinquishment by the mortgagee but merely with the consent of the mortgagee expressed in an unregistered document cannot be valid unless the facts amount to an authorisation of the mortgagor to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realised in the sale in discharge of his debt. A sale therefore by the official receiver under such circumstances would not in any way bind the mortgagee. [P. 761, C. 1.]

A. Krishnaswami Ayyar and B. C. Seshachala Ayyar—for Appellants.

A. Visvanatha Ayyar—for Respondents.

Ramesam, J.—In this case the 9th defendant and the legal representatives of the 10th defendant are the appellants, Respondents 1 to 3 are the plaintiffs. The suit was brought for recovery of the principal and interest due on a mortgage bond executed by the husband of the second defendant and defendants 1 to 6. The defence was that the plaintiffs were not entitled to maintain the suit on account of certain proceedings in insolvency.

The further facts necessary to be stated for understanding this defence are that the sixth defendant became insolvent and his properties were vested in the Official Receiver, Chittor. On the 16th August 1915, the Official Receiver gave a notice to the mortgagees in which he stated that he proposed to sell the properties of the insolvent by public auction free from their mortgage with the same charge to them on the sale-proceeds as they might have on the properties, and called upon them to consent to the proposal. He added that, in case they did not intimate to the contrary before a certain date, he would take it that they had consented to the above proposal. Incidentally it may be mentioned that the original notice is not exhibited in the case and all that has been exhibited is an office copy. This office copy contains blanks in all important places, where dates and amounts have to be mentioned, in particular the date before which a reply was expected is not in the document and is also a blank. This notice was received as appears from the acknowledgment Exhibit I (a)-on the 26th August 1915 but there was no reply by the mortgagees to the notice. The Official Receiver proclaimed the sale of the properties and the proclamation is dated the 16th December 1915. It was signed by the Official Receiver as Official Receiver and was issued from his office. It mentions that the entire right of the insolvent was intended to be sold and also mentions that the property was to be sold free from encumbrances; and this particular mortgage was intended to be mentioned there but was described incorrectly, but we do not think that very much turns on the correctness of the description of the mortgage. The property was then purchased by defendants 9 and 10, who are now represented by the appellants. On the 22nd February 1916 the mortgagees, applied to the District Judge for cancellation of the sale on the ground that the notice was not served upon them, that the price realised was not adequate, that the sale was held at a time when there was plague prevailing, and the petition also implies that they did not consent to the sale. The matter came up to the High Court and it was held that the petition was out of time and the petition was dismissed on

that ground. The mortgagees then brought the present suit.

On these facts, it is contended by the appellants that the present suit does not lie, that the former sale is binding on the mortgagees. Under the Provincial Insolvency Act III of 1907 only the property of the Insolvent vests in the Official Receiver. The Act contains no provisions for selling the whole property free from all encumbrances even with the consent of mortgagees. S. 16 (5) says, that "nothing in the section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." S. 31 contains some provisions according to which a secured creditor may after realising his security prove for the balance, or he may relinquish his security and prove for the whole of his debt like any other unsecured creditor. or he may prove for the difference between his debt and the estimated value of the property where the estimated value is less than that of his debt. Here it cannot be said that the mortgagees have relinquished their security. Therefore none of the provisions of S. 31 applies. It cannot be said that the Official Receiver was a person with certain limited powers and the silence of the mortgagees in not replying to the notice amounted to such a consent as would justify the receiver to sell the properties. Mr. Krishnaswami Iyer, the learned vakil for the appellants then argued that apart from any limited powers under the Act, the Official Receiver at least stands in the position of a mortgagor, and any mortgagor can sell the mortgaged property with the consent of the mortgagee. But it seems to us that a sale by mortgagor without a relinquishment by the mortgagee but merely with the consent of the mortgagee expressed in an unregistered document cannot be valid unless the facts amount to an authorisation of the mortgagor to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realised in the sale in discharge of his debt. In the present case it is very difficult to make all these implications on account of the mere silence of the mortgagees when they received the notice Exhibit 1. There is no doubt that the Official Receiver and the purchasers thought that the Official Receiver was authorised to sell under the Act and had limited powers of sale. I find it difficult to accept the contention for the appellants that the plaintiffs are estopped by the proceedings in insolvency. Nor can it be said that the plaintiffs chose one remedy, namely of applying to set aside the sale in the insolvency jurisdiction and that, therefore, they are precluded from their legitimate remedy. They chose the wrong remedy and they never got a relief. They never got any relief when they applied in the Insolvency Court.

We think that the judgment of the Court below is right and that this appeal must be dismissed with costs of respondents 1 to 3.

Now, as regards the memorandum of objections, the learned Subordinate Judge has committed a clerical error in paragraph 22 of his judgment where the figure ought to be Rs. 2,530 instead of Rs. 2,800. The amount due to the plaintiffs will be amended accordingly.

With reference to the interest the judgment is right, but the decree directs that it should be calculated at 6 per cent from the date of the decree. This should be altered into "at the contract rate up to the date fixed for payment and 6 per cent. thereafter."

Clause 3 of the decree will also be deleted as the purchasers will be liable for costs personally and for the balance of any unrealised debt the plaintiffs-respondents can prove in insolvency.

The respondents 1 to 3 will be entitled to the costs of the memo. of objections.

Appeal rejected.

✱ 1924 MADRAS 763

WALLACE J.

K. Tirumalacharyulu alias Ramanujacharyulu and others—Defendants-Appellants.

▼

Ammisetti Venkiah and others — Plaintiffs—Respondents.

S. A. No. 843 of 1921, Decided on 6th February 1924, against the decree of the District Court of Guntur.

✱ *Civil P. C., O. 32 R. 3—Appointment of guardian without notice to person in whose care the minor is, invalidates decree only if minor is prejudiced.*

No irregularity by way of an omission to send a notice required by O. 32 R. 3, C. P. C. will operate to render void the presumed representation of the minors in suit, unless such an omission has in fact prejudiced their defence and such prejudice is not a matter of assumption or presumption but of proof. Before the Court will declare that they were not properly represented on account of such irregularity the minors must prove that they had a good defence which by the negligence of the guardian had not been put forward. [P. 763, C. 2, P. 764, C. 1]

R. Sitarama Rao - for Appellants.

N. Rama Rao—for Respondents.

Judgment.—The plaintiffs sued in this case to set aside the decree in O. S. No. 274 of 1917 on the file of the Principal District Munsif's Court, Guntur, obtaining against them when they were minors. They sued on the ground that they were not properly represented by the guardian in the suit and that the said guardian was guilty of gross negligence.

There is no doubt that they were minors at the time of suit, and both their father and mother were dead. It is also clear that they had no certificated guardian and no natural guardian. It appears that the Plaintiff in O. S. No. 274 of 1917 first applied to the Court to have one K. Ramiah appointed as guardian ad litem and notice was sent to him but he refused to act. The plaintiff then applied for a Court guardian and the Head Clerk of the Court was appointed. The plaintiffs here in this case urged that the appointment of the Court guardian was illegal because no notice of the application to appoint a Court guardian was sent, as it should have been sent, under O. 32, R. 3 (5) to the person in whose care the minors were. The defence urged that, since plaintiffs were in the care of K. Ramiah who already had notice of the application to appoint himself as the guardian, it was not necessary to send a fresh notice to him. Plaintiffs rejoined that K. Ramiah was not the person in whose care then they were; that they were in the care of R. Seetharamaswami, that even if they were in Ramiah's care, it was necessary to serve him with a notice again in order to comply with the Rules, so that he might have had an opportunity of objecting to the appointment of the Court guardian or of proposing some other person as guardian; and at least under the rules the Court should and could not have been satisfied, without sending a fresh notice to him, that there was no person fit and willing to act as guardian, which is the only condition on which the appointment of a Court guardian can stand. See O. 32, R. 4 (4).

The first Court found that the plaintiffs were not in the care of R. Seetharamaswami but it has not been clearly found that they were in the care of K. Ramiah to whom notice under the rules did not go. Both the lower Courts have held that the mere omission to send such a notice is a sufficient ground in law for holding that the minors were not properly represented in the suit. I do not think that the law is so. The correct view, I think, is that no irregularity by way of an omission to send a notice as required by O. 32, R. 3 shall operate to render void the presumed representation of the minors in a suit, unless such an omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof see *Suresh Chunder Waru Choudhry* v. *Jugut Chunder Pal* (1), *Bhagwan Dayal* v. *Param Sukh Das* (2), and in this Court the case reported in *Nachiappa Chetti* v. *Chinniah Ambalan* (3) and particularly

(1) [1887] 14 Cal. 204. (F.B).
(2) [1915] 37 All. 179 — 27 I. C. 623 — 13 A. L. J. 179.
(3) [1916] 4 L. W. 362—36 I. C. 794.

in *Ramaswami Chetti* v. *Doraiswami* (4). The *ratio decidendi* in *Maruthamalai* v. *Palani* (5) is to the same effect. It is clear then that the ower Courts were not justified in setting aside the decree in O. S. No. 274 of 1917 without first considering the question whether in fact the minors had been prejudiced in their defence.

The answer to this question again will depend very much on the answer to the question whether the minors had a good defence which. by the negligence of the Court guardian, whose appointment followed on the breach of the rule, had not been put forward. In the present case it is clear that the Court guardian put forward no defence, did not file a written statement and did not supply the vakil for the minors with any material on which to cross-examine the plaintiff's witnesses in that suit. So, the points to be settled are whether the minors had a good defence and whether the omission to obey the rules had the effect of shutting out that defence. Those points are embodied, not as clearly as they might have been perhaps in issues II, III and IV framed by the first Court. The appellants argued that the plaintiffs put forward no evidence on these issues, and therefore they must be found against them the onus lying on them ; but, on my reading of the first Court's judgment, I am forced to the conclusion that the first Court refused to go into these issues, holding that its finding on the first issue was enough to dispose of the suit, and the lower appellate Court never touched on these points at all. I must hold therefore that these issues are still to be tried. I therefore reverse the decision of the lower appellate Court and direct the suit should go back to the first Court and be reheard there on the other issues in the light of this judgment. Fresh evidence is of course admissible. Costs up to date will abide the result.

Case remanded.

(4) 1923 Mad. 465 — 44 M. L. J. 299 — 17 M. L. W. 638.
(5) [1912] 37 Mad. 235—16 I. C. 182.

1924 MADRAS 764

PHILLIPS AND ODGERS, JJ.

A. Sethurama Mudaliar—Petitioner.

v.

M. P. Mangala Goundar—Respondent.

C. R. P. No. 1072 of 1923, Decided on 5th February 1924, from the order of the Sub. Judge of Dindigul D/-3rd December 1923.

Madras Act, (V of 1920), R. 17 (1), S. 9 (1)—Ballot pap r.

Putting not only the serial number on the back of ballot paper but also the voter's own number on the electoral roll, renders election invalid; the effect of the election being declared void is that a fresh election should be held and not that the retiring councillor should be deemed to have been re-elected. Rule 17 (1) of the Election Rules does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark. S. 9 (1) of Madras Act V of 1920 is not meant to apply to cases where an election has been held and is subsequently declared void.

[P 765, C 1 & 2]

S. Muthiah Mudaliar, K. S. Ganapathi Aiyar and *W. Subramania Aiyar*—for Petitioner.

K. V. Krishnaswami Aiyar and *N. Swaminatha Aiyar*—for Respondent.

Judgment.—In this petition the Subordinate Judge of Dindigul has found that the ballot papers at a Municipal election held in Palani Municipality are invalid under R. 17 (1) of the Election Rules. The polling officer, when giving out the ballot papers to the voters, put not only the serial number upon the back of them but also the voter's own number on electoral roll. Consequently, anyone seeing this number on a voting paper could, by a reference to the electoral roll which is available to everybody, identify the particular voter ; and it has been held in *Woodward* v. *Sarsons* (1) in an almost identical case, that the ballot papers were invalid ; but in that case the electoral numbers were placed not upon the back, but upon the face of the ballot paper. It is now argued that this makes a great deal of difference, because the back and the front of the paper cannot be

(1) [1875] 10 C. P. D. 733—44 L. J. C. P. 293—32 L. T. 867.

seen at the same time. In Madras there is no rule like the English rule enjoining on the Returning Officer the necessity of keeping the ballot paper's face upwards as far as possible, and it is not suggested that the backs of the ballot papers would not be visible when taken out of the box. R 17 (1) merely says that the paper is invalidated by any mark put upon it by which the voter may be afterwards identified. Considering the possibility and even the probability of the back of the voting paper being visible to the candidate or his agent, the fact that the electoral number is on the paper would afford a ready means of identification, and it is I think such a mark as is contemplated in R. 17 (1). No doubt, at the present election these numbers were not particularly noticed at the time of the election and, as a matter of fact, the voters were not identified thereby ; but the Rule does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark. In fact, in the case already referred to, *Woodward* v. *Sarsons* (1), the Court observed that in the case before it the numbers had not been identified ; but as they could have been seen by the persons present at the counting of the ballot papers, it was held that the rule, which is similar in England to that in Madras, had been violated and the votes were invalid. It is argued for the petitioner that the decision in *Woodward* v. *Sarsons* (1) cannot be applied to India, because under R. 17 (1), the mark by which identification may be had must be placed on the voting paper by the voter himself. Apparently the first part of the Rule does apply to marks put by the voter, but there is nothing in the latter part to show that it is the voter himself who must put the mark by which he may be identified : and in the absence of words restricting the meaning of the Rule, I see no reason why the view held in *Woodward* v. *Sarsons* (1) with reference to similar rule should not equally apply to R. 17 (1). There is no restriction in the words of the rule and, consequently, no restriction could be read into it without adequate reason. It follows, therefore, that these votes are invalid under R. 17 (1) ; and inasmuch as all the votes cast at the election are invalid, no proper election has been held and the petitioner has not been properly elected.

It is then argued for the petitioner that under S. 9 (1) of the Madras Municipalities Act V of 1920, the petitioner who is the retiring councillor must be deemed to have been re-elected. That section reads as follows:—"If for any cause no councillor is elected at an ordinary election held under the previous section, the retiring councillor shall, if willing to serve, be deemed to have been re-elected." The argument is that, as all the votes cast were invalid, there has been no election of a councillor and that, consequently, the provisions of S. 9 (1) apply. On the other hand, it is contended for the respondent that this section is only applicable to cases in which an election is held but no candidates are nominated for election or no voters vote for any of the candidates. The petitioner's contention has the support of the case, *In the matter of the Specific Relief Act and In the matter of Sarafally Mamooji and Jaffer Jushib* (2), where Macleod, J., read a similar section in the Bombay Municipal Act as being applicable in the case of an invalid election. The point is not at all discussed in Macleod, J's Judgment and it does not appear whether there are rules framed in Bombay similar to those framed in Madras for the decision of disputes as to the validity of an election. From the Madras rules framed for this purpose it is quite clear that S. 9 (1) is not meant to apply to cases where an election has been held and is subsequently declared void, for R. 12 states that the Judge, on declaring an election void, must proceed to declare some other party to the petition to have been duly elected, or must order a fresh election. It is suggested that the first portion of this Rule declaring any other party to the petition to be duly elected applies to the case of the retiring councillor who would generally be made a party. It

(2) [1910] 34 Bom. 659—7 I. C. 958—12 Bom. L. R. 737.

does not follow, however, that a retiring councillor would necessarily be a party and I do not think that it is the intention of this Rule. If the section applied to all cases of invalid elections, there is no reason why it should not say so in terms but it purports to apply only to the case where no councillor is elected. When an election has been duly held and votes have been cast and a councillor has been declared duly elected, can it be said, when that election is declared void, that no councillor has been eleced? I think not, for the councillor undoubtedly was elected and would remain in office as a councillor provided that no petition objecting to such election was put in. In this view. S. 9 (1) is not applicable to the present case and, consequently, a fresh election must be held and this petition dismissed with costs (two sets).

Odgers, J.—I agree and have nothing to add.

Petition rejected.

1924 MADRAS 766

PHILLIPS AND ODGERS JJ.

R. Viswanatha Pillai—Petitioner

v.

T. K. Periaswami Pillai—Respondents.

C. R. P. No. 1073 of 1923, Decided on 5th February 1924, to revise the order of the District Court of Trichinopoly, D/-8th November 1923, in Original Petition No. 126 of 1923.

Madras Act, V of 1920—Election—Initials of polling officer placed on face of bollot papers does not affect validity of votes nor does Serial number printed on face of ballot paper—Election Rules 14 (1), 17 (1)—Rule requiring marking of serial number on back of ballot paper is not ultra vires.

The placing by the polling officer of his initials on the face of the ballot papers does not *per se* contravene R. 14 (1) and does not by itself invalidate the votes. The serial number printed on the ballot paper is not a mark by which the voter may be identified within the meaning of R. 17 (1); nor does the fact that the serial number appearing in the counterfoil of the ballot papers was printed not only on the back of the ballot paper itself but also on its face. The placing of such initials does not in any way facilitate the indentification of particular voter and consequently, the provisions of R. 17 (1) are not thereby infringed.

[P. 766, C. 2 & P. 767, C. 1]

T. R. Ramachandra Aigar and *S. R. Dikshit*—for Petitioner.

K. Rajah Aiyar—for Respondents.

Judgment.—This petition relates to an election held in the Trichinopoly Municipality, and the only question for consideration is whether certain ballot papers that were then recorded are valid or not. These ballot papers are objected to on the ground that they infringe Rule 17 (1) of the Rules for the conduct of Elections of Municipal Councillors. That Rule is as follows: "Any ballot paper which is not duly marked, or on which votes are given to more candidates than there are members to be elected, or on which any mark is made by which the voters may afterwards be identified, shall be invalid." In the present case the contention before th District Judge of Trichinopoly was that these votes were invalid, because the polling officer had initialled the ballot papers not only on the back as directed in R. 14 (1) but had also placed his initials on the face. This placing of intials on the face does not *per se* contravene R. 14 (1) and we agree with the District Judge that in itself it cannot invalidate the votes and we also agree with the District Judge that the placing of these intials does not in any way facilitate the identification of the particular voter and, consequently, the provisions of R, 17 (1) have not been infringed thereby.

In this Court a fresh objection is taken to these ballot papers on the ground that the serial number which appears in the counterfoil of the bollot papers has been printed not only on the back of the ballot paper itself but also upon its face, although the form prescribed under the Rules distinctly states that the numbers shall be printed only upon the back. It is argued that this number is a mark by means of which the voter may be identified. The rules, however, prescribe that all ballot papers shall have this number

upon the back and there is no doubt that, when the ballot paper is handed to the voter, a candidate or his agent may very easily see this number and make a record of it. Similarly as there is no provision that the backs of the ballot papers shall not be seen during the counting, it would appear that, if the candidate had recorded these numbers with the voter's name against each, it would be possible to identify the voter of any particular ballot paper. The putting of this number on the face would render such a process easier still; but it must be remembered that, although the Rules are framed with a view to obtain secrecy of voting, it is impossible to defeat all attempts which may be made to violate that secrecy, and probably no Rules could be framed which could defeat every deliberate attempt made by a candidate's agent to violate secrecy. It is suggested that even the number on back of the ballot paper is liable to violate this secrecy, but it is also essential that the ballot papar shall bear some mark on the back for purposes of identification, for, otherwise, there will be no means of preventing false ballot papers being inserted into the box. If it is once conceded that this number on the back is essential, we do not think that the addition of that number on the face would make any difference, unless it were proved that a list of names with the corresponding serial numbers had been prepared and that the voters could, therefore, be identified. No doubt in this case such a list might have been prepared and the voters identified thereby, but it has been laid down in *Woodward* v. *Sarsons* (1) that the identification must be made by seeing the paper itself or by reference to other available facts. Here the inspection of the paper would not reveal the voter's identity and, if there is no list such as mentioned above available for reference, the identity could not be discovered. We think, therefore, that this number is not a mark by which the voter may be identified within the meaning of R. 17 (1) and in this connection reference may also be made to the Judgment of Field, J. in 4 O Malley and Hardcastle, page 34 in which he follows *Woodward* v. *Sarsons* (1) and says that it must be only from the mark itself that the means of identification must be obtained. We would, however, point out that the printing of the number on the face of the ballot paper is not authorised under the Rule and should not be repeated in future elections.

A further contention is raised that the Rule providing for the marking of the serial number on the back of the ballot paper is *ultra vires* because it is conducive to the secrecy of the ballot for which purpose the Rules were framed. As remarked above, it is impossible to obtain absolute secrecy if persons are deliberately scheming to violate it. The Rule is a reasonable one made for the identification of ballot papers and for the prevention of insertion of false papers and, consequently, we cannot say that it is in any way *ultra vires* of the Government.

In the result, the petition is dismissed with costs.

Petition rjeected.

(1) [1875] 10 C. P. 733—44 L.J.C. P. 293—32 L. T. 867.

1924 MADRAS 767

OLDFIELD AND DAVADOSS, JJ.

Avudainayagappa Pillai—Appellant

v.

Sundaranandam Pillai—Respondent

Appeal Against Order No. 306 of 1922, Decided on 17th April 1923, from the Court of the District Judge, Tinnevelly, D/-25th July 1922.

(a) *Civil P. C., O. 21 R 66—Appeal.*

No appeal lies against an order settling the terms of the proclamation of the sale in so far as it relates to the valuation to be given to the properties proclaimed for sale 27 Mad. 259. Foll. [P. 768, C. 2]

(b) *Civil P. C., O. 21 R. 66—Setting aside sale.*

It is open to any party aggrieved by the incorrect valuation in the proclamation, who suffers substantial loss on account of it to have the sale set aside. [P. 768, C. 2]

K. Rajah Aiyar and *P. N. Appuswami Aiyar*—for Appellant.

C. V. Ananthakrishna Aiyar and *P. V. Krishnaswami Aiyar*—for Respondent.

Judgment. — The lower Court's order is one settling a proclamation of sale. The first objection taken to it is that the right, title and interest of the sixth defendant, here the appellant, is not correctly described in the words "The right, title and interest in the property to be sold is that of sixth defendant, Avudainayagam Pillai, excluding that part, if any, of his right, title and interest derived by him from the deceased, fifth defendant Muthukaruppa Pillai."

The circumstances are that the fifth defendant died during the pendency of the suit, one brought on a mortgage. The plaintiff did not implead any legal representative for him, within the statutory period. The decree passed referred to the death of the fifth defendant and the consequent abatement of the suit against him. But it was in terms against the whole mortgaged property. It is clear, however, that only the share of the defendant against whom the decree was passed, that is of the sixth defendant can be made liable, since the decree can be executed only against him. In fact, the fifth defendant's widow and the sixth defendant are now litigating regarding the fifth defendant's share. The question between them being whether the fifth and sixth defendants, brothers, were undivided or whether the widow took the fifth defendant's share by inheritance. In these circumstances, there is no doubt that the sixth defendant's share alone can be sold under the decree and that has not been seriouly disputed. We think then that the lower Court's description of the sixth defendant's share, including the words, which statedly limit what is to be sold to the sixth defendant's share in his own right and exclude any addition to it, which may ultimately be found to have accrued by survivorship, was a clear and sufficient description. It is said that the sale should be postponed, because, in the circumstances, the property cannot be brought to sale to advantage; but the issue before us is not of any claim, for postponement of the sale, but of the terms in which the sale proclamation is to be made. Those terms seem to us to be perfectly fair and as accurate as they can be made on this point. The appeal fails. The other question raised by the appellant is whether the valuation inserted in the the proclamation is correct. It is objected that no appeal lies against that portion of the lower Court's order, with reference to *Sivagami Achi* v. *Swbramaina Ayyar* (1). Some attempt has been made to canvass the correctness of that decision. It was, however, given twenty years back, and we see no reason why we should dissent from it. As the Full Bench there pointed out, it will be open to any party aggrieved by the incorrect valuation in the proclamation who suffers substantial loss on account of it, to have the sale set aside. That remedy being open, we do not entertain the suggestion which has also been made by Mr. Raja Aiyar, on behalf of the sixth defendant, that we should treat the appeal as a revision petition.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1904] 27 Mad. 259—14 M. L. J. 57 (F. B.)

1924 MADRAS 768

ODGERS AND WALLACE, JJ.

The Public Prosecutor—Appellant.

v.

Palathingal Valia Peedikakkal Muhamad—Accused.

Criminal Appeal No. 847 of 1923, Decided on 6th December 1923.

Criminal Trial—Delay—Conviction secured but set aside on Habeas Corpus *proceedings—Institution of fresh prosecution under different charge is not maintainable after unexplained delay.*

Where an accused was summarily convicted by a Magistrate having no jurisdiction on 6th September 1921 under Sect 149 Indian Penal Code and the conviction was subsequently set aside by the High Court on *habeas corpus* proceedings on 30th August 1922 and the Government decided on 8th December 1922 to prosecute the same accused under sect 121 Indian Penal Code but the Sessions Judge acquitted him of the charge under S. 121.

(i) *Held*: that there was delay which could not be understood;
and (ii) that the accused should not be furthre pursued even under a new charge. [P. 679, C. 1]

The Public Prosecutor—for Appellant.

K. P. M. Menon and B. Pocker—for Accused.

Odgers, J.—We agree with the Sessions Judge in thinking it doubtful and arguable whether the part taken by the accused amounted to waging war, under Section 121, Indian Penal Code. We have purposely not entered into the merits of the case on the evidence; but the Sessions Judge finds that the accused had only a stick; he was not otherwise armed or dressed in uniform. We do not for a moment suppose that he was as alleged innocently walking along the the road; but the police after killing or wounding other Moppilas forced the mob to retire and the mob then dropped their weapons and 38 of them were arrested. This is admittedly the first incident in the rebellion and we do not express an opinion that it was or was not an act of war. We think it doubtful, and we think the accused is entitled to the benefit of that doubt. Further the accused was summarily convicted by a magistrate having no jurisdiction on 6th September, 1921, under Section 149, as far as we can make out, from the vague judgment of the magistrate. This was subsequently set aside by the High Court on *hebeas corpus* proceedings, which ended on 30th August 1922. The Government did not either in 1921, or till 8th December 1922 decide to prosecute this accused under Section 121. We cannot understand this delay and we think it hard that accused having succeeded before the High Court and now having been charged, under Section 121, Indian Penal Code, should now be further pursued on that charge.

The Sessions Judge refused to find whether the facts proved against accused amounted to waging war or not, but convicted accused, under Section 147, of rioting. There is no appeal with regard to this. We should add that the *habeas corpus* proceedings were not completed, till 11 months of the accused's sentence of 2 years had been served. The Appeal must be dismissed.

Appeal dismissed.

1924 MADRAS 769

KRISHNAN AND ODGERS, JJ.

Venkatanarayana Chetty and another—Petitioners—Appellants.

v.

Vu. R. M. M. S. S. Sevugan Chetty and others—Respondents.

Appeal against Orders No. 46 and 47 of 1921, Decided on 25th March 1924, against the orders of the District Court of Salem D/-17th April 1920.

Provincial Insolvency Act, (V of 1920), S. 39 (4)—Judgment debtor having no notice of declaration can re-open distribution,

When a notice under S. 39 is prescribed by the rules made under the statute a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed. Where the Court did not send the necessary notice as required by the section the creditor should be allowed to reopen the matter and he should be given an opportunity of proving his debt.

[P 770, C 1]

S. T. Srinivasagopalachari—for Appellants.

K. Bhashyam Aiyangar—for Respondents.

Krishnan, J.—This is an appeal in an Insolvency proceeding, which began in 1912. The appeal is by one of the creditors. He claimed to be entitled to a dividend from the assets realised from the Insolvent's Estate. His application was dismissed by the learned District Judge, on the ground that the final dividend had been declared before his application was filed and that the distribution of the dividends so ordered could not be revised, so as to include his share, as he knew that such dividend was going to be declared and took no steps in time. The learned Judge points out that he appeared in Court in person, when it was claimed by the Official Receiver that a property transferred to him by the insolvent was not validly transferred: it was a a case of a fraudulent preference and the Receiver applied to have the alienation set aside and it was set aside. The learned Judge holds that he should have kept in touch with the proceedings in Court; and as he had tendered no proof of his claim in time, he was rightly refused his share in the dividend. Now the difficulty in adopting this view is that under S. 39, Cl. 4 (a), of the Pro-

vincial Insolvency Act, of 1907, a particular form of notice to creditors, whose claims have been notified, but not proved is prescribed, whenever a final dividend is to be declared. It appears that in this case, such a notice had not been given to the creditor. Under Rule 21 (b), of the rules framed by this Court under the Insolvency Act, it is prescribed that the notice under S. 39 (4) should be in the form of a separate registered letter addressed to each creditor. S. 39 (4) says also that the creditor should have express notice that the Receiver is proceeding to make a final dividend and that he would do so, without regard to the claims of the creditor, if he does not take care to prove his debt in time. When a notice of that sort is prescribed, by the rules made under the statute, a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed.

We have not been referred to anything to show that the appellant has proved his claim up to date or that his proof has been accepted. But as the Court did not send the necessary notice, as required by the section, we think that the creditor should be allowed to reopen the matter and that he should be given an opportunity of proving his debt, within a time to be fixed by the Lower Court. We are saying all this, on the footing that the final dividend has been declared in this case. The learned Judge says that there was only one dividend and that was the final dividend in the case. If, however, the dividend that has been declared is not the final dividend, of course the creditor will have no ground to share in it, for none of these remarks made above will apply to the case. That is a matter that should be considered and decided by the Lower Court; it must see whether the dividend was the final dividend, or whether any further assets are available for payment of another dividend. The order of the Lower Court is set aside and the case will go back to the lower Court, for disposal in the light of the observations made by us. As regards the costs of this appeal, we think we would not be justified in giving any costs to the appellants, as all the delay and difficulty has arisen from the fact that he delayed the tendering of proof of his debt. We direct each party to bear its costs in this Appeal.

C M. A. No 47 will follow C. M. A. No. 46 of 1921 and the same order will be passed in it.

Appeal allowed.

✱ 1924 MADRAS 770

VENKATASUBBA RAO, J.

Modadugu Perayya — Defendant—Appellant.

v.

Peroli Venkayamma — Plaintiff—Respondent.

S. A. No. 66 of 1921, Decided on 23rd January 19 4, against the decree of the 2nd Additional Sub-Judge of Guntur.

✱ (a) *Civil P. C, O. 21 R. 63—Burden of proof.*

Plaintiff in his suit to set aside order is bound to establish his ownership though defendant alleges that the transaction was *benami*, notwithstanding the fact that ordinarily it will be for the party who sets up that a particular transaction is not real but *benami* to make out affirmatively the case put forward by him. 36 Mad. 68 Foll. [P 771 C 1]

(q) *Civil P. C, O. 41 R. 23—Burden of proof.*

Where the lower appellate Court placed the burden of proof wrongly and came to a certain conclusion.

Held: remand should be ordered though it may be possible that the lower appellate court might still come to the same conclusion after the consideration of the probabilities and the evidence in the case. [P 771 C 1]

V. Ramadoss—for Appellant.

K. S. Ganapathi Ayyar—for Respondent.

Judgment. — The plaintiff is the wife of one Narayana Row against whom the defendant obtained a decree. In execution proceeding, the plaintiff intervened with a claim alleging that the property attached was not her husband's but her absolute property. The claim having been dismissed the plaintiff has filed this regular suit, which the District Munsif has dismissed on the ground that the sale in favour of the plaintiff was

benami for her husband. On appeal the Subordinate Judge has reversed the finding of the District Munsif. He in effect has held that the plaintiff is not merely the ostensible but also the real owner of the property; but unfortunately he has thrown the onus wrongly upon the defendant, and this is what he observes on the point. "The burden was on the defendant to establish that Exhibit A which stands in plaintiff's name was *benami* for her husband, and, in my opinion, it was not discharged at all". Ordinarily it will be for the party who sets up that a particular transaction is not real but *benami* to make out affirmatively the case put forward by him. But it has been pointed out in the decisions to which my attention has been drawn that, after the dismissal of a claim, where a regular suit is instituted to set aside the order made on the claim petition, it is for the plaintiff in that suit *i. e.*, the defeated claimant to establish that he is the owner of the property, and that it is not sufficient for him to merely rely upon the deed which shows his ostensible title: see *Jamahar* v. *Askaran* (1) *Govind Atmaram* v. *Santai* (2) and *Nanhi Jan* v. *Bhuri* (3). It is quite possible that, if the Subordinate Judge had considered the evidence without applying the rule of evidence which he has, he might still have come to the same conclusion after consideration of the probabilities and the documentary and oral evidence in the case. He, however, having considered the evidence from a wrong standpoint, his decision must be reversed. I accordingly set aside the decision of the Lower Appellate Court and remand the appeal for fresh disposal.

In the circumstances I direct that the costs of this appeal do abide the result of the suit. Refund of the court fee paid for this appeal is ordered.

Case remadned.

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(1) [1915] 22 C. L J. 27—30 I. C. 855.
(2) [1887] 12 Bom 270.
(3) [1908] 30 All 321—5 A. L. J. 601—(1908) A. W. N. 125.

1924 MADRAS 771

RAMESAM AND WALLACE, JJ.

Kannan Kutty and another—Defendants—Appellants.

v

Elaya Veetil Velu and another—Plaintiff and Defendant—Respondents.

S. A. No. 164 of 1921 Decided on 12th October 1923, against the Decree of Sub. J. South Malabar in A. S. No. 28 of 1920.

Malabar Law—Uralans—Notice by one co-Uralan to quit to a lessee is invalid—Acceptance of invalid lease from one co-Uralan does not take away the right of lessee to fall back upon a prior valid lease.

Per Ramesam, J.—Where the other Uralan is a party to the suit the principle that a suit by one of two Uralans to recover Devaswam property from a lessee without consulting the other is liable to be dismissed, does not apply. 34 Mad. 406; 26 Mad. 461 and 24 M. 296 Dist. [P. 772 C. 1]

Per Wallace, J.—The remedial right of the Uralans as trustees does not accrue to the trustees until they as a body after consultation signify their will to determine the lease and communicate that will to the lessee. [P. 773 C. 1]

Per Ramesam and Wallace, JJ.—Acceptance of an invalid lease of property belonging to two Uralans, from one of the two Uralans by a tenant who held under a lease from both the Uralans from year to year does not prevent the lessee from falling back on the original lease. A condition in the lease that the landlord must give the value of the *Kuzhikurs* and *Chamayams* to the tenant on his eviction does not dispense with the necessity of notice to quit. Notice by one of the two Uralans of a Devaswam to determine a lawfully created tenancy is invalid. [P. 772 C. 1 and 2]

K. P. M. Menon—for Appellants.

C. V. Ananthakrishna Iyer and *K. P. Ramakrishna Iyer*—for Respondents.

Ramesam, J.—The suit property belongs in jenmam to Kannancheri Devaswam of which the Uralans are the plaintiff and the 3rd defendant. Plaintiff's predecessor and the 3rd defendant leased it to the 1st defendant for a period of 12 years under Ex. A, on 10th August 1897. Plaintiff brought the suit to recover the property, on behalf of the Devaswam. The Munsif dismissed the suit. The Subordinate Judge decreed it. The 1st and 3rd defendants appeal.

The first point argued is that the suit filed by the plaintiff (one of the Uralans), without consulting the 3rd

defendant is not maintainable. It is true that, in any transaction which creates or destroys rights, all the Uralans must be consulted: See *Istoop* v. *Ayappen* (1) a case of demise; and *Chandu* v. *Kuttiyil Rayiru* (2), a case of Melcharth. But this principle does not apply to suits, provided the other Uralans are also parties: See *Mariyil Raman Nair* v. *Narayanan Nambudirpad* (3) and *Kunhan* v. *Moorthi* (4). The decision in *Savi ri Antarjanam* v. *Raman Nambudri* (5) was distinguished in the former of these cases and has scarcely any authority after the latter. The remarks at p. 689 of *Angamuthu* v. *Ramalinga Pillai* (6 (in so far as they refer to suits) are *obiter*. This is conceded by the counsel for the appellants in reply. I hold that the suit cannot be dismissed for non-consultation of the 3rd defendant, provided it is otherwise maintainable.

The second point argued is that the suit is bad for want of notice to quit. Though the 1st defendant's tenancy, under Ex. A, was only a tenancy for a term, it was converted into a tenancy from year to year by the payment and acceptance of rent after 1897 (see paragraph 3 (2) of the plaint, which shows that rent was paid after 1897). This is conceded by the respondent. The first respondent, however, contends that the 1st defendant, having accepted, by Ex. II, a renewal of the Original lease by the 3rd defendant only, cannot fall back on the tenancy from year to year. The Courts below found that Ex. II is invalid. That being so, the prior lease was not extinguished by Ex. II. It is true that the 1st defendant insisted on the validity of Ex. II in his written statement; but the plaintiff repudiated it; and as Ex. II has been proved to be invalid, the rights under the prior tenancy did not cease. Moreover, the 1st defendant's plea in paragraph 12 of the written statement: "This suit which is brought by the plaintiff alone to recover possession under the prior lease is not maintainable," shows that he meant to rely on his rights, under the prior lease, as a defence to the suit. The prior lease has not been surrendered or otherwise legally put an end to: (see *Ramunni* v. *Kerala Varma Valia Raja* (7) and *Kunhunni Pannikkar* v. *Thirumump* (8). The respondent also contends that the clause "You must give (me) the value of the Kuzhikoors and Chamayams..... .....when I am evicted at any time after the expiry of 12 years," in Ex. A, dispenses with a notice to quit. I do not agree with this contention. A proper notice to quit is therefore necessary.

The next question is whether Ex. C, which was issued by the plaintiff alone, is enough. It is true that in England it has been held that one of the several joint tenants may issue a notice to quit and put an end to a lease created by all of them: [see *Doed Whayman* v. *Chaplin* (9), *Doed Aslin* v. *Summersett* (10) followed in *Doed Kindersley* v. *Hughes* (11) Alford Vickery, I. C. and Mar. 283]. Apart from the fact that this rule has not been followed in India by the Bombay and Calcutta High Courts, as to which I express no opinion, it cannot apply to the present case, where there is no joint tenancy. The Devaswam is the only owner of the property. It is represented by the Uralans, both of whom must act to determine a tenancy lawfully created. None of the English cases is a case of trustees: [see *Cassim Ahmed Molla* v. *Eusuf Haji Ajam Pepardi* (12), which is a case of joint receivers.] I therefore hold that the notice Ex. C is not a valid notice. The other question argued, whether the notice is a sufficient notice (only 15 days being allowed for quitting the land) need not be considered.

The appeal is allowed and plaintiff's suit is dismissed with costs of the 1st defendant throughout.

(1) [1912] 16 I.C. 435.
(2) 1922 Mad. 2—42 M.L.J. 280—15 M L.W. 264—(1922) M.W.N. 172—32 M.L.T. 25.
(3) [1903] 26 Mad. 461.
(4) [1910] 34 Mad. 406—20 M.L.J. 951—7 I.C. 422—(1910) M.W.N. 359—8 M.L.T. 208.
(5) [1901] 24 Mad. 296.
(6) [1921] 39 M.L.J. 685—60 I.C. 766.
(7) [1892] 15 Mad. 166.
(8) [1919] 10 L. W. 427—26 M.L.T. 332—52 I.C. 675—(1919) M.W.N. 742.
(9) [1810] 3 Taunt. 119.
(10) [1830] 1 B. and Ad. 136.
(11) [1840] 7 M. and W. 139.
(12) [1916] 23 C.L.J. 453—34 I.C. 221.

Wallace, J.—I am in full agreement with my learned brother, as to the necessity for a notice to quit and as to the invalidity of Ex. C, which is the only notice given in the matter of the determination of the suit tenancy. This finding is sufficient to dispose of this Second Appeal. I own some doubt on the proposition, whether plaintiff was in law entitled to file his suit, without consulting his colleague, since to adopt the language of *Kunhan* v. *Moorthi* (4), the remedial right in this case, *viz.*, the right to eject the 1st defendant would not accrue to the trustees, until they, as a body, after consultation, had signified their will to determine the lease of the 1st defendant and had communicated that will to him. As there was neither such consultation nor communication, the remedial right did not accrue; and therefore, on the principle laid down in that case, it would not be competent for the plaintiff alone to sue. I prefer at present, however, not to rest my decision on this point, which is not necessary for the disposal of this appeal. I agree that the suit be dismissed with costs of the 1st defendant throughout.

Appeal allowed.

1924 MADRAS 773

RAMESAM AND JACKSON, JJ.

Esuf Ali Mahammedbhoy Allibhoy and others—Plaintiffs—Appellants.

v.

A. K. Thaha Ummal and others—Defendants—Respondents.

Appeal No. 63 of 1921, Decided on 24th January 1924, against the decree of the Court of the Subordinate Judge of Tuticorin.

Carrier—By sea must prove peril of the sea—That accident could be avoided by greater foresight does not prove negligence.

The mere fact that the accident might have been avoided by greater foresight does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (S. 512) has not been accepted by the authorities: (Carver S. 87). The loss need not be extraordinary in the sense that the cause must be uncommon. It is true that negligence does not save the defendants' liability; but if reasonable care is taken the perils of the sea while not including the effects of mere ordinary wear and tear, will include the consequences of any kind of accident ending in damage by sea water.

[P 775 C 2]

T. R. Venkatrama Sastri and *K. S. Sankara Aiyar*—for Appellants.

S. Sreenivasa Aiyangar, *K. V. Sesha Aiyangar* and *K. R. Rungaswami Aiyangar*—for Respondents.

Ramesam, J.—This is a suit for damages to plaintiffs' goods, consigned on defendants' Schooner, Sahul Hameed. The Schooner left Colombo on 25th August 1917 and arrived at Tuticorin on 28th August, with 250 cases of Safety Matches, entrusted by plaintiff to the master. On a certificate of survey (Ex. C), by the Secretary of the Local Chamber of Commerce the goods were sold by auction, on 30th October 1917 (Ex. C) and realized Rs. 3142 (Ex. D). The market value is alleged to be Rs. 31,750. The suit is for the difference.

Ex II is the bill of lading issued by the defendants' agent. It contains the usual exemption clause:

"The act of God, King's enemies, Fire and all and every other dangers accidents of the Seas, Rivers and navigation of whatever nature or kind whatsoever excepted."

Though there has been considerable argument, on the question of burden of proof and several cases have been cited before us, the matter seems to be clearly settled, in the present state of authorities. It is for the defendant to plead and prove perils of the sea. If he makes out a *prima facie* case, the plaintiff can rebut it, by proving defendants' negligence (see the judgment of the Court of Appeal in *The Glendanoch* (1); Esher M. R., explains certain expression of Lord Herschell, in *The Kantho* (2). See also *The Norway* (3), Scrutton on Charter Parties (10th Edition) Art. 79, Note 1 and Art. 83, Note at page 298, and Carver on Carriage by Sea, S. 87).

We have therefore to see what the facts alleged and proved are. The defendants claim that the damage to the goods was on account of a peril

(1) [1894] P. 226.
(2) 12 A.C., 508.
(3) 3 Moore P.C. (n.s.) 245—11 Jur. (n.s.) 892—13 L.T. 50—13 W.R. 1085.

of sea, *i.e.*, that there was a strong wind on the night of the 29th and the Ship was driven away, from the place where she anchored at first towards the south. The wind then changed its direction, with the result, that the Schooner swung round and set on her anchor, causing a hole on her port-side. The vessel stranded and at 6 a.m., there was 5 feet of water in the hold. The cases of safety matches were damaged by the sea water. The plaintiff denies any change in the position of the ship and alleges negligence on the part of the master in anchoring in shallow water.

Before discussing the evidence on these allegations, I may observe that the Subordinate Judge found on the 2nd issue that the liability of the defendants, as carriers, continued, till the 30th and on the 9th issue, he found against their allegation that the master was ready and anxious to deliver the goods on the 29th. It is on this footing that the appeal has been argued before us.

I will now discuss the evidence, as to what happened on the 28th and 29th.

Firstly, the weather on the 29th: P. W. 1 says that no signal of high and violent wind was given on that day. But this evidence is useless, as it is proved by D. W. 1, the Port officer, that no observation was taken during night. The extract from the log book, Ex. K, also shows that no entries were made for the night. D. W. 1 says that he recollects that the weather on the 29th was unsettled. We see no reason to reject this evidence. D. W. 3., the owner of another Schooner, M. S. Hydrose, which was also anchored in the harbour that night (see Ex. IX: this is also admitted by P. W. 2) says that there was high wind. D. W. 4., who was *tandal* of that Schooner, says there were violent winds from 2 a.m., upto 3 or 3-30 a.m. But D. W. 5 says that there was not strong wind, but only average wind. On the whole, it seems to me that there was some rough weather in the night, though it is possible, D. W. 4 was exaggerating. It might not have amounted to a storm or a cyclone.

The next question is where did the Schooner first anchor and did she move to another place further south, on account of the wind. The coast here runs from north to south. A little to the south of the port and harbour, there is an island called Hare Island, on which there is a light-house. During night, lights were prohibited as the war was then going on. On account of the island, the contours of equal depth near it recede towards the east and further from the coast. The form of the coat is as shown in the margin (*vide* any map with sea depths.)

If a ship, anchoring due east of the port, at a proper depth, drifts towards the south, parallel to the coast, the water would be getting shallower, on account of the nearness of the island

On the 30th, the ship was found in 7 feet of water, (ebb). This is conceded by all the witnesses: (*vide* also Ex. E.). According to P. W. 2, she was then 2 or 3 miles away from the pier and the other Schooner was about half a mile to the north, in 10 or 12 feet of water. He was not asked as to where the ship anchored, on the 28th, a curious omission, nor was P. W. 3 questioned on this matter. P. W 1 says that she was standing on the 28th, at a point one mile from the beach The distance given by P. W. 1 for the 28th and that by P. W. 2 for the 0th suggest that the ship changed her situation. The evidence for plaintiffs throws no further light either way. D. W. 3 says that the suit Schooner was east of his own Schooner (which it may be remarked was in 10 feet or 12 feet of water according to P. W. 2) by half a mile. To the same effect is D. W. 4; but his evidence is not intelligible being too briefly recorded. D. W. 3 says that she had moved on the morning of the 30th, one-fourth furlong off. D. W. 5 says that the ship had moved about 4 or 5 furlongs towards the shore of the southern side. D. W. 6 says that she had moved half a mile from her original place, which must have been at 9 feet (ebb.). He also says that she was 2 or 2½ miles away from the shore on the 28th and that he noticed her changed situation with

reference to a buoy quarter mile off. He appears to be disinterested and on his evidence I am inclined to think that the other Schooner was 1½ miles east of the port, probably in 10 feet high water, or 8 feet (ebb); the suit Skooner was half a mile further east, *i.e* 2 miles from the shore and that she must have been in 9 feet (ebb). It may be that D. W. 2 slightly exaggerated when he said he anchored in 12 feet (high water) in Ex. III. The place, where the Schooners were anchored was the usual place for them. Here, it must be remembered that the difference in the tonnage between the two Schooners is only 14 tons (Ex. IX) and half a mile towards the east is a proper distance between the two. The draught of the suit Schooner shaft is 7 feet (Ex. X) and it is unlikely that on the 28th, she anchored in 7 feet of water (ebb). She must have moved towards the south parallel to the coast, thus getting into shallow water. A slight gale causing such change or even a wreck in the native craft is not uncommon: (see also D. W. 5.) The only difficulty in the case is caused by the reports of D. W. I, Ex. X and Ex. N, where he expresses his opinion that, from the beginning, she must have been in 7 feet of water. I have already observed that this is unlikely. His first, report, Ex. N (dated 4th September, 1917), shows that the holding ground where the ship was said to have been first anchored was, not good. He then says that the evidence is not conclusive, so far as the vessel's dragging of the anchor is concerned. Probably he had not all the evidence we now have before us and his conclusion is therefore not decisive. He repeated it in the second report (Ex. X, dated 8th September 1917). The learned vakil for the appellant drew our attention to Ex V, a protest made by the Master, on the 30th August. This is in English, a language, not known to the Master. That he relied on a change or situation, on the 4th September, appears from Ex. N. and he mentioned it expressly in his later protest, Ex. III, dated 7th September, 1917. It may be that the scribe of Ex. V omitted part of what was mentioned to him. Anyhow it must have been prepared in a hurry and that omission of the change, in the position of the vessel, in that document, is not conclusive (in the face of the other evidence), to show that the explanation of the Master was an after-thought of the 4th September. I have not relied on the evidence of D. W. 2, as it may be said to be interested. I therefore find that the ship dragged her anchor and moved towards the south from her original position (8 feet ebb. and 10 feet flow) to the later position (7 feet ebb.) If she was fully loaded, 8 feet (ebb) of water could not be enough, but, with her actual load, it was sufficient. (see D. W. 5).

The next question is whether the facts so proved amount to a peril of the sea. If the vessel had anchored from the beginning in 7 feet of water, one may say it was sheer carelessness; but on the facts proved it cannot be described as negligence. It may be that if the vessel had anchored in deeper water, further off towards the east, she would not have stranded even if she drifted towards the south, on account of the wind. The mere fact that the accident might have been avoided, by greater foresight, does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (Sect. 512) has not been accepted by the authorities: (Carver Sect. 87). The loss need not be extraordinary, in the sense that the cause must be be uncommon. It is true that negligence does not save the defendants' liability (Wallis, J., in *Grill* v. *General Iron Screw Collier Co* (4) But if reasonable care is taken, the perils of the sea, while not including the effects of mere ordinary wear and tear, will include the consequences of any kind of accident ending in damage by sea, water (Abbot on Merchant Shipping, p. 612, citing *Fletcher* v. *Inglis* (5) Scrutton, Art. 83, *Carcoran Gurney* (6) and *Laurie* v. *Douglas* (7). *The Thruscoe* (8) *The Catharine Chal-*

(4) [1866] L. R. 1 C. P. 612.
(5) [1819] 2 B. and Ald. 315=20 R. R. 448.
(6) 1 E. and B. 456.
(7) [1846] 15 M. and W. 746.
(8) [1897[P. 301

mers (9), *Bishop* v. *Pentland* (10) where a rope broke, *Merchants' Trading Co.* v. *Universal Marine Insurance Co.* (11).

In *Amies* v. *Stevens* (12), a sudden gust of wind was held to make all the difference. On the question of what is a proximate cause, the latest decision is *Loyland Shipping Company* v. *Norwich Union Fire Insurance Society* (13), especially the judgment of Lord Shaw of Dunfermline may be referred.

The appellants pointed out that while the other Schooner had 3 or 4 anchors (P. W 3). it does not appear that the suit Schooner had more than one. I do not think this matters. She had 15 fathoms of cable (Ex. N). The crew had put out more chain to prevent the dragging but without success; (Ex. X.). Some of the cases relied on by the learned vakil for the appellants *Davis* v. *Garrett* (14) and *James Morrison and Co.*, v. *Shaw Savi Albion Company, Limited* (15) are cases of deviation. In *Joseph Tarvers and Sons Limited* v. *Cooper* (16), clear negligence in leaving the barge unattended at night was proved and then it was for the defendant to show that the loss was not caused by the negligence. Negligence was also proved in *Price & Co.*, v. *Union Lighterage Company* (17) (on appeal) and in *In re Polemisand Furness Wi hy and Co* (18) *Steiurnan & Co*, v. *Angier Line* (19) was a case of theft by the men in the ship service. The cases of *City of Peking* (20) and *The President Lincoln* (21) are cases of collusion and negligence where negligence was held to be the initial cause. In *Leonards Carrying Company Ltd.* (22) the vessel was unseaworthy and the owners did not discharge the onus that lay on them.

We think the defendants have not been guilty of negligence and have proved a peril of the sea. In view of this finding, we have not heard arguments on the question of damages.

The appeal must be dismissed with costs.

Appeal dismissed.

(9) 32 L. T. 847
(10) 7 B & C. 219=1 M & Ry. 49=6 L. J. (O S.) K. B 6=31 R. R. 177.
(11) [1870] 9 Q. B , 581 at p. 596.
(12) [1718] 1 Strange 127.
(13) [1918] A. C , 350.
(14) 6 Bing. 716=4 M.& P. 540=8 L. J.(O.S.) C. P. 253=31 R. R, 524
(15) [1916] 2 K. B., 783.
(16) [1915] 1 K, B., 73.
(17) [1907] 1 K, B., 750 (on appeal (1904) 1 K. B., 413.
(18) [1921] 3 K. B., 560.
(19) [1891] 1 Q. B., 619.
(20) 14 A. C.. 40.=58 L. J. P. C. 64=61 L. T. 136=6 Asp. M. C. 396.
(21) [1911] P. 248=81 L. J. P. 5=105 L. T. 442=12 Asp. M. C. 41.
(22) [1915] A. C. 785.

1924 MADRAS 776

SPENCER, Og. C. J. AND KUMARASWAMY SASTRI, J.

Gopala Kuduva and others—Plaintiffs—Appellants.

v.

Sheikh Muhammad Hamza Sahib and others — Defendants — Respondents.

S. A. No. 48 of 1921, Decided on 30th January 1924, from the Decree of Dist. Court of South Canara in A. S. No. 229 of 1919.

Landord and Tenant—Lease—Mulgeni lease is forfeited by sale—Sub leases by the vendees of lessee to the vendor lessee are also forfeited.

Where certain mulgeni lessees executed a sale deed and purported to deliver possession to the vendees though they actually continued in possession under a lease taken at the same time from the vendees held that the mulgeni lease was forfeited and that both the original lease and the under leases were annulled.

[P 777 C 1, 2]

K. Yeganarayana Adiga—for Appellants.

K. Ramanatha Shenoi and K. Sundara Rao—for Respondents.

Spencer, Og. C. J.—The principal question for decision in this Second Appeal is whether the sale deed dated 18th Appril 1916, Ex. B., executed by defendants 1 to 7 in favour of the 8th defendant worked a forfeiture of the one third share of the properties held by these defendants and others, upon a mulgeni lease of 1864, Ex. A. Ex. B. purports to be an outright sale, the vendors declaring "We have given up all our rights and interest in the said property and placed the property, which is in our

possession, in your possession now." There is also a clause of divestment, "Neither we nor our representatives have any right, interest, or power, or claim etc., in the said property."

Under Ex. A. the tenant undertook that he would not alienate the said land in any way and there was a covenant: "In default I shall be liable to surrender the said land to you immediately."

The District Munsif and the District Judge held that the plaintiffs were not entitled to recover the property, on the ground that there was a lease of the same property in favour of defendants 1, 4, 5 and 6, executed by the vendees. As possession did not pass to the alienee, the District Judge considered that there was no forfeiture. We cannot agree with this view. Under Ex B. the legal possession was clearly alienated. Actual possession is not the test of alienation. For it would have been possible for the lessees under the mulgeni lease deed of 18th April, 1916, to have done some act, which would, according to its terms, forfeit their right in favour of the vendees and in that manner, the entire right to this property might change hands. The word used in Ex. A is "*Paraswathinam*" which is equivalent to the English word 'alienation,' or in other words, giving control to a stranger. As the lease deed prohibits alienation "in any manner," it cannot be seriously argued that this outright sale did not come within the terms of that prohibition.

On behalf of defendants 11 and 12, it is argued that they are not bound by the acts of defendants 1 and 7. These defendants are persons in whose father's favour the conditional sale deed, Ex. III, was executed in 9[illegible] are bound by fresh acts of alienation made by the tenants, under whom they held under their conditional sale. We held in S. A. No. 483 of 1913, that the plaintiff had waived his right to object to that conditional sale. The District Judge was mistaken in holding that the plaintiffs were bound by the conditional sale, if he meant by that, that they had lost their right to evict. In the previous litigation, it was only decided that the plaintiffs had waived their right to evict the tenants, on account of that particular breach of the condition of the lease. Subsequent acts of alienation will give rise to a fresh cause of action. (See *Parameshri* v. *Vitappa Shanbaga* (1)). *Great Western Railway Co.* v. *Smith* (2) is an authority for holding that, if there is a lessee who has created an under lease, or any other legal interest, if the lease is forfeited, then the under-lessee loses his estate as well as the lessee himself. The authorities are collected in Foa on 'Landlord and Tenant', at page 632.

The District Judge's observation, that, if the 11th defendant died before the appeal was presented, his legal representatives could not be brought on the record, is unintelligible. As all the parties are now before us, we are able to adjudicate on the rights of all concerned.

An objection has further been taken that the plaintiffs have no right to sue for recovery of possession of the portion of the property in possession of the defendants without suing for the whole land, as it stood before the partition. In paragraph 5 of the plaint, the plaintiffs have recognised the partition, which was one of the subjects of the decision in S. A. No. 483 of 1913, and this objection was not taken in the trial Court and cannot be heard now.

The Second Appeal is allowed. The decrees of the Lower Courts are set aside and the plaintiffs will have a decree for possession as prayed for on payment of improvements, as given in the District Munsif's decree with costs throughout.

Kumaraswami Sastri J.—I agree with my Lord.

Appeal allowed.

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(1) [1903] 26 Mad. 157.
(2) [1876] 2 Ch. Div. 235.

1924 MADRAS 778

JACKSON, J.

Akshia Pillai—Appellant.

v.

Govindarajulu Chetti and others — Respondents.

A. A. A. O. No. 81 of 1922 and 12 of 1923, Decided on 21st July 1924, against the Order of the District Court of Chingleput in Miscellaneous Appeal No. 4 of 1921.

(a) *Civil P. C., S. 151 — Appellate Court considering validity of execution sale is not confined to O. 21, R. 90, but may exercise inherent powers.*

There is no objection to the Judge, when the sale is before him in appeal, considering its validity from every point of view and exercising his inherent jurisdiction. The ruling that a Court must confine itself to S. 311 of the old Code was before anything like S. 151 was embodied in the statute [P. 778, C. 2]

(b) *Civil P. C., O. 21, R. 90—Judge setting aside sale not on ground of material irregularity but on ground of certain order having been violated, acts not under O. 21, R. 90 but S. 151—Civil Pro. Code. S. 151.*

If the Judge decides to set aside the sale not on the ground of material irregularity occasioning substantial injury, but merely on the ground that an order has been violated, he can not be said to be acting under O. 21. R. 90. He must be acting under his inherent powers. That being so an appeal will lie to the High Court, although no second appeal lies from an order under O. 21, R. 90.

[P. 778, C. 2; P. 779, C. 1]

(c) *Civil P. C., S. 47—Dispute as to execution sale — Court should act under S. 47 read with O. 21, R. 90 or with S 151—Second appeal does not lie in former case but lies in latter case—Civil P. C., S. 100.*

If the parties disputing the sale are parties to the suit they approach the Court under S. 47 which decides the forum The Court then proceeds according to its statutory powers. It may exercise its inherent jurisdiction under S. 151, or it may exercise its power under O. 21, R. 90. There is no second appeal when a Court approached under S. 47 acts under O. 21 R. 90. But when it is so approached and exercises its inherent power under S. 151 there is a second appeal. [P. 779, C. 1]

M. S. Venkatarama Aiyar and *S. Jagadisa Iyer*—for Appellant.

E. Vinayaka Rao — for Respondents in A. A. A. O. No. 81 of 1922.

M. S. Venkatarama Aiyar and *E. Vinayaka Rao*—for Respondents in A. A. A. O. No. 12 of 1923.

Judgment.-Appeal against an appellate order setting aside a Court sale.

The Principal District Munsif of Chingleput in C. M. P. No. 453 of 1920 dismissed the application of the present respondents under O. 21, R. 90, holding that there was no evidence of fraud or irregularity. On appeal the District Judge found that the judgment-debtors had no cause for complaint on the score that lots 1 and 2 were sold for a low price, nor were they adversely affected as regards the remaining lot 3. There was therefore no substantial injury. He records no finding as to fraud apparently agreeing with the lower Court that there was no proof He thus practically confirms the order under O. 21, R. 90. But in his sixth paragraph he finds that the lower Court's orders on M. P. No. 230 of 1917 were not brought to the notice of the Court which directed the sale and inasmuch as the sale was in contravention of the orders under M. P. No 230 of 1917, which were final, the sale must be set aside. This is to break fresh ground. The judgment debtors cited the failure to bring the previous petition to the lower Court's notice as evidence of plaintiff's fraud—Affidavit in M. P. No. 453 of 1920, paragraph 6. But the District Judge does not find that there was fraud; he merely finds that the sale was in contravention of the orders under M. P. No. 230 of 1917. There is no objection to the Judge, when the sale was before him upon appeal considering its validity from every point of view [cf. *Palaniappa Uddayar* v. *Arumuga Pandaram* (1)] and exercising his inherent jurisdiction. The ruling that a Court must confine itself to S. 311 of the old Code, [*Harbans Lal* v. *Kundan Lal* (2)] was before anything like S. 151 was embodied in the statute. And if the Judge decides to set the sale aside not on the ground of material irregularity occasioning substantial injury, but merely on the ground that an order has been violated, he cannot be said to be acting under O. 21, R 90. He must be acting under his inherent powers. That being so an appeal will lie to

(1) [1916] 1 M.W.N. 256=33 I.C. 692,
(2) [1898] 21 All. 140=(1898) A.W.N. 212.

this] Court, although no second appeal lies from an order under O. 21, R. 90, *Asimaddi Sheik* v. *Sundari Bibi* (3). The action of the District Judge is very similar to that discussed at page 610 by Tyabji, J., in *Muthia Chettiar* v. *Bava Saheb* (4). Oldfield, J., in the same case page 606 quotes the appellant as urging that remedies lie alternatively under O. 21, R 90, or S. 47. This argues some confusion. If the parties disputing the sale are parties to the suit they approach the Court under S 47, which decides the forum. The Court then proceeds according to its statutory powers. It may exercise its inherent jurisdiction under S. 151, or it may exercise its power under O. 21, R. 90. These are really the alternative provisions and this is presumably what is meant in *Palaniappa Udayar* v. *Arumuga Pandaram* (1), "O. 21, R. 0, must be read with S. 47, Civil Procedure Code," etc. Again in *Anantaramier* v. *Kuttimalu Kovilamma* (5) "one must presume at the outset that S. 47 always applies." If it is coupled with O. 21, R. 90, no second appeal lies. That is to say there is no second appeal when a Court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151 there is a second appeal. In *Sheik Moula Bux* v. *Raghubar Ganjhu* (6) it has been held that if a Court professing to act under S. 47 sets aside a sale there can be no second appeal because O. 43 gives a right of appeal against all orders setting aside sales. But O. 43 is hardly so comprehensive It gives a right of appeal against orders under R. 72, or 92 of O. 21, but not in cases where the Court is acting under Ss. 151 and 47. This finding that an appeal lies practically disposes of respondent's case, for the order of the lower appellate Court is based on an entire misapprehension of facts. Even if, as alleged in para. 6 of their affidavit in M. P. No. 453 of 1920, the plaintiff and the 7th defendant got an order that the 3rd lot was to be sold last, without bringing the order on M. P. No. 230 of 1917 to the notice of the Court, nevertheless as shown in para 7, the respondents heard of the fraud and brought the order to the Court's notice. The Court then considered the whole question with everything before it and ordered on 11th August 1920, that the 3rd and not the 2nd lot should be sold last—Order on M. P. No. 402 of 1920 This was the order followed at the sale. (Para 8 of the affidavit and sale list.) Therefore there was no violation of a final order as the learned District Judge was led to suppose.

In the circumstances these appeals are allowed with costs throughout. Vakils' fees one set. The order of the District Munsif on C. M. P. No. 453 of 1920, dated 30th October 1920, is restored.

Appeals allowed.

(3) [1911] 38 Cal. 339=15 C.W.N. 844=10 I. C. 315=14 C.L.J. 224.
(4) [1914] 37 M.L.J. 605=26 I.C. 46=1 L.W. 969.
(5) [1916] 30 M.L.J. 611=19 M.L.T. 357=34 I.C. 829=3 L.W. 504.
(6) [1918] 3 Pat. L.J. 645=48 I.C. 560.

** 1924 MADRAS 779

KRISHNAN AND ODGERS, JJ.

Rajagopala Chetty—Appellant.

v.

Sivagami Ammal and another—Respondents.

A. A. O. 458 of 1922, Decided on 11th April 1924, against the order of the District Court of North Arcot, in C. M. P. No. 104 of 1922.

** *T. P. Act, S. 53—Covers transfer for defeating future creditors—Transfer due to natural love may yet be fraudulent—Question depends on circumstances of each case.*

It is not necessary under S. 53 that the creditor impugning the alienation should have been a creditor at the time of the alienation. If a person makes a transfer of his property, in view of his becoming a debtor, or of getting a decree passed against him in the future, and if the object of the transfer is shown to have been to defeat the claims of such creditors, S. 53 will cover the case. That the deed of transfer was not executed gratuitously but on account of natural love and affection does not necessarily imply that the intention was not to defeat creditors. A man may make a

transfer to his wife or a near relation of his to defeat creditors. The question has to be decided on evidence, as to the circumstances under which the transfer was made. [P 780 C 1]

C. V. Ananthakrishna Aiyar and A. Viswanatha Aiyar—for Appellant.

Respondents were unrepresented.

Judgment.--This is an appeal under Ss. 47 and 96 of the Code of Civil Procedure, in an execution matter. The appellant had obtained a decree for a sum of Rs. 4,000 andodd, against the 2nd respondent, his father and in execution of that decree, had attached certain items of properties. Now these items had been transferred by the father to his 2nd wife, after the suit had been brought, but before attachment, by a deed of settlement. The plaintiff thereupon impugned the document, as one fraudulently executed, with a view to defeat and delay the claims of creditors, particularly of himself, The learned Judge disposed of the matter, without taking any evidence, as to the circumstances, under which the settlement was executed, to see whether it was not a case of fraudulent conveyance. He starts by observing that the plaintiff cannot be regarded as one of his father's creditors at the time, when the settlement was executed, as he had not obtained his decree yet, the suit being only one on account. It is not however necessary under Sect. 53 of the Transfer of Property Act, that the creditor impugning the alienation should have been a creditor at the time of the alienation. If a person makes a transfer of his property, in view of his becoming a debtor, or of getting a decree passed against him in the future, and if the object of the transfer is shown to have been to defeat the claims of such creditors, Sect. 53 will cover the case. The District Judge also says that the settlement deed was not executed gratuitously, but on account of natural love and affection. That may be so; but it does not necessarily follow that the intention was not to defeat creditors ; a man may make a transfer to his wife or a near relation of his to defeat creditors. The question has to be decided on evidence, as to the circumstances, under which the transfer was made. In this case, the father is said to have transferred all his properties to his second wife, after the son had brought his suit for an account and for the delivery of his share of the family properties. The transfer seems *prima facie* to be fraudulent, but the question must be decided by the Court after taking evidence. We set aside the order of the District Judge and remand the case to the lower Court for disposal, in the light of the observations above made. Costs will abide and follow the result.

Case remanded.

✱ ✱ 1924 MADRAS 780

PHILLIPS AND ODGERS, JJ.

Rachamadugu Venkatapathi (minor) by next friend Lakshmamma—Appellant.

v.

K. Ramadas Rao — Receiver—Respondent

A. A. O. No, 418 of 1922, Decided on 11th March 1924 against the order, of the District Court of Anantapur, in I.A. No. 235 of 1922 in I. P. No. of 1920. D/- 13th September, 1922,

✱ ✱ *Assignments—Rights of assignor.*

When right to rents and other dues is assigned for the purpose of collection, the assignor and the assignee being entitled to certain proportions of the collections, the assignor has a lien of the nature of a trust or charge on the moneys received under the assignment and the right can even be enforced in case of the assignee's bankruptcy, against the person holding his estate for the time being. The assignor's position is not that of an unsecured creditor. [P 781 C 2]

B. Sitarama Rao & K. Sreenivasa Rao—for Appellant.

B. Somayya—for Respondent.

Phillips. J.—I agree with the order proposed by my learned brother and need only say that the decision of the Court of Appeal in 1891 in *Comfort* v. *Betts* (1) governs this case also. I may also refer to *Palaniappa* v. *Lakshmanan* (2) and *Navajee* v. *The Administrator-General of Madras* (3)

(1) [1891] 1 Q.B. 737—60 L. J. Q. B. 656—64 L.T. 685—39 W.R. 595—55 J.P. 630.
(2) [1893] 16 Mad. 429
(3) [1913] 38 Mad. 500—22 I.C. 566.

as supporting this conclusion. The appellant is entitled to the money in Court as the assignment created in the assignor's favour a lien in the nature of a trust or a charge on the money recovered thereunder. The appeal is therefore allowed with costs throughout,

Odgers, J.—On 23rd September, 1913, the Swami of Ahobilam Mutt assigned to Rangiah and Sanjeeviah the amount due for rent and damages from one Ramappa who had leased certain lands belonging to the Mutt. The assignees were to collect the arrears of rent due from Ramappa, recover damages from him in respect of cutting trees, pay all the costs themselves in the first instance and pay over half the net proceeds to the Swami after deducting costs. Rangiah is now represented by minor petitioner-appellant and in 1915 Sanjeeviah was adjudicated an insolvent. Certain moneys have been recovered from the lessee and are in deposit in the District Court of Kurnool. The appellant states that he paid the Swami in 1919 Rs. 1,500 and took a deed of relinquishment whereby he acquired the Swami's half-share in the net proceeds provided for by the deed of assignment. The appellant asserts that the insolvent (now represented by the Official Receiver) is entitled only to ¼th of the amount rocovered, himself being entitled to the other ¼th which together with the ½ acquired from the Swami amounts to ¾th of the fund in Court. The Official Receiver contends that he is entitled, to ½ the decree amount and not ¼th only and that as the Swami would, as to his ½ under the assignment deed, be in the position of an ordinary creditor, the appellant, by the transaction in 1919, can acquire no better rights against the insolvent's estate than the Swami had and must rank as an ordinary creditor. This contention was upheld by the District Judge and the question is whether it is right and whether under the deed of assignment the assignees were constituted trustees for the Swami as to ½ the proceeds they recovered. It is further contended that if they were not trustees they were agents for collection or that a charge was created on the fund recovered in favour of the Swami. In my opinion I think the assignment was an absolute one in favour of the assignees. "I do hereby assign to you, your heirs and assignees the amount now owing and hereafter falling due." It does not signify in this country whether the assignment is one at law by virtue of S 25 of the Judicature Act of 1873 or is only an equitable assignment. A trust in favour of the assignor whether of the whole debt assigned or of the surplus after retention thereout of a definite sum by the assignee does not prevent the assignment being absolute; in the case of an equitable assignment a direction to pay a sum of money out of a specified debt or fund constitutes such an assignment, though not of the whole debt or fund and it is immaterial that the amount of the debt assigned is not ascertained at the date of the assignment. *See* per Chitty, L. J., in *Durham Brothers* v. *Robertson* (4) This case appears to me to resemble *Comfort* v. *Betts* (1) where certain persons assigned debts due to them to the assignee to recover the same and on recovery to pay to the assignors respectively out of the aggregate sum recovered such proportionate part of such aggregate sum as should represent or comprise the individual debt due to them respectively or such part thereof as might have been recovered by the assignee. The Court of Appeal held that what was intended was an absolute assignment of the debts subject to a trust for the payment of the money recovered to the creditors. In my opinion this decision is applicable to this case; the only difference here is the clause with regard to the recovery of damages, but as pointed out above that is not a matter which needs consideration in this country. The intention here was to pass the whole of the assignor's interest in the debt due and in the recovery of damages. He was however entitled to half the net proceeds recovered. The Court of Appeal has held in the case quoted that the intention in such a case imports a trust and following that decision, I have no doubt that it

(4) [1898] 1 Q.B. 765—67 L.J. Q.B. 484—78 L.T. 438.

was intended by the parties here to the deed of assignment that the assig ees should hold half the proceeds in trust for the assignor. The Swami would therefore not be in the position of an ordinary unsecured debtor with regard to the proceeds and the appellant who stands in his shoes will occupy the same position.

Appeal allowed.

1924 MADRAS 782

KRISHNAN AND ODGERS, JJ.

Ganjain Manikyamba and another—Plaintiffs—Appellants.

v.

Pasala Mallayya and others—Defendants—Respondents.

A. A. O. No. 4.3 of 1922, Decided on 23rd April 1924, against the order of the Court of the Additional Subordinate Judge of Cocanada, D/- 21st April 1922.

(a) *Madras Estates Land Act, S. 6—S. 8, must be read subject to explanation to S. 6—Construction-Madras Estates Land Act, S. 8.*

S. 8 must be read subject to the explanation in S. 6 so that a person owing an occupancy right already in the land does not lose it subsequently by getting the interest of the landholder. [P 783 C 1]

(b) *Madras Estates Land Act, S. 3 (5).*

A person who owns the kudivaram already and to whom the melvaram right is subsequently transferred does not become a landholder and his suit for rent is maintainable in a Civil Court. 1922 Mad. 373 (F. B.) Dist. 39 M. L. J. 325 (F. B.) Foll. [P 783 C 1]

Ch. Raghava Rao—for Appellant.

K. Srinivasa Rao—for Respondents.

Judgment.—This appeal is against an order of the Sub-Judge of Rajahmundry returning a plaint to be presented to the proper Court; and the Subordinate Judge held that the Civ Court had no jurisdiction to try the suit but only the Revenue Court had. The suit was for the recovery of possession of certain properties on the strength of a lease alleged to have been given orally to the 1st defendant by the 2nd plaintiff. The defendant denied the lease and claimedl occupancy rights in the lands and anso pleaded that the plaintiff as I amdar was a landholder within the meaning of the Madras Estates Land Act and therefore this suit could not be tried by the Civil Court. The Subordinate Judge decided on the first part of issue 3 that the suit land is a Darmila inam; and that finding we must accept. He then considered himself bound by the ruling of the Full Bench reported in *Brahmayya* v. *Achiraju* (1) to hold that the plaintiff as a Darmila inamdar was a landholder within the meaning of the Act, and therefore the Civil Court had no jurisdiction to try this suit, and he directed the plaint to be returned to the proper Court. It is pointed out to us that the plaintiffs' case was that they owned the kudivaram interest to start with in this land and that it was only subsequently that they obtained by grant the melvaram interest from the Zamindar. It was argued that, when a kudivaramdar gets by transfer or otherwise the melvaram interest in the land, the kudivaramdar does not lose his kudivaram interest thereby, and the persons who were in occupation of the lands as tenants under him as kudivaramdar do not become ryots and do not get kudivaram rights automatically transferred to them by the transfer of melvaram rights to the original kudivaramdar. The Full Bench case referred to is sought to be distinguished from the present case on this ground. In the Full Bench case the transfer was of both the varams simultaneously to the grantee and the question arose whether under those circumstances the suit by the grantee for rent should be tried by the Revenue Court or the Civil Court. The question depended upon whether he was a landholder within the meaning of the Act or not. The majority of the Judges held that in the circumstances he was landholder.

Here we have a different case put forward by the plaintiff, namely, a case of the transfer of melvaram to a person who already owned the kudivaram right. If the plaintiff was a kudivaramdar to start with before the melvaram right was transferred

(1) 1922 Mad. 373=45 Mad. 716=31 M. L. T. 91=(1922) M. W. N. 280—43 M. L. J. 229 (F. B.)

to him his position is different from the position of the parties in the Full Bench case. The Subordinate Judge has not considered the question whether the plaintiff's allegation, that he was a kudivaramdar to start with, is true or not. The District Munsif discussed the question and came to the conclusion that the plaintiff's allegation was true That finding of the District Munsif has not been displaced by the Subordinate Judge. We must, therefore, for the purpose of deciding this appeal, assume that the plaintiff was a kudivaramdar before he got the melvaram interest. In such circumstances we are of opinion that the ruling in the Full Bench case above cited will not apply. The Estates Land Act, itself in the explanation to S. 6 recognises that a person owing a right of occupancy already in the land does not lose it subsequently by getting the interest of the landholder in the lands No doubt, as pointed out by Mr. Justice Oldfield in the Full Bench case there is some difficulty in reconciling this explanation with S 8. We must take it that S. 8 must be read subject to the explanation in S 6. A question similar to the one before us arose before another Full Bench in this Court on a former occasion in *Marina Veerasami* v. *Boyinapally Venkatrayudu* (2). It was held by that Full Bench of five Judges that a person who was already the owner of the kudivaram right and to whom the Zamindar granted the melvaram subsequently is not a person holding an estate or part thereof, and is also not a person entitled to collect the rent by virtue of a transfer from the owner or his predecessor in title within the meaning of S. 3 (5) of the Estates Land Act, and therefore he did not acquire the status of a landholder in consequence of the grant by the Zamindar and his suit was maintainable in the ordinary Civil Court against his tenants for recovery of rent. The authority of that Full Bench is still subsisting and it has not been overruled by any subsequent Full Bench of this High Court. We must therefore hold that the Subordinate Judge was not right in disposing of this case without going into the question whether the plaintiff owned the kudivaram interest before the melvaram was granted to him. If he finds that the plaintiff had no kudivaram interest at all, that he became an inamdar solely by virtue of the grant made by the Zamindar of melvaram rights, his view that the plaintiff could not maintain the suit in the Civil Court would be right; but if, on the other hand, he comes to the conclusion, as the Munsif has done, that the plaintiffs owned the kudivaram interest before they became entitled to the melvaram by the grant by the Zamindar, the Full Bench case in *Marina Veerasami* v. *Boyinapally Venkatrayudu* (2) already referred to, will apply, and the present case will have to be tried by the Civil Court. In the latter case the Subordinate Judge will consider the other issues in the case and dispose of the appeal himself. In the former case the order returning the plaint would be reaffirmed. We therefore set aside the order of the Subordinate Judge and remand the appeal to him to be disposed of in the light of the observations made above. Costs will abide and follow the result of the appeal. The Court-fee paid for the appeal in this Court will be refunded to the appellant.

Appeal reversed and remanded.

(2) [1920] 39 M. L. J. 225=57 I. C. 778=12 L. W. 51 (F. B.)

1924 MADRAS 783

WALLACE, J.

Gourikantam and others — Defendants—Appellants.

v.

Ramamurthy and others—Plaintiffs and Defendants 5 to 7—Respondents.

S. A. No. 1752 of 1922, Decided on 31st January 1924, against the decree of the Add. Sub. J. of Vizagapatam.

Grant — Inam — Service Inam — Exclusive prior possession against grantee of a title deed after enfranchisement is of no avail against the grantee.

The lands comprising the emoluments of the karnam office are attached to the office as such, so that even if a stranger to the family is appointed the land goes with the appoint

ment, eligibility to the office is a personal matter; the land goes with the office and is impartible and Government, in the act of enfranchisement, severs the land from the office and allows the office holder for the time being to enfranchise it. The distinction between the enfranchisement of a service inam and that of a personal inam is that the latter is a mere release of the service obligation, release by the Crown of its reversionary interests, while the former is a resumption of the land by Government and a re-grant of it to whomsoever Government pleases, although no doubt ordinarily the re-grant would be to the holder of the office at the time of the enfranchisement. The enfranchisement of a service inam and the issue of a title-deed thereupon create a new title in the grantee, unless Government had at the time of the resumption no right to resume. Adverse possession prior to resumption does not count against the new grantee. [P. 784, C. 2; P. 785 C. 1 2]

Y Suryanarayana—for Appellant.

K. N. Rajagopala Sastri for *B. Satyanarayana*—for Respondents.

Judgment. — The plaintiff, the seventh defendant and another were the sons of one Bayyapuraju. The plaint property was a mirasi karnam inam enfranchised in the names of seventh defendant, the plaintiff and Suryanarayana, who were the three sons of Bayyapuraju, and the first defendant, who is the brother of Bayyapuraju. Suryanarayana died long ago. The plaintiff sued for one half share in the property on the footing that first defendant had no right in it. The first defendant relied on a family arrangement in 1905 in which the plaintiff and the seventh defendant gave up their third share to the first defendant. The District Munsif upheld that arrangement and dismissed the suit on the ground that the first defendant had been in adverse possession for more than 12 years since 1905. In the lower appellate Court it was argued that, as the enfranchisement of the inam was in 1911, the property was until then the absolute property of Government, that the first defendant, if he was from 1905 to 1911 prescribing for a title for adverse possession, could so prescribe against Government only and had not completed such title, that no adverse possession was running from 1905 against the plaintiff since the plaintiff's title only began in 1911, and that the title of any of the grantees under the Inam title deed began only on the date of the enfranchisement, namely in 1911. The lower appellate Court accepted that argument, and gave a decree for plaintiff. The first defendant appeals.

There are two main lines of argument for the appellant, first that enfranchisement and grant of an inam title deed mean nothing more than a removal of the service obligation on the land and does not in any way affect the manner in which the land was previously held or affect the rights of those previously holding it, whether members of the service holder's family or outsiders; and secondly that, even if it be held that the inam title deed implies total resumption by Government and re-grant that re-grant will not avail to disturb the pre-existing rights in the land, of persons not claiming any title or *spes* in the office, and, particularly will not rid the land of any right in the land acquired by outsiders by adverse possession. These points were argued on the assumption that, if the enfranchisement does not avail to break, the running of the adverse possession in favour of the first defendant, then the first defendant's title by adverse possession is perfected.

On the first point I am quite clear that it cannot now be considered good law in the face of the Privy Council pronouncement in *Venkata Jagannadha* v. *Veerbhadrayya* (1). That decision interpreted an inam title deed of exactly the same terms as the present one and of almost the same date. It lays down clearly that the lands comprising the emoluments of the karnam office are attached to the office as such, so that, even if a stranger to the family is appointed, the land goes with the appointment, that eligibility to the office is a personal matter, that the land goes with the office and is impartible, and that Government, in the act of enfranchisement, severs the land from the office and allows the office holder for the time being to enfranchise it. The Full Bench ruling in *Venkata* v. *Rama* (2) and other rulings which have followed it are

(1) 1922 P.C. 96—44 Mad. 643—48 I.A. 244—41 M.L.J. 1—34 C.L.J. 16—14 L.W. 59—(1921) M.W.N. 401 (P.C.)
(2) [1884] 8 Mad. 249 (F.B.)

approved in that decision, and other rulings of this Court which do not follow *Venkata* v. *Rama* (2) for example *Gunnaiyan* v. *Kamakchi Iyer* (3) and *Pinyala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) are disapproved of. The whole trend of that decision was set out and relied on in Second Appeal No. 287 of 1921 in this Court, with which I respectfully agree. It was there clearly pointed out that the distinction between the enfranchisement of a service inam and that of a personal inam is that the latter is a mere release of the service obligation, release by the Crown of its reversionary interest, while the former is a resumption of the land by Government and a re-grant of it to whomsoever Government pleases, although no doubt ordinarily the re-grant would be to the holder of the office at the time of the enfranchisement. The appellant relies on the wording of Act IV of 1862, Act IV of 1868 and Act VII of 1869 and the ruling in *Lakshminarasimham* v. *Venkataratnayamma* (5). The first two Acts are mere legal statements of the evidentiary value of the inam title deed, while Act VIII of 1869 seems to me merely to save the existing rights of occupancy holders or kudivaramdars already on the land. It has been pointed out to me that Act VIII of 1869 in terms only applies to inam title deeds "heretofore issued" and this point seems to have been overlooked, if I may say so with respect, by Spencer, J., in *Lakskminarasimham* v. *Venkataratnayamma* (5). It does not follow from that Act that inam title deeds issued after it did not create a title where no title existed before. The other learned Judge, Ramesam, J., proceeded on the footing that *Venkata Jagannadha* v. *Veerabhadrayya* (1) does not prevent an aggrieved party, whose name was already in the title-deed, from showing that another name was included in it by mistake. I may also note that the pronouncement on this point in that case was not necessary for the decision of the case, since the decision proceeded on a finding of estoppel *aliunde*. I therefore follow what I conceive to be the *ratio decidendi* of the 44 Mad. case and hold that the enfranchisement of a service inam and the issue of a title deed thereupon create a new title in the grantee. I do not in any case understand the first defendant to contend here that the name of the plaintiff was included in the inam title-deed by mistake other than failure to give effect, at the time of the issue of the title-deed, to his own title by adverse possession. There is no plea before me, for example that the grantees were not at the time holders of the service.

This brings me to the second point, namely, whether assuming that the first defendant has been in exclusive possession of the land for more than 12 years before suit, that prescriptive title can avail against the rights of the grantees under the title-deed. Such an argument has been considered in S. A. No. 287 of 1921 quoted above, and it was there decided that no one claiming adversely to the inam title-deed can succeed on prescriptive title, unless he proves either, that there was no inam at all, or that Government had no right left in it at the time of the resumption, that is, that his prescription was for more than sixty years at the date of the grant. The first alternative does not arise here since it is not contended that the land was not service inam. As to the second alternative the appellant argues that it is not necessary for him to prescribe against the Government and that it is sufficient if he had prescribed against the plaintiff, who claims under the title-deed. Since, however, I hold it is clear on the authority of the 44 Mad. case that enfranchisement is a clear and unequivocal resumption by the Government of the land and a re-grant to whomsoever it pleases, it follows that, unless Government had, at the time of the resumption, no right to resume, the first defendant has no case. If the rulings relied on by him, *Neelachalam* v. *Kamaraju* (6) and *Kotirajudu* v. *Venkataratnam* (7) imply the con-

(3) [1902] 26 Mad, 339.
(4) [1906] 30 Mad. 434—17 M.L.J. 101—2 M.L.T. 101 (F.B.).
(5) [1921] 30 M.L.T. 334—70 I.C. 642.
(6) [1904] 14 M.L.J. 438.
(7) [1919] 38 M.L.J. 320—59 I.C. 65—11 L.W. 453.

trary, they must be taken to have been overruled by the 44 M. case, which was pronounced in 1921. The case of *Mojavath Ali* v. *Mujafar Ali*(8) is a case of a khaji inam, to which the 44 Mad. case has no application and is not in point here. Different considerations, as pointed out in that case, apply to the cases of personal inams.

Another point might have been taken, namely, that, as the first defendant is one of the grantees, presumably he was an office-holder prior to the grant and therefore was holding not adversely to the office-holder but on his or their behalf. But, as there is no evidence as to who actually was the holder at the time of the grant and as the case can be disposed of on the lines indicated above without going into that question, I need not consider it any further.

I hold, therefore, that the finding of the lower appellate Court is correct. The Second Appeae is therefore dismissed with costs.

Appeal dismissed.

(8) 1924 Mad. 201—45 M L J. 791—18 M.L.W. 887—(1924) M.W.N. 53—33 M.L.T. 175.

1924 MADRAS 786

SPENCER AND ODGERS, JJ.

Natesa Pillai—Petitioner — Appellant.

v.

Kannammal Anni and others—Respondents.

A. A. A. O. No. 71 of 1921, Decided on 11th September 1923 from Sub. J. Negapatam in A. S. No. 33 of 1920.

Civ. P.C., Order 22 R. 1—Suit continues until final decree.

Where the plaintiff dies before the passing of the final decree but after the passing of the preliminary decree and a legal representative is not brought on record within time the suit abates since the suit continues till the stage of final decree is reached. 39 Mad. 488 Fol.

[P. 786, C. 2.]

K. S. Champakesa Aiyangar — for Appellant.

S. Ramaswami Aiyar and *T. V. Ramanatha Aiyar*—for Respondents.

Judgment.—The appellant claims to be the legal representative of the plaintiff, who obtained a preliminary decree, in a mortgage suit, in O. S. No. 97 of 1912.

The plaintiff admittedly had died before this appellant applied on 29th November, 1915, to be recognized as the heir of the plaintiff and to get a final decree passed.

His application was dismissed on 9th February, 1916, on account of his absence.

As he did not get himself brought on the record at that time, the suit abated under O. 22 R. 3. of the Code of Civil Procedure, upon six months expiring after the plaintiff's death, and so he did not apply subsequently to have the abatement set aside, the present application presented on 10th October, 1918, is out of time and incompetent.

It is true that the District Munsif erroneously held that the suit had not abated, because the plaintiff's death occurred between the passing of the preliminary and the final decrees. But this Court has held in *Lakshmi Achi* v. *Subbarama Ayyar* (1) that the suit is continued till the stage of final decree is reached: see also *Subbarayudu* v. *Ramadasu* (2), which is a direct authority for holding that after the abatement of the suit an application to pass a final decree, which is not made within the time provided by law, should be dismissed as time barred.

This Civil Miscellaneous Second Appeal is therefore dismissed with costs.

Appeal dismissed.

(1) [1915] 39 Mad. 488—2 L.W. 403—28 M.L.J. 491—29 I.C. 142—(1915) M.W.N. 327—17 M.L.T. 385.

(2) 1923 Mad 237—45 Mad. 872—42 M.L.J. 301—15 M.L.W. 309—(1922) M.W.N. 375—30 M.L.T. 202—68 I.C. 942.

1924 MADRAS 787

WALLACE, J.

Kunhammad Kutti — 1st Defendant—Appellant.

v

Cheria Mammad and others—Plaintiffs and 2nd Defendant—Respondents.

S. A. No. 228 of 1921, Decided on 7th February 1924, against the decree of the District Court of North Malabar.

Malabar Law—Moplas of North Malabar following Marumakkathayam law — Gift to daughter in the singular and to her Santhanam is Putravakasam property of the Tavazhi.

Where a Mahomedan of the north Malabar who followed the Marumakkathayom law executed a gift deed in favour of his daughter which recited after giving the property to her in the singular as follows "in future except for you and your offspring (Santhanam) there is no claim, concern or right of entry for me over this paramba . . . . you and your Santhanams should hold the said paramba in possession and enjoy the same as your jenmom."

Held: that the property became putravakasam property belonging to the donee's tavazhi and not the absolute estate of the donee.

[P. 787 C. 1 & P. 788 C. 2]

T. R. Ramachandra Ayyar and *S. Srinivasa Ayyar*—for Appellant.

C. V. Ananthakrishna Ayyar—for Respondents.

Judgment.—The decision in this appeal turns on the interpretation to be put upon Ex. B, a gift deed executed by one Parapravan Bavothi Haji in favour of his daughter The donor was a Muhammadan of North Malabar admittedly following the Marumakkathayom law prevalent in those parts and he was the sole survivor and senior member of his tarwad.

Ex. B recites that he gifts the property "to you "(in the singular)" "and then goes on to say that in future except for you and your offspring (Santanam) there is no claim, concern or right of entry for me over this paramba . . . you and your Santanams should hold the said paramba in possession and enjoy the same as your jenmom." Both the Lower Courts have held that the form and the circumstances of the gift necessarily lead to the inference that the gift was not for the donee's exclusive benefit but for the children also and that the property gifted is therefore putravakasam property belonging to the donee's tavazhi.

The 1st defendant in this appeal challenges that finding. The point for determination is whether this was a gift to the daughter exclusively or a gift to her as the head of a tavazhi formed of herself and her children.

Various reported and unreported cases bearing on this question of Marumakkathayom law have been cited to me, relating to gift deeds or bequests more or less analogous to one in suit. The general test is, having regard to the presumed knowledge of local customs by donor or testator and the manner of holding property in the community of the donor or testator and having regard to the terms in which they have expressed their intention in their deeds of gift or bequests, what was their real intention. Generally it has been held that, unless there are apt words to indicate that the intention was that the property should be held in any manner different from the usual manner in which such property is held apt words to imply that the property is to be held with powers larger than usual then it must be taken that the intention was that the property should be held in the usual manner.

Thus in cases where the gift or bequest has been to a woman and her children and there is no further expression of intention as to how it should be held, no apt words to express the gift of an absolute alienable estate, it has been held that they took it and hold it as a woman and her children usually would hold under the Marumakkathayom law, that is, as a legal corporate unit or tarwad: see *Kunhacha Umma* v. *Kutti Mammi Hajee* (1), *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (2) and *Naku Amma* v. *Raghava Menon* (3). Where, a gift or bequest is to a woman and her children which words might be taken to impose an intention to confer an absolute estate, it has been held that since the usual manner of

(1) [1892] 16 Mad. 201—2 M.L.J. 226.
(2) [1906] 29 Mad 322.
(3) [1912] 38 Mad. 79—18 I.C. 1.

holding property by a woman and her children under Marumakkathayom law is in the form of a tavashi, it must be taken that the donees held the property in that way. See *Chakkra Kannan* v. *Kunhi Pokker* (4). It may be noted that the bequest in *Chakkra Kunnan* v. *Kunhi Pokker* (4) was a bequest to children only.

In *Pattatheruvath Pathumma* v. *Mannam Kunniyil Abdulla Haji* (5) the suit property, as I have verified with reference to the original records, had been purchased by a Muhammadan husband in the name of his wife only. The husband had previously given a house to his wife and children, which however was not part of the property in suit and the question was to whom the property in the suit descended on the wife's death. The High Court held in that case that the intention was that the purchase in the name of the wife was intended for the children also and followed the case in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (2); that is, they took it with the incidents of tarwad property. There was no question there of apt words in any deed of gift or bequest. The case in *Kalliani Amma* v. *Govinda Menon* (6) as I have also verified from the records was a case of a gift to a woman only with a recital that "besides the jewels and vessels which I acquired out of my own funds and which I have given to you and your santanam for enjoyment permanently and for ever, I have now given properties" of which particulars are given; and the document goes on to say, "I have resolved that you and your santanams should be in enjoyment for ever along with me as long as I live and *in proprium* thereafter, and that to it my heirs shall have no right." It was there held that that was really a gift to the woman and her children and *Kunhacha Umma* v. *Kutti Mammi Haji* (1) was followed.

Besides the authorised reported cases, I have *Kuyyathil Kanaran Kutty* v. *Vyalpath Parkum* (7) and *Paru Amma* v. *Itticheri Amma* (8). The former was a case of gift by a Marumakkathayom donor to his nieces with no apt words to express an absolute estate and the case of *Kunhacha Umma* v. *Kutti Mammi Haji* (1) was followed by Kumaraswamy Sastry, J., whose judgment was upheld in Letters Patent Appeal No. 19 of 1916. The other case was one of a bequest in which the words 'with absolute rights of alienation' were used and it was there held that the legatee took an absolute estate.

On consideration of these cases I am of opinion that the present document of gift bears most resemblance to that in *Kalyani Ammal* v. *Govinda Menon* (6). There are here no apt words conferring absolute rights of alienation. The gift is to the woman only, but the enjoyment is to be by her and her santhanams and I do not think any distinction can be drawn between the present document and that in *Kalyani Amma* v. *Govinda Menon* (6) merely on the ground that the donor in the latter case had already given other properties to his wife and santanams. There is nothing in the suit document to take it out of the ordinary category of gift to a woman under Marumakkathayom law of property to be enjoyed by her and her santanams, that is to say, to be enjoyed with all the incidents of tarwad property.

I therefore agree with the Lower Courts that this property is putravakasam. I am not prepared to interfere and I dismiss the appeal with costs of the 1st respondent.

Appeal rejected.

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(4) [1915] 39 Mad. 317—29 M.L.J. 481—30 I.C. 755—18 M.L.T. 255—(1915) M.W.N. 740 (F.B.)
(5) [1907] 31 Mad. 228—18 M. L. J. 16—4 M. L. T. 82.
(6) [1911] 35 Mad. 648—22 M.L.J. 33—12 I.C. 492—10 M.L.T. 399—(1911) 2 M.W.N. 467.
(7) [1916] 32 I.C. 107.
(8) [1916] 32 I.C. 459.

1924 MADRAS 789

RAMESAM, J.

C. Venkata Reddy—Plaintiff—Petitioner.

v.

Nataraja Setty and another—Defendants—Respondents.

Civ. R. P. No. 643 of 1921, Decided on 16th January 1924.

Civil P. C., S. 17 *—Suit for money lies at the place where money is payable.*

Where the plaintiff, a resident of Madanapalle talked and settled with the defendant at Madras about the commission to be paid to him as commission agent for the sale of goods which the plaintiff was to send directly to Madras or to others according as defendant would direct and the defendant was from time to time informing plaintiff of the current prices in Madras and suggesting him despatch of goods and under the arrangement the sale price was to be paid to the plaintiff at Madanapalle.

Held **: that the suit for price of goods despatched lay at Madanapalli, as a part of the cause of action arose there.** [P. 790, C. 1]

B. Somayya—for Petitioner.

K. Rajah Aiyar—for Respondents.

Judgment.—The plaintiff is the petitioner before me. The suit was brought in the District Munsif's Court of Madanapalle to recover Rs. 316-5 2, in respect of 9 bags of jaggery delivered to defendant, as commission agent, on behalf of the plaintiff. The District Munsif and the District Judge held that the Madanapalle Court had no jurisdiction. Hence this petition.

Six or seven years prior to the plaint, the plaintiff went to Madras where he and the defendant "talked and settled about the commission to be paid to him." He told 1st defendant in Madras that he would consign goods directly to him, or to others who would be directed to deliver goods to him. The defendant was afterwards writing letters to plaintiff, informing the latter of the current prices prevailing in Madras and suggesting the despatch of goods. In October 1915, plaintiff sent 18 bags of jaggery to P. S. Abdul Khader Saheb and Brothers at Madras, with instructions to deliver 9 of them to the defendant. He also wrote to the defendant asking him to sell them and send the amount. Abdul Khader delivered the bags on 25th October 1915, to defendant. On 5th December 1915 (Ex. A 17), defendant wrote stating that he would send the amount after selling jaggery. On these facts the Courts below held that the Court of Madnapalle had no jurisdiction.

Of the cases relied on by the respondent, *Jivaraju* v. *Purushotam* (1) was not decided with reference to S. 17 of the Code of 1882 as amended in 1888. In *Kamisetti Subbiah* v. *Katha Venkataswamy* (2), Citing *Newcomb* v. *De Ross* (3), where the facts are somewhat similar, it was held that the cause of action did not arise in Kurnool but in Madras, the *ratio decidendi* being that the contract was made at the place where the letter of acceptance was posted. *Taylor* v. *Jones* (4), also cited in it, was a case in which the facts were peculiar. There, though a letter of offer was posted in London, no reply accepting it was posted, but the goods were delivered in London and obviously the contract came into existence wholly in London. It is true that the making of an offer may be part of the cause of action (See *Borthwick* v. *Walton* (5) and *Green* v. *Beach* (6) cited in *Appu Thamban* v. *Foulkes* (7); but this means not the posting of the offer but the receipt of the offer: [See *Mylappa Chettiar* v. *Aga Mirza Mahamad* (8), citing *Clarke Brothers* v. *Knowles* (9).] In this case, the plaintiff's offer does not nelp him. But the receipt of the acceptance, when the contract is complete, is a part of the contract, there being no reason why acceptance should be in a worse position than offer. The English Cases in *Newcomb* v. *De Ross* (3) and *Borthwick* v. *Walton* (5) are cases under the then County Courts Act 9 and 10 Vic.

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(1) [1884] 7 Mad. 171.
(2) [1904] 27 Mad. 355.
(3) [1859] 2 E. and E. 271.
(4) [1875] 1 C.P.D. 87.
(5) [1855] 15 C B. 501.
(6) [1873] 8 Exch. 208.
(7) [1919] 10 L.W. 445.
(8) [1919] 37 M.L J. 712.
(9) [1918] 1 K B. 128.

Ch. 60, according to which 'the whole cause of action must arise within the jurisdiction of the County Courts. No doubt the latter case *Clarke Brothers* v. *Knowles* (9) arose on the latter County Court Act 51 and 52 Vic. Ch. 43, under which it is enough, if part of the cause of action arose within the jurisdiction of the County Court. But it does not appear from the affidavit, upon which the application was based, that any letter of acceptance was received at West Herlepool. If it can be said on the facts of *Mylappa Chettiar* v. *Aga Mirza Mahamad Shirazee* (8), that the defendants' acceptance of plaintiff's offer was ultimately communicated to plaintiff at Negapatam, then the correctness of the decision is doubtful. Nor was any attempt made in the case in *Kamisetti Subbiah* v. *Katha Venkataswamy* (2) to support the judgment under appeal on the ground that a letter of acceptance was received in Kurnool. But, apart from this ground, it is clear that in this case the money was intended to be paid to the plaintiff at his native place: (See *Naina Maracayar* v. *Somasundaram Chettiar* (10), *Robey* v. *Snaefell Mining Company* (11) and *Bangali Mal* v. *Ganga Ram* (12)]; and if so, part of the cause of action arose within the jurisdiction of Madanapallee Courts. The contract in *Comber* v. *Leyland* (13) is special and peculiar, as pointed out in *Naina Maracayar* v. *Somasundaram Chettiar* (10). On both the grounds above indicated. I reverse the order of the Courts below and direct that the suit be taken on file and disposed of according to law. The Respondents must bear the costs of this petition in this Court and in the lower appellate Court. The costs in the 1st Court will abide the result.

Suit remanded.

(10) [1920] 11 L.W. 593.
(11) [1887] 20 Q.B.D. 152.
(12) 1923] All. 465(1).
(13) [1898] A.C. 524.

1924 MADRAS 790

WALLACE, J.

Seetharamabrahman — Plaintiff—Appellant

v.

Kristabrahmam and others—Defendants—Respendents

S. A. Nos. 691 and 692 of 1921 Decided on 6th February 1924, from the Decree of Dist. J. of Bezwada in A. S. Nos. 14 and 39 of 1920.

Provincial Sm. C. C. Act. Art. 41—Contribution suit.

Suit for contribution on account of recovery of arrears of rent and water cess collected from plaintiff in respect of defendant's land after partition between plaintiff and defendant is not covered by Art. 41 and second appeal will not therefore lie where account in suit was below 500. [P. 790, C.]

C. Lakshmanna—for Appellant.

V. Suryanarayana—for Respondents.

Judgment.—Respondents raise the preliminary contention that the suits are of a Small Cause nature and therefore no second Appeal lies. The plaintiff's case was that he and defendants had divided their properties, though the property still remained under the same patta, and that his property was attached for arrears under this patta, which were due from defendants 1 to 6, they not having paid up the kist on their property under the same patta, that plaintiff, to save his own property therefore, had to pay up the arrears and he sued for contribution.

I think it is clear that the suit is not of the nature contemplated by Art. 41 of the 2nd Schedule to the Provincial Small Causes Courts Act. Here there was no joint property, since plaintiff and defendants, on plaintiff's own showing were devided. The mere fact that the patta is still joint and therefore the liability under it is joint, will not affect the manner in which the property is held. The ruling in *Srinivasa* v. *Sivakolundu* (1) is directly in point.

I hold that the suits are of a Small Cause nature and therefore no Second Appeals lie. These Second Appeals are dismissed with costs. In S. A. No. 691 of 1921, the memorandum of objections is not pressed and is dismissed with costs.

Appeals dismissed

(1) [1889] 13 Mad. 349.

1924 MADRAS 791

RAMESAM, J.

P. V. Radhakrishniah Chetty and others—(Insolvents)—In Re.

Ins. Pet. Nos. 192 of 1920 and 174 of 1921, Decided on 9th January 1924.

(a) *Presidency Towns Ins. Act, S. 17 — Insolvency of adult sons does not vest shares of minor sons where sons and father were carrying joint business.*

Where adult sons and minor sons and father constituting a joint Hindu family carried on business and the adult sons became insolvents.

Held : the shares of the minor sons did not vest in the Official Assignee nor could he get power to deal with them under S. 17. [P. 792, C. 1]

(b) *Presidency Towns Insolvency Act, S. 8— Scope.*

S. 8 gives wider powers of review than are conferred by C. P. C. [P. 791, C. 2]

M. A. Thirunarayanachari instructed by *A. Kandaswami*—for Petitioners.

V. Narayana Aiyangar instructed by *V. Varadaraja Mudaliar* — for Mortgagees.

Judgment.—This is a matter arising out of the Insolvency of P. V. Chenroya Chetty and Brothers.

The history of the family is briefly told. The family belongs to Vayalpad in the Cuddapah District. They belong to the Komati caste, the premier trading caste in Southern India, specially among the Telugus. Chenroya, the grand-father of the Insolvents, carried on his business, namely, a money-lending business, at Vayalpad. After him, his son Venkatramiah continued the old business. He tried business in grain in partnership with others, but this was not very successful. In 1911, a cloth business was started. Soon after this, Venkatramiah retired and his eldest son began to attend to the business. In 1912 the eledst son opened a piece-goods business at Madras under the style of P. V. Chenroya Chetty and Brothers. The second son Ramanujam Chetty was attending college. In 1917, he attained majority and left the college. In 1918-1919, the business was extended to Bombay and the third brother Radhakrishna was in charge of it. The business at Bombay ended in heavy losses. Debts were also incurred by the firm at Madras. On 15th October 1920, all the debts (Madras and Bombay) were consolidated into a single debt and a deed of mortgage was executed for Rs. 80,000, in favour of the executors of Volaipalli Venkata Veerabrahman Chetty. In December 1920, the third brother was declared insolvent. On 31st August 1921, the two elder brothers applied to be and were declared insolvents.

On 7th November 1922, on the application of the Official Assignee, Coutts Trotter, J., held that the interests of all the members were liable and directed their sale by the Official Assignee. In this petition, the minors (that is, the two brothers of the insolvents and the sons of the insolvents) were represented by their fathers as guardians *ad litem* ; but no formal order of appointment as guardians *ad litem* was made. It is now said that the notices were not served on them as guardians. Anyhow, in insolvency, the jurisdiction to annul a prior order under S. 8 is wider than the power to review under the Civil Procedure Code and the whole question, now that both sides are represented, is open before me.

The present petition is filed by the minors (that is the 4th and 5th brothers of the Insolvents and the sons of the Insolvents). Substantially, it seeks for a declaration that the shares of the minors are not liable to be sold by the Official Assignee. The petition has not been pressed, so far as the sons of the Insolvents are concerned, I think rightly ; and it has to be considered, so far as Balaramaswamy and Devanathaswamy are concerned, who will be referred to hereafter as the Petitioners.

Two points have been argued before me :—

(1) How far the mortgage is binding on the petitioners.

(2) Even if it is binding, whether the Official Assignee can deal with the shares ;

It seems to me the decision of the first point is unnecessary, in view of my opinion on the second. If it is necessary to decide, I am inclined to hold that (1) the business at Madras is an extension of the family business at Vayalpad and was carried on with family funds. (2) Though it may not

be open to a manager (other than a father) to create a new family business so as to impose any liability on the minor members [*Vide Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1), and *Sadasiva Mudaliar* v. *Hajee Fakir Mahomed Sait* (2)] yet a father can; (see Mayne's Hindu Law, 9th Edition, pp. 396 to 400). (3) In the present case, the father consented to the extension of the family business and took part in it, such part as was consistent with his age. (4) All the major members never imagined for a moment that the business was other than a family business. It is unnecessary to refer to the evidence supporting these conclusions. (5) The mortgage-deed, to which all the minors and the father are parties, shows that though it refers to the debts as the debts of Chenroya Chetty and Brothers only, the deed of mortgage is binding on all the members. (see judgment of the Privy Council dated 29th November 1923; *Brij Narain* v. *Mangla Prasad* (3).

But on the second point, I think, the petition has to be allowed. The father, Venkatramiah, has not been declared an insolvent. It is true that not only the properties but also the powers of the Insolvents are vested in the Official Assignee: *Official Assignee of Madras* v. *Ramachandra Ayyar* (4). But Chenroya Chetty and his two brothers have no power to sell the properties of their brothers I do not think that they can be regarded as the managers of the joint family properties (outside the firm properties). The fact that the father, Venkatramiah, was named as the guardian negatives the suggestion. If so, whatever may be the binding nature of the mortgage, as matters stand, the properties of Balaramaswami and Devanathaswamy are not vested in the Official Assignee; nor can he sell or otherwise deal with them. I accordingly declare. The petitioners will have half of the taxed costs. The other minors will pay half the costs of the Official Assignee.

Petition allowed.

(1) 1922 P.C. 237 (P.C.)
(2) 1922 P.C. 397 (P.C.)
(3) 1924 P.C. 50 (P.C.)
(4) 1923 Mad. 55.

✱ 1924 MADRAS 792

SCHWABE, C. J. AND COLERIDGE, J.

Varadarajan—Plaintiff--Appellant.

v.

Srinivasa Rao and others—Defendants—Respondents.

S. A. No. 2050 of 1920, Decided on 18,th April 1923 against the, decree of the Court of the Subordinate Judge, Trichinopoly.

✱ *Hindu Law—Manager—Insolvency of—Shares of other members do not vest in Official Assignee.*

On the insoevency of the managing member of a joint Hindu family the Official Assignee succeeds to the undivided interest of the insolvent in the joint property and his rights as managing member so far as they can be exercised for his own benefit; but he is not entitled to have vested in him the shares of the other members though he is entitled to deal with them as the insolvent would lawfully have done if there be no insolvency. 1923 M. 55 Foll. 1923 L. 1 (F. B.) Not Foll

[P. 793, C. 1]

T. Narasimha Aiyangar—for Appellant.

C. V. Ananthakrishana Ayyar—for Respondents.

Schwabe, C. J.—This is a second appeal from the judgment of the Subordinate Judge' Trichinopoly, in a partition suit. The plaintiff was the son of the first defendant and they were puisne members of a joint Hindu family. At one time before the suit the first defendant became insolvent. The plaintiff joined in the partition suit, certain alienees of the joint family property alleging that the consideration was such that the transactions were not binding on him. The case came up before the District Munsif and then on to the District Judge who remanded the matter to the District Munsif again for finding on the question whether the consideration for these assingnments was of a nature to bind the son. The findings were given and the case came up again and was heard on the findings by the Subordinate Judge. The Subordinate Judge took no notice of the finding and did not enquire at all into any of the matters considered by the District Judge as relevant, but accepted the contention that, as

the first defendant had become an insolvent, the whole joint family property vested in the Official Receiver, and, therefore, the son had no claim to partition and could not take any steps to recover this alienated property from the alienees. In my judgment, that is not the law. The matter has recently been before this Court in the *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) when I expressed my views to be that, on the insolvency of the managing member of a joint Hindu family, the Official Assignee succeeds to the undivided interest of the insolvent in the joint property and his rights as managing member so far as they can be exercised for his own benefit, but he is not entitled to have vested in him the shares of the other members though he is entitled to deal with them as the insolvent would lawfully have done if there be no insolvency.

There has since been a decision of the Full Bench in Lahore, *Bihari Lal* v. *Sat Narain* (2) in which the Court, though expressing preference for the view of this Court which was not before it, held itself bound by authority to decide that the whole joint family property vests in the Official Assignee. I think we must follow the decision of the Bench of this Court. It follows from that that the decision of the Subordinate Judge in this case is wrong and the matter must be remanded to the Subordinate Judge, Trichinopoly, to be heard from the stage at which it had arrived on return of the findings called for by the District Judge. It seems to me necessary that the Official Receiver of the second defendant should be a party. The point was raised early in the case, and notice must be given to him so that he may come before the Court, if so advised.

The Plaintiff is entitled to his costs of this appeal.

Coleridge, J.—I concur.

Case remanded.

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(1) 1923 Mad 55 = 46 Mad = 54 = 16 M.L.W. 559 = 43 M.L.J. 596 = (1922) M.W.N. 653.
(2) 1923 Lah 1 = 3 Lah 329 (F. B.)

1924 MADRAS 793

KUMARSWAMI SASTRI, J.

Arunachala Aiyar, Attorney High Court Madras—In re application of in C. S. No. 556 of 1920.

Ordinary Original Civil Jurisdiction Civil Suit No. 556 of 1920, Decided on 17th March 1924.

Madras High Court Original side rules—Fees of Attorney.

The Court at the instance of the attorney engaged by a party has jurisdiction to declare the costs due to him to be a charge on the property purchased in Court auction, on being satisfied that the party is attempting to defeat the claims of the attorney. Where a party executed a vakalat, by which he agreed to pay the attorney the regulation fees and stated that there was no counter-agreement between him and the attorney.

Held, it is not open to the party to plead that he never engaged the attorney and never agreed to pay him any amount. 25 Cal. 887, Foll. [P. 795, C. 2.]

Vere Mockett—for Petitioner.

T. A. Vijayaraghavachari—for Respondent.

Judgment.—This is an application by the Attorney, who appeared for the auction-purchaser, the counter-petitioner for an order that the petitioner should be declared to have a charge, on the premises, more particularly described in the schedule, in respect of the costs, which are due to the Attorney, the counter-petitioner having engaged him, for the purpose of appearing in the application, to set aside the sale of the property, wherein he was declared the purchaser. It is clear from the Vakalat, which the counter-petitioner admittedly executed in favour of the Attorney, that he engaged Mr. Arunachala Aiyar, the Attorney, to appear for him and get the sale confirmed and oppose the application for setting aside the sale and that he had agreed to pay him costs, according to the scale laid down by the High Court Fee Rules, 1902. The counter-petitioner declares in the Vakalat that no counter-agreement was made between himself and the

Attorney, in respect of costs. The Vakalat was accepted and filed and Mr. Arunachala Aiyar, the Attorney, appeared on record, for the counter-petitioner, during certain stage of the proceedings and subsequently there was a change of attorney and Mr. V. V. Devanathan was engaged as Vakil. The Attorney does not claim for any work done after the change of attorney and so far as I can see there is nothing to prevent the Attorney from recovering fees due to him for work done by him, till there was a change. The Attorney has filed an affidavit wherein he states that he appeared., that a number of affidavits, about 10 in number, were filed, that two witnesses were examined, that the application was on board for a number of days, that it was heard for two days, and that the sale was confirmed. He says that the costs of the application were taxed by him and that his costs, excluding Counsel's fees, came to Rs. 305 and that it has not been paid, in spite of demands. The Attorney states that at the request of the counter-petitioner he gave a change of attorney to Mr. V. V. Devanathan and that although the Attorney has been demanding payment of the fees due to him the counter-petitioner is executing the decree for costs but has not paid him anything.

The affidavit of the counter-petitioner states that it is false that he engaged Mr. Arunachala Aiyar, or that he agreed to pay him anything and that he took no instructions from him, in respect of the subject matter in dispute. He says that at the instance of the decree-holder, his son-in-law, Mr. P. Rajagopala Aiyangar, formally engaged the Attorney, so as to enable him to appear and do his best for his father-in-law, in the matter, that he does not owe anything to the Attorney and that the Attorney did nothing in the matter, that he gave a change of attorney to Mr. V. V. Devanathan voluntarily, that he paid large sums to Mr. V. V. Devanathan. He also says that Mr. V. V. Devanathan himself was overpaid by him. I find it difficult to believe the counter-petitioner's affidavit. It is not disputed that the Vakalat was filed and the terms of the Vakalat are clear. He agrees to pay the Attorney his regulation fee, under the Original Side Rules and distinctly states there was no counter-agreement between the Attorney and the counter-petitioner. I do not think that in the face of the Vakalat, it is open to the counter-petitioner to plead that he never engaged the Attorney, and never agreed to pay him any amount. That the Attorney did appear when the case came on is not disputed and I think it is a matter of great regret that the allegations in paragraphs 2 and 3 should ever have been made. When a person engages a professional gentleman and signs a Vakalat for that purpose, it is impossible to allow him to be heard to say that the whole thing was merely a farce and that he is under no liability to pay the professional gentleman. Oral evidence of any agreement is inadmissible to contradict the terms of a written-contract. The bill of costs in this case has been taxed at Rs. 549, as between party and party and what the Attorney claims is the portion that is due to him for work done and this according to the petitioner amounts to Rs. 305. The costs have been taxed by the Deputy Registrar and I take it that the costs were the costs that were lawfully due to the Attorney. It is significant that the counter-petitioner is attempting to recover the costs so taxed from the other side, while he is denying liability to pay the Attorney.

Under these circumstances, there can be no doubt that the Attorney is entitled to Rs. 305, which is his due. Any over-payment to Mr. V. V. Devanathan, or any request by the decree-holder to contest the proceedings is a matter with which the Attorney has absolutely no concern. If the decree-holder asked the auction purchaser to contest and should there be anything in the nature of a promise by him to pay the costs incurred, it is open to the counter-petitioner to get the money from the decree-holder, and if Mr. V. V. Devanathan has been overpaid, it is a matter between him and the counter-petitioner.

As regards the objection taken that I have no jurisdiction to make the order, I think the authorities, which Mr. Mockett has cited give the Court power where a party wants to defeat his Attorney's claim for costs. I would only refer to *Khetter Kristo Mitter* v. *Kally Prosunno Ghose* (1), where we have the high authority of Sir Lawrance Jenkins, as to the power of the Court to make the order in question. There is also a clear precedent in the judgment of Coutts Trotter, J., dated 24th April, 1917, in C.S. No. 100 of 1916, where the learned Judge held that the English cases on the subject are applicable and pointed out the difference between the special lien over the property recovered in an auction and the general lien given by the Contract Act. I entirely agree with the learned judge. The English case, as regards the power of the Court, is stated in Halsbury, Vol. XXVI, p. 823 and the cases cited. There will be an order declaring that the petitioner Mr. Arunachala Aiyar, is entitled to a charge on the house and ground described in the schedule to the Judge's Summons, for the sum of Rs. 305. The counter-petitioner will pay the petitioner's costs.

I do not think I can, having regard to the decision of Wallis, C.J., and Oldfield, J., in O. S. A. No. 62 of 1916, give costs on a higher scale, though I think the counter-petitioner's allegations are unfounded. Certify for counsel.

Application allowed.

(1) [1898] 25 Cal. 887=2 C. W. N. 508.

✱ 1924 MADRAS 795

SPENCER, J.

G. Suryanarayana —Petitioner

v

Sree Raja Ankineed Prasad Bahadur and others — Respondents

Cr. R. C. Nos 206 and 207 of 1923 and Cr. R. P. Nos. 160 and 161 of 1923, Decided on 19th February 1924.

✱ (a) *Criminal P. C., S. 145—Dropping proceedings under section on being satisfied, without taking evidence, that no dispute likely to cause breach of the peace existed is not illegal—Source of Magistrate's information is immaterial*

Dropping proceedings after passing the preliminary order is not illegal if the Magistrate is satisfied that no dispute likely to cause a breach of the peace existed although in coming to the conclusion he acted on the petition of a third party to the proceedings; and the Magistrate is not bound under such circumstances to record the evidence of the witnesses of the petitioner who might have shown by their evidence that a dispute still existed. [P 795 C 2, P 796 C 1]

(b) *Criminal P. C. S. 145-Sale proceeds,*

The sale proceeds of crops standing on the lands when the lands were attached in proceedings may be ordered to be kept in deposit in the Court until one party or the other obtained an order in his favour. [P 796 C 1]

K. Venkataraman Raju—for Petitioner.

V. Ramadas—for 1st Respondent.

Order.—An objection has been taken that the Magistrate acted illegally in dropping proceedings under S. 145 Criminal Procedure Code on being satisfied that no dispute likely to cause a breach of the peace existed.

It is argued that he was bound to record the evidence of the witnesses of the petitioner, who might have shown by evidence that a dispute still existed, and that he should not have acted on the petition of the niece of the Zamindar who stated that she had compromised that matter in dispute between herself and the Zamindar who is the 1st Counter-petitioner.

In *Manindra Chandra Nandi* v. *Barada Kanta Chowdhry* (1) it was held that whatever the source of the Magistrate's information he might act upon it if he was satisfied that the state of things which alone would have given him jurisdiction to proceed with the enquiry no longer existed and in another case in the same volume at page 161 it was pointed out that S. 145 (5) gives even third parties who are interested in the land a right of intervening and showing that no dispute existed. When the Magistrate is able to act on a police report or other information in starting proceedings under S. 145, I do not see why he should not stay further pro-

(1) [1903] 30 Cal. 112=6 C. W. N. 417

ceedings on similar information without being obliged to record such evidence as the parties may produce with the same formality as he would have done, if he had gone on with his enquiry instead of dropping it. The petitioner cannot complain that he had no opportunity of showing cause against the order that was made, as the Magistrate's order contains a full discussion of his power to drop proceedings at any stage. I decline to interfere with the order of the Magistrate on this point.

As regards the money deposited in Court, it appears that the deposits made by bidders at the sale of the right to cultivate the disputed lands in fasli 332 was ordered to be returned to them. That was a proper order, as the sale was cancelled in consequence of these proceedings, The main order speaks of some other money deposited in Court. This may be the sale proceeds of crops that were standing on the lands when the lands were attached. If so, that money might have been ordered to be restored to the persons who raised the crops, as was done in *Mahalakshmi* v. *Subbarayudu*(2). But there is authority in *Chenga Reddi* v. *Ramaswamy Goundan* (3) for the orders passed in this case, *viz*, that the money should be kept in deposit in the Court until one party or the other obtained an order in his favour. I shall therefore allow the order to stand.

The Criminal Revision Petitions are dismissed with costs.

Vakil's fee Rs. 50.

Petition dismissed.

(2) 1923 Mad. 472=17 M. L. W. 429=24 Cr. L. J. 783.
(3) [1915] 1 L. W. 1032=27 I. C. 152—16 Cr. L. J. 104.

1924 MADRAS 796

SPENCER, Og. C. J. AND DEVADOSS, J.

Ellammal—Appellant.

v.

A. S. Venkataramana Rao and another—Respondents.

A. A. A. O. No. 19 of 1922, and C. R. P. No. 315 of 1922, Decided on 7th February 1924, against the order of the S. J. of Vellore, D/-5th August 1921.

Contract Act, S. 74—Forefeiture cannot be relieved against where time is the essence of contract—Decree—Forfeiture.

Where time is of the essence of the contract the question of relieving of forfeiture, which only arises when a penalty is provided for non-performance, does not arise. 33 C.L.J. 241 Appl. 24 Mad. 265, (1914) M.W.N. 192 Foll. [P. 796, C. 2.]

P. Hari Rao and M. C. Narayanaswami—for Appellant.

C. V. Ananthakrishna Ayyar—for Respondent.

Order.—The Subordinate Judge has not found whether the sum payable was actually tendered in time. He is directed to return a finding on this point within six weeks from the date of the receipt of the record in these casesand seven days are allowed to the parties for filing objections to the findings after notice of the return of the same shall have been posted up in this Court.

[The Subordinate Judge returned a finding that the tender pleaded was not true.

On return of the finding the cases came again before the Bench as constituted above.]

Judgment.—The Subordinate Judge has now found against the alleged tender by appellant on November 30th and it has not been suggested that there was a tender on any other day before a petition was filed on December 2nd that the Court should allow the amount to be deposited in Court. We think that time in this case was of the essence of the contract and that the question of relieving against forfeitures, which arises when a penalty is provided for non-performance as it did in *Nagappa* v. *Venkat Rao* (1) and *Ana Sheik Mohidin Tharagan* v. *Vadivalagianambai Pillai* (2) does not arise here.

The distinction between the two classes of cases is made clear in the judgment of Mookerjee, Ag. C. J. in *Kandarpa* v. *Bannari* (3).

The interval between the date for payment of money and the date for taking possession of lands made the case in *Supdu Dhodu* v *Madhavra Jiv-*

(1) [1900] 24 Mad. 265.
(2) [1914] M.W.N. 92—22 I. C. 37.
(3) [1921] 33 C.L.J, 244—60 I. C. 964.

ram (4) one where time was not of the essence of contract.

In the present case neither the appellant (1st defendant) nor the 5th defendant had any absolute title to the land apart from the compromise and it was expressly stipulated in the last paragraph of the compromise decree, that in default of payment within the time fixed, the alienation by the 1st defendant in favour of the 5th defendant should be null and void.

The Lower Appellate Court is right and the Civil Miscellaneous Second Appeal is dismissed with costs and the Civil Revision Petition is dismissed.

Appeal dismissed.

(4) [1920] 44 B. 544—57 I. C. 534—22 B. L. R. 780.

1924 MADRAS 797

JACKSON, J.

Venkatasubbiah Chettiar—Petitioner

v.

Sesha Aiyar—Respondent.

Civil Revision Petitions Nos. 808 and 809 of 1922, Decided on 6th March 1924.

Madras District Municipalities Act, (V of 1920) S. 303 (2) R. (6)—Court can't grant an injunction restraining the candidate declared elected from taking his seat.

Pending an enquiry into an objection to an election the District Judge can't grant an *interim* injunction restraining the candidate whose election is in question from taking his seat on the Municipal Board. Such a power is not one vested inherently in any Court trying a suit or making an inquiry. R. 6 of the rules framed under the Act, extend only the procedure for the trial of suits and not all incidental remedies provided for in C. P. C.

[P 799 C 1]

S. Swaminadhan—for Petitioner.

T. R. Venkatarama Sastry and *K. S. Sankara Aiyar*—for Respondent.

Judgment.—This is a petition under S. 115 of Act, V of 1908 and S. 107, Government of India Act.

Petitioner and respondent were the only two candidates at the election held on 22nd September, 1922, for the appointment of a councillor to represent the 12th ward of the Trichinopoly Municipality. The petitioner was declared duly elected, and respondent filed a petition before the District Judge of Trichinopoly under the rules framed in accordance with S. 303 (2) (b) Madras Act V of 1920. While the inquiry into this petition was pending the respondent applied in I. A. No. 625 of 1922 purporting to be under Ss. 94, 141, 151 and O. 39. R. 2 of the Civil Procedure Code that the present petitioner be restrained by a temporary injunction, from taking his seat in the Municipal Council until the disposal of the petition. In his order on this application dated 30th October 1922, the District Judge restrained the petitioner by interim injunction from taking his seat in the council. Hence this Revision Petition.

The question for determination is whether the District Judge had jurisdiction to pass such an injunction. R. 1 of the Rules for the decision of disputes, as to the validity of an election lays down that:

"no election held under the Madras District Municipalities Act shall be called in question, except by an election petition presented in accordance with these rules."

Under R. 6.

"every election petition shall be inquired into by the Judge as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, 1908 to the trial of suits."

It is argued for the petitioner that 'procedure applicable to the trial of suits' cannot include the power to pass an interim injunction, while on behalf of the respondent, it is contended that R. 6 does convey such power and in any case the District Judge has a residuary power, which enables him to take such action under the Code, as may seem proper, during the course of the enquiry.

It is to be noted that the application of the Civil Procedure Code to these inquiries is definitely restricted in R. 6 to the trial of suits. Had the Government intended that the judge in an election inquiry should have the same powers as he has in the exercise of his original jurisdiction this presumably would have been stated in terms. In this connection R. 6 may be compared with S. 5 of

the Provincial Insolvency Act, where full powers are conferred upon the Insolvency Court, and the differences in the wording of the respective clauses is significant. An interim injunction can only be within the jurisdiction of the Judge holding an enquiry into an election petition, if that injunction is for the purposes of and in furtherance of the trial which he is conducting. But a temporary injunction under O. 39 R. 2 is not necessarily for the purposes of the trial. S. 94 Civil Procedure Code, out of which O. 39 arises is framed generally 'in order to prevent the ends of justice from being defeated, and then, under O. 39, R. 2:

"In any suit for restraining the defendants from committing.....an injury the plaintiff may apply to the Court for a temporary injunction to restrain the defendant from committing the injury."

An injunction restraining an elected candidate from taking his seat may be in the ends of justice, assuming that there is a prima facie ground for holding his election to have been so irregular that any act consequential upon that election is a fraud upon the defeated candidate, but such an injunction in no way affects the conduct of the trial. A Court which issues such an injunction is really proceeding as if it were seized of the case, in the ordinary exercise of its, civil jurisdiction and not as a Court inquiring under special rules into the validity of an election. And under R. 1, an election can only be called into question by a petition presented under the rules. When the party is specially prescribed from invoking the Civil Courts, in the ordinary exercise of their judicial functions, I can see no warrant for a Court importing into the inquiry its ordinary civil powers of its motion. And, of course, if a Court cannot act under S. 94 and O. 39. S. 151 does not extend its powers. The learned District Judge has justified his order in I. A. No. 63 of 1922 on the ground that it is better that a councillor whose qualifications for his office are questioned does not take part in an election (i. e. does not sit as councillor and vote for the election of Chairman) as that may lead to questions about the validity of the election. Had the disqualification in question been one falling within the provisions of S. 50, there could be no such difficulty, because it is expressly provided in S. 51, Cl. 3, that pending the decision of the District Judge after inquiry into the alleged disqualification, the councillor shall be deemed to be qualified. By parity of reasoning, I think that the councillor whose election is impugned on account of alleged irregularities may also be deemed to be qualified pending the judge's decision.

The rules under S. 302 (2) (b) do not contain a provision similar to that in S. 51, but in R. 13 it is laid down that where an election is declared void, the seat of the returned candidate shall be deemed to be vacant from the date of the Judge's order, which implies that up to the date of the Judge's order the unseated councillor shall be deemed to have been qualified

Therefore, I find no reason to hold that Government must necessarily have intended that a power of granting an interim injunction should vest in the Judge inquiring under R. 6. The English decisions, to which my attention had been directed, *Aslatt* v, *Southampton Corporation* (1) and *Richardson* v *Metheley School Board* (2) establish that the Court of Chancery has exercised this power of granting injunctions, but I do not think it is decided that in the exercise of their ordinary judicial functions, the Indian Courts acting under O. 39 R. 2 can exercise this power, cf *Sarvothama Rao* v. *Chairman Municipal Council Saidapet* (3). The question is whether this power has been carried into the special rules for election inquiries, and in this connection the English cases are valuable, chiefly as showing that such powers should be exercised with the greatest discrimination. In *Aslatt* v. *Corporation of Southampton* (1). the Corporation was restrained from declaring the

(1) [1880] 16 Ch. D. 143=50 L. J. Ch. 33=43 L. T. 464=29 W. R. 117=45 J. P. 111.
(2) [1893] 3 Ch. 510=3 R. 701—62 L. J. Ch. 943=69 L. T. 308=42 W R. 27.
(3) 1923 Mad. 475=17 M. L W. 431=32 M. L. T. 178=(1923) M. W. N. 266=45 M. L. J. 23.

office held by plaintiff void. (Here it may be noted, the status quo was preserved by the interim order of the Court, which is very different from temporarily un-seating the elected candidate)

In the course of that ruling, Jessel M. R. observes at p. 148 that the mere fact that some proceeding was being taken to test a right to continue in an office was never considered a ground for interfering by injunction; because the old Court of Chancery never interfered, if a legal right only was in question. The Judicature Act, 1873, conferred upon the Courts, the right of granting injunctions; but as a general rule the Court only interferes when there is some question of property though there may be interference even when personal status is the only thing in question.

This case is considered in *Richardson* v. *Methley School Board* (2), where certain doubts in respect of *Aslatt* v. *Southampton Corporation* (1) are discussed, but the Court concludes by granting a similar injunction, that the Court of Chancery has exercised this power is no warrant, for assuming that it was meant to be included by Government within the provisions of R. 6 and it is not disputed that Indian Courts in the exercise of their ordinary functions, under the Civil Procedure Code, would have such power of granting injunction. I find that the District Judge acted without jurisdiction, in granting an interim injunction, by his order in I. A. No. 625 of 1922 dated 30th October, 1922 and order that it can be cancelled. Respondent will pay the cost of the petitioner.

The District Judge, after hearing the present petitioner, re-affirmed the interim injunction in his order of 3rd November 1922, and that order is sought to be revised in Civil Revision Petition No. 809 of 1922, which must also be allowed, on the same grounds but without costs.

Petitions allowed.

1924 MADRAS 799

ODGERS AND WALLACE, JJ.

Thurman—Accused—Petitioner—*In re*

Cr. Rev. Case No. 563 of 1923, (Cr. Rev. Petition No. 448 of 1923) Decided on 6th December 1923, from Court of the Bench Magistrates Madras.

(a) *Criminal P. C., S. 263 (b)—Hony. Magistrate.*

Hony. Prescy. Magistrates should record reasons for convictions. [P. 799, C. 2.]

(b) *Criminal P. C., S. 370—Hony. Magistrate.*

Hony. Prescy. Magistrates should record reasons for conviction where imprisonment is inflicted. The omission to record the reasons is, however, only an irregularity and where the accused has not been prejudiced, revision will not be allowed.

[P. 799, C. 2. P. 800, C. 1.]

T. S. Ramaswami Aiyar—for Petitioner.

The Public Prosecutor—for the Crown.

Order.—It is clear that no reasons have been given in the judgment of the Magistrates. This is contrary to S. 263 (b), of the Criminal Procedure Code. Honorary Magistrates are constantly being reminded of their obligations in this respect and we again call their attention to the requirements of the Code. No statement has been received from the Magistrates, under S. 441, Criminal Procedure Code. Honorary Magistrates, as Presidency Magistrates, are governed also by S 370 (1) in cases where imprisonment is inflicted. The omission of reasons for the conviction is no doubt an irregularity. The only question is whether the irregularity has prejudiced the accused. In *In re Dervish Hussain* (1), the judgment of one of us (Wallace, J.), it was held that a conviction passed without reasons, when no evidence is recorded, is very different from a case where as here evidence is recorded. There is no record of any cross examination, but we are informed that accused was not defended and there was probably no cross-examination at all. The Conviction is "found guilty" and that is, the accused was found guilty of assault and also failed to show cause against being bound over, under

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(1) [1923] Mad. 185—46 Mad. 253—44 M. L. J. 84—17 M. L. W. 18—32 M. L. T. 109—24 Cr. L. J. 84.

S. 106. Criminal Procedure Code. He was found guilty of an assault in the public street and we think there was no prejudice to the accused, by the failure of the Magistrates, to record a finding that accused was guilty of a breach of the peace. They no doubt should have done so, but the accused had been previously bound over and as soon as his previous security expired, he broke out again. There is thus an irregularity; but we hold it is cured as in the former case, by S. 537. Criminal Procedure Code, and the Criminal Revision Case is dismissed.

Petition dismissed.

✱ 1924 MADRAS 800

VENKATA SUBBA RAO J.

Narayanaswamy Devaroyar—Plaintiff-Appellant.

v.

Thangavelu Padayachi—Defendant. Respondent

S. A. No. 506 of 1921, Decided on 22nd January 1924, against the decree of the Dt Court of the South Arcot.

(a) *T. P. Act, S. 123–Want of registration.*

Want of registration vitates gift. [P 800 C 2]

(b) *Registration Act, S. 49–Unregistered deed.*

Unregistered deed of gift though invalid may be considered for the purpose of ascertaining the nature and character of the donee's possession. [P 800 C 2]

(c) *Adverse Possession–Invalid title deed.*

Person in possession of lands under invalid deed of gift conferring absolute rights on the donee, perfects his title at the end of the statutory period. [P 800 C 2]

✱ (d) *Deed–construction-maintenance deed–Hindu Law.*

Words "with absolute rights etc" in maintenance deed are not to be construed in a different manner from similar words in other documents. [P 800 C 2]

T. Narasimha Aiyangar—for Appellant.

T. V. Muthukrishna Aiyar—for Respondent.

Judgment.—On the death of Kuppuswmi in the year 1885 there appear to have been some negotiations regarding a provision for suitable maintenance to his widow Alamelu. In 1890 Exhibit I was executed by which the surviving coparceners gifted to Alamelu certain portions of family property in lieu of her right to maintenance. She was in enjoyment of the property from that date till her death. The defendant is now in occupation of it claiming under a will executed by Alamelu. The lower courts have found that the will is genuine and that finding must be accepted. The question to be decided, is, did Alamelu have an absolute interest in the property? On behalf of the plaintiff it is argued that the deed of gift was unregistered and could consequently confer no title on Alamelu. This argument is perfectly correct. But Alamelu was in enjoyment of the property for over the statutory period, in fact, for about 23 years. Exhibit I. is not operative as a deed of gift as it was not registered. But to ascertain the nature and character of Alamelu's possession, the deed may be looked at. See *Varada Pillai* v. *Jeevarathnammal* (1). and *Madepena Appamma* v. *Chinnaveadu* (2). In the deed what do we find? The recital is, that these lands were given to Alamelu with absolute rights including the right to sell, make gifts and alienations. For ascertaining the nature of the right which she was setting up, the recitals in the deed may be referred to, The document was properly admitted in evidence for this purpose and the finding that she perfected her title by adverse possession is not open to question.

Then it is said that in maintenance deeds the words " with absolute rights etc " ought to be construed in a manner different from the way in which they would be construed if those words occurred in other documents. I do think there is any warrant for this proposition. In fact in *Jogeswar Narain Deo* v. *Ram Chandra Dull* (3). and also in *Muthu Venkatanarayan Chetty* v. *Authi Panduranga Naidu* (4). similar contentions were overruled.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

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(1) [1919] 43 Mad. 244=46 I. A. 285=38 M. L. J. 313=27 M. L. T. 6=22 Bom. L. R. 144=18 A.L.J. 274=24C W.N. 346=(1919) M. W. N 724=53 I. C. 901=10 L. W. 679 (P. C.)

(2) 1924 Mad 292=47 Mad. 203=45 M. L. J. 667=(1923) M. W. N. 825=19 M. L. W. 37=33 M. L. T. 146.

(3) [1896] 23 Cal. 670=23 I. A. 37=6 M. L. J. 75=7 Sar 13.

(4) [1919] M. W. N. 103=51 I. C. 217.

✱ 1924 MADRAS 801

KRISHNAN, J.

K. S. Krishna Aiyar—Defendant—Appellant.

v

Nynadikkam Pillai and others — Plaintiff's Legal Representatives — Respondents.

S. A. No. 1071 of 1921, Decided on 13th March 1924, against the decree of the Court of the Subordinate Judge of South Malabar at Palghat.

✱ (a) *Contract Act, S. 25—Assignment of decree—Judgment-debtor becoming insolvent—Decree.*

Assignment of decree is valid notwithstanding that judgment-debtor has become insolvent. 43 C. 999 Dist. [P 801 C. 2]

(b) *Specific Relief Act, S. 21—Assignee of decree who resiles from contract may be made to pay price instead of damages—Damages.*

There is no invariable rule that in cases relating to moveable property damages only should be given. In a suit against a person who agreed to take an assignment of a decree the price which he promised to pay to the assignor may be decreed. [P. 801 C. 2]

P. V. Parameswara Aiyar and *K. B. Venkatachala Aiyar*—for Appellant.

P. S. Narayanaswami Aiyar — for Respondents.

Judgment —This suit was brought on an arrangement, which was made between the plaintiff and the defendant, that the defendant was to take an assignment of a decree, which the plaintiff obtained against one Ananthanarayana Aiyar, on payment of Rs. 400 in the circumstances that have happened here. Two points were taken before me in Second Appeal. The first point is that as Ananthanarayana Aiyar has become an insolvent, the defendant is not bound to accept the assignment of the decree and is not bound to pay the money due under the contract. Reliance is placed on a case reported in *Jatindra Nath Basu* v. *Peyer Deye Debe* (1), a decision of the Privy Council. There, the decree that was agreed to be assigned subsequently became barred by limitation, as the assignor did not take steps in time to keep the decree alive; their Lordships held that as the plaintiff had agreed to take the assignment of a subsisting decree, there was a duty on the part of the decree-holder to keep the decree alive and that as he failed to perform that duty and the decree became valueless, the assignee was not bound to take the assignment That case has no bearing on the present case. Here, there is no difficulty of the decree having become barred, as it was expressly kept alive. The judgment-debtor has become an insolvent, but that does not mean that the decree has become entirely infructuous. No doubt, it may be that the amount of the money realisable in execution of the decree had become reduced, but that is no ground for saying that the agreement to assign has become invalid.

The second point taken is that the plaintiff is not entitled to sue for the amount that the defendant agreed to pay, but can only sue for damages against the defendant, for not accepting the assignment. I do not think that there is any ground for this contention. The defendant agreed to pay for and take the assignment of the decree and the plaintiff was always ready and willing, as found by the Lower Court, to make the assignment to the defendant. The plaintiff is entitled to the price arranged under the contract and need not sue for damages. It may be that the recovery of the price is in the nature of a specific performance of the contract, but that does not affect the question; for, in such a contract as this, the payment of the price is the proper remedy that should be allowed. There is no invariable rule that in cases relating to moveable property, damages only should be given. The point was not taken in the first Court nor was it made a ground in the memo-

(1) [1916] 43 Cal. 999=43 I.A. 108=14 A.L.J. 527=20 C. W. N. 866=(1916) 1 M. W. N. 403=18 Bom. L. R. 509=24 C. L. J. 67=34 I.C. 69=20 M.L.T. 25=3 L.W. 553=11 M. L.J. 248 (P.C.)

randum of appeal to the Lower Appellate Court. The point, therefore, should not have been allowed by the Subordinate Judge to be argued at all. However, I consider that there is no substance in the contention. Both the points taken failing, the Second Appeal fails and is dismissed with costs.

Appeal dismissed.

✱ 1924 MADRAS 802

COUTTS TROTTER, C. J. AND RAMESAM, J.

The Commissioner of Income-tax, Madras—Referring Officer.

v.

Messrs. Binny & Co. Madras, Ltd.—Assessee.

R. C, No. 1 of 1924, Decided on 27th March 1924.

Income-tax Act (1922) S. 4 - Issue of new share to share-holders is not income.

The issue of new shares to share-holders representing their share in the accumulated surplus is not taxable as income and no super tax is payable on the value of such shares. Brewery Case 1914, A. C. 231 Dist. Blott's Case 1921, A. C. 171 Foll. [P.802, C.2, P.804, 2.]

Nugent Grant instructed *by L. M. Taylor*—for Assessee.

The Government Pleader—for Government.

Coutts Trotter, C. J.—This a reference by the Commissioner of Income-tax which raises a very simple point in the sense that it can be put within a narrow compass on a very few undisputed facts; in another sense it raised a subtle question of law, for it has given rise to a great variety of judicial opinion in very high quarters.

Now the facts are these. A company called the Deccan Sugar and Abkari Co., Ltd. was incorporated in 1897 with a share capital of ten lakhs in shares of Rs. 500 face value each. In May 1908, the capital was increased to 22 lakhs by adding 7,000 Preference Shares of the A class of Rs. 100 face value each and 5,000 Preference Shares of the B class also of Rs, 100 face value each. In 1908, in pursuance of a resolution passed in June, the ordinary share capital was reduced to Rs. 1,66,672, thus making the total capital of the company something over 13 lakhs. Messrs. Binny & Co.; Ltd, held 200 ordinary shares of Rs. 125 each in this Company. In 1921 the Deccan Company had on its books a surplus accumulation of profits undistributed of practically 5 lakhs of rupees. In July 1921, by a special resolution, which was confirmed in the following month, the Articles of the Company were amended, and the two important amendments were these: The first was a preliminary one enabling the Company, by a special resolution, to sub-divide or consolidate its shares or any of them. The other was a new Article 133-A by which the Company, by a special resolution, may at any time take to itself the power to capitalise undivided profits or reserve fund: and that is what purported to take place in this case. Each holder of a share of Rs. 125 became the holder of three additional shares. The capital of the Company was increased by 1,328 shares of Rs. 375 each: and therefore the result was that Messrs. Binny & Co. for 200 shares of Rs. 125 each got 200 shares of Rs. 500 each, and in 1921 scrip carrying out that change of position was issued.

The question we have to decide is whether this issue of new shares to the share-holders representing their share in the accumulated surplus is taxable as income. I propose to say very little about this matter, because, to my mind, it crystallises for our purposes into two questions. The first is, are we concluded by the decision of the Privy Council in *The Swan Brewery Case* (1)? The next is, are we at liberty, or is it desirable if we are not covered by the Privy Council decision, to decide contrary to the House of Lords in *Blott's Case* (2)?

Now, it is best that I should deal with the first contention at the outset. It is suggested that *The Swan Brewery's Case* (1) directly covers the

(1) [1914] A. C 23.—83 L. J. P. C. 134—110 L. T. 211—30 T. L. R. 199.
(2) [1921] A. C. 171.

present point, but with great respect to certain observations of Lord Summer in *Blott's Case* (2) I am unable to say that it does cover. If it does, of course, we as an Indian Court are not at liberty to say, as some of the members of the House of Lords did in *Blott's Case* (2), that it was erroneously decided. If it does not decide the point finally for the House of Lords, it decides that finally and conclusively for this Court. That was a decision on an Act known as the Dividend Duties Act of Western Australia, which, to put it shortly, taxed dividends and contained a definition of 'dividends,' which covered every profit, advantage or gain intended to be paid or credited to or distributed among any members of any Company. It is quite obvious that a distribution of what was conveniently called Bonus shares is an advantage to the share-holder, and therefore, one may conclude that, on the words of the Act, their Lordships of the Privy Council had no option but to hold that this was a dividend within the meaning of the Act. Lord Sumner, in delivering the judgment of the Board said this:—"In ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend" (it has to be observed that what is made taxable by the Act is a dividend and nothing more). "The question in issue," his Lordship goes on, "here is whether or not the new shares were a dividend under the Act above-mentioned." Now, if that judgment stood alone unexplained by any subsequent utterance of his Lordships, I should infer that not merely was it a decision on the words of that statute but that it was carefully confined to be a decision on the words of the Australian Statute with an intimation that, but for that statute the word could not be capable of bearing the meaning required to be put upon it before the Crown could succeed. But in *Blott's Case* (2) there is no doubt about it that Lord Sumner undoubtedly said that he had intended to lay down a wider principle, and the principle so far as I can see is this: Ever since the decision in *Trevor and Worth* (3) it has been the accepted law that a Company cannot buy its own shares. That is used, as I follow the reasoning of Lord Sumner and Lord Dunedin, to found this contention, that as a Company cannot buy its own shares, that is to say, cannot pay its funds into its own coffers and issue scrip to itself, what must be supported to have taken place, as Lord Sumner says, notionally is that, although no such thing in fact happened, the company paid its profits over to the shareholder and that share-holder repaid them and in return got scrip handed to him, which of course would give him a draft on the capital of the company. In my opinion, that reasoning is completely answered by the reasoning of Viscount Haldane and Viscount Finlay. I will just refer very briefly to one or two passages in Lord Finlay's judgment at page 192 of the report. He says this:

"The general scope and effect of those transactions is beyond dispute. There was an increase in the capital of the company by the retention of the amounts available for dividends. Though the number of shares was increased by the issue of the new preference shares to the ordinary share-holders, this did not affect the proportions to which they were entitled in the undertaking and in any profits. All the share-holders received these new preference shares, so that the proportion in which they were to share in any profits remained the same..... ...The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future: so far as the present was concerned there was no dividend out of the accumulated profits; these were devoted to increasing the capital of the company."

Then again at page 194. "The effect of this operation (that is, the one which he described) was that the amount of of the bonus was retained by the company as additional capital, and that the share-holders got the new preference shares. No option was left to any particular share-holder. He was compelled by the action of the company to take the preference shares. He could not have sued for the bonus in money as the resolution which gave the bonus *uno flatu* declared that it was to be satisfied by the distribution of preference shares. Under these circumstances it seems

(3) [1887] 82 A. C. 40.

to me impossible to treat the share-holders for the purpose of supertax as having received the bonus and paid it back to the company to be retained as capital. They never received it at all. The case appears to stand exactly as Rowlatt, J., put it in *Inland Revenue Commissioner* v *Blott* and *Inland Revenue Commissioner* v, *Greenwood* (4):—"I do not think that there is a payment of a dividend to a share-holder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it and he takes it." If I may humbly add a word in such a distinguished company I think it might be put in this way: "That you cannot say that there is a notional payment of a dividend to a share-holder when the position is that, if he sued for it his action must be dismissed." That is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance. That being so, it is enough for me to say that I think that this Court, having regard to the fact that the words of the Indian Statute are, for all practical purposes identical with those of the English Statute, should respectfully follow the opinion of the majority of the highest Court in the Empire.

I must add this that, in doing so, the learned Lords were confirming the unanimous decision of a very strong Court of Appeal of three very eminent Lords Justices. I may also add that of the majority of the House of Lords whose view prevailed, two at least were eminent and distinguished Company Lawyers, and the dissentients were in the same unfortunate position as myself of being only common Lawyers. I should also like to add this, that I think it is extremely improbable that this arrangement about the distribution of these profits and the manner in which the transaction should be carried through was drafted without reference to the English cases. I do not know whether at the time the Resolution was drafted the decision of the House of Lords was available, but, at any rate, the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Blott* (4) *and Shone* v. *Greenwood* (5) was available. I have looked at that decision and it expresses the opinion that that decision was determined by the decision in *Bouch* v. *Sproule* (6), itself a House of Lords' decision, and that opinion of the Court of Appeal must have been available to the learned gentleman who drafted these articles and amendments to articles. I also observe that both Viscount Haldane and Viscount Cave agreed with the Court of Appeal in thinking that the matter before them in *Blott's Case* (2) is concluded by the previous decision of the House of Lords. In these circumstances, although I have treated the matter as one of law, I think that it would be an undesirable and inequitable result if we had to come to any other conclusion than that which I have arrived at.

Our answer to the reference is that the company Messrs. Binny & Co. is not liable to pay super-tax on the value of shares newly issued by the Deccan Sugar and Abkari Co., Ltd. in the year 1921. The company will have its costs on the O. S. scale.

Ramesam, J.—I agree. There are three features in this case as in *Blott's Case* (2) which make it difficult for a Court to say that the additional shares issued amount to income. The first is that there was no option to the share holders, and it was not open to them to sue for the additional dividend in the shape of cash or in the shape of other chattels or goods The Resolution of the Company compelled them to take it only in the form of additional shares and in no other. This feature was emphasised by all the Law Lords who formed the majority in *Blott's Case* (2). The next feature which perhaps is a corollary from the first is this: The relative situation of each share-holder to the other share-holders in the company remains unaltered. His proportion out of the total earnings that may be set apart for distribution as dividends among the share-holders remains the same after this operation of the company. To explain it further, if, for instance, in any

(4) [1920] 1 K. B. 114, 133.

(5) [1920] 2 K. B. 657.

(6) 12 A. C. 385=56 L. J. C. H. 1037=57 L. T. 345=36 W. R. 193.

year, the amount of profits that is set apart available for distribution among the share-holders is one lakh, the proportion which a particular share-holder gets remains the same after the increase in shares as before. If formerly a share-holder got 32 per cent. on shares of Rs. 125 each, now he will be getting Rs 40 for each share of Rs. 500, *i. e.*, 8 per cent. on shares of Rs. 500, the total income would be the same amount.

The third feature which again may be regarded as a corollary from the other two is that the effect is the same as if the company passed a Resolution expanding its operations and for increasing its machinery. This has been pointed out by Viscount Finlay at page 196 in (1921) 2 A. C. It is true that, as Lord Sumner points out, there was a payment in *Bouch* v. *Sproule* (6), a dividend warrant was sent out in the form of a negotiable instrument, which had it been presented payment must have been made. But this fact only served to distinguish *Bouch* v. *Sproule* (6) from the case before the House of Lords in (1921) A C. If that distinction is emphasised, it follows that we ought to agree with the decision of the majority in *Blott's Case* (2). It may be that the effect of the operations in question by the company is to increase the value of a share and, if a particular share-holder sells his enhanced share, he may realise more in the market as pointed out by Viscount Cave. This amounts to only realising his assets in the shape of capital and not in the shape of income.

I agree with the answer proposed by my Lord.

Reference answered

1925 MADRAS 805

COUTTS TROTTER, C. J.

Lilaram Ganganmull—In Re—Petitioner.

Cr. Rev. Case No. 569 of 1923 (Cr. Rev. Petition No. 451 of 1923) decided on 20th March 1924 from the judgment of the Court of the Presidency Magistrate of Egmore, Madras D/- 16th August 1923.

(a) Evidence Act, S. 10—Conspiring—evidence of.

If *prima facie* evidence of the existence of a conspiracy is given and accepted the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all. [P. 806, C. 2]

(b) Evidence Act, S. 30—Confession is evidence only against the person making it.

A confession is only evidence against the person who makes it. A conviction of an accused based solely on the confession of another accused cannot stand and there must be independent evidence entirely outside if the confession can be used. [P. 807, C. 1]

Nugent Grant and V. L. Ethiraj—for Petitioner.

The Public Prosecutor—for the Crown

Order.—In this case, one Lilaram Ganganmull brings up in revision a conviction and sentence of the Chief Presidency Magistrate, sentencing him to six months' rigorous imprisonment. Another man called Sibagtullah, who was charged with him, was convicted along with him and sentenced to three month's rigorous imprisonment. The matter came in revision before two learned Judges, who agreed in rejecting Sibagtullah's petition, but differed as to Lilaram's, my brother Krishnan, J, being in favour of setting aside the conviction and my brother Waller, J., in favour of upholding it. The charge and the only charge against the accused was of conspiring together to bribe a public servant, to wit, Mr. Auston, Superintendent of the Preventive Service, Customs Department, in order that he might return certain account books of the Firm of Lilaram Brothers, which he had seized under a warrant and that he might show favours in future to Lilaram; and the charge proceeds to set out that in pursuance of this conspiracy Sibagtullah offered to Mr. Auston a bribe of Rs. 8000. This charge was treated as one under the combined effect of S. 116 and 261, Indian Penal Code. The offence is said to have been committed on the 1st March and the story begins a few days before that. Two bales of silk had arrived by a steamer, apparently consigned to Lilaram's firm. Of one, we know nothing it disappeared. But the second was seized by the Customs Officials, was appraised and adjudged

to be under-valued, and Lilaram was accordingly called upon to pay a considerable sum in excess of what he had declared to be its value. Mr. Auston seems thereupon to have suspected that this might be only one instance of a systematic course of smuggling, and he accordingly obtained and executed a search warrant on Lilaram's business premises and removed 14 books of account. Those books have been in the possession of the authorities, for a very long period and no one has thought fit to frame a charge upon them. The explanation that, as they are written in the Sindhi languag , the expense of having them translsated would be prohibitive, does not commend itself to me. The facts as found are that Sibagtullah, the second accused called on Mr. Auston, about noon on the 1st March 1923 and offerred to make it worth while to Mr. Auston to hand over Lilaram's books to him. There was a second visit from Sibagtullah at 3 O'clock, when again professing to act on behalf of Lilaram, he made definite offer of Rs. 8000 for the books. Mr. Auston played the part of an *agent provocateur* and arranged for a subsequent interview in the evening, when Sibagtullah would present himself with the cash, at the same time reporting the matter to his superior officers, Mr. Richardson and Mr, Boyd. It was arranged that Mr. Auston should interview Sibagtullah and that Mr. Richardson should be in a position to witness the tender of the money to him. In due course Sibagtullah presented himself that night, was interviewed by Mr. Auston and handed to him Rs. 8,000 worth of notes, an act which was witnessed by Mr. Richardson. The consideration is alleged to be, first the return of the account books, and secondly the granting of further favours in the future of passing consignments of silk, without levying the proper customs duties. It is a curoius story with some remarkable features in it. First, Mr. Auston appeared extremely anxious to pin Sibagtullah down to the story that he was definitely acting on behalf of Lilaram. In this connection, a promissory note was put in evidence drawn by Lilaram in favour of Sibagtullah for Rs. 3,000. It is dated 1st February and is explained by Lilaram as being given by him to Sibagtullah to raise money upon it. The prosecution did not and obviously cannot rely upon it, because apart from its date, the account of it given by Sibagtullah, according to Mr. Auston's evidence, of what he said, is hopelessly at variance with the written statement that has been put in, in this case. In the second place, it is difficult to believe that Lilaram should be ready to pay so large a sum as R 8,000, for the return of books, which after having been in the hands of the authorities for months have not proved capable of founding a criminal charge. Finally, if the real consideration is the granting of future indulgences, Mr. Auston, according to his own account, indicated that the bribe was useless, because he said:

"I watch preventive officers. preventive officers watch me. and the Assistant Collector watches everybody."

Moreover, it is difficult to believe that two men embarking in a dangerous game of this kind should not have known that Mr. Auston had been gazetted for a subsantial period of leave in the very near future, and would be useless to them for their purpose. At the trial Sibagtullah put in a written statement, in which he admitted that he had offered a bribe to Mr. Auston and that he did so, at the instigation and on behalf of Lilaram, though he denies that he said anything about the future favours to come.

This being a charge of conspiracy, the law of evidence relating to it was clearly laid down as early as the case of *R.* v. *Blake* (1) and I do not conceive that the Indian Evidence Act meant to depart from the law, as there expounded. [See also *R.* v. *Basherville* (2)]. The rule is this: that if *prima facie* evidence of the existence of a conspiracy is given and accepted, the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all. On this view

(1) [1844] 6 Q. B., 126, = 13 L. J. M. C. 131 = 8 Jur 115 = 66 R. R. 311 = 115 E. R. 49.
(2) [1916] 2 K. B. 653.

of the case, the statement made by Sibagtullah to Mr. Auston established by the evidence of Mr. Auston and Mr. Richardson would be directly admissible, as against Lilaram. What took place in the Police Court I do not know. But the Magistrate had expressed his opinion that the evidence, which alone could possibly be treated as *Prima facie* evidence of the conspiracy, outside the statement of Sibagtullah, is unreliable and he does not profess to accept it. One is not surprised that he was unwilling to act on that evidence, because Abdul Ghani Nawazi, who is the chief witness to speak to frequent meetings between the two accused shortly before the offence, himself stated that he and the two accused had been intimate friends, for a number of years, which goes a long way to rob such meetings of any significance. In any event, sitting in revision, I do not think it is competent for me to look at the case from a point of view, which has practically been given up by the prosecution. The case, as presented to my learned brothers, was put in a different way altogether. It was said that the written statement of Sibagtullah handed in, at the trial, was a confession, within the meaning of the Evidence Act and therefore by Sect. 30 may be taken into consideration, as against the other co-accused. I have always thought that was a most unsatisfatory section and was a needless tampering with the wholesome rule of the English Law that a confessin is only evidence against the person who makes it. The Courts of India in construing it have laid it down that a conviction of an accused, based solely on the confession of another accused, cannot stand and there must be independent evidence entirely outside, if the confession before it can be used. Here there is none on which the Magistrate has professed to rely: and it is obvious that the corroboration of Sibagtullah must come from another source than himself, which would of course exclude all his statements made in the hearing of Mr. Auston and Mr. Richardson. I have carefully gone through the judgment of Mr. Justice Waller, to see what circumstance, independent of Sibagtullah's statements, he might have relied on, as corroboration of him and the only thing I can find is the fact that Lilaram's books had been seized and were in the possession of the Customs authorities. That seems to me wholly inadequate to support the prosecution story, as that is explained as being the outcome of the smuggling of silk, with which we are not concerned and with which Lilaram has never been charged. I may add that the prosecution are really in a logical dilemma. If the evidence outside Sibagtullah's confession was enough to corroborate it, it was sufficient *prima facie* evidence of conspiracy to make his statements to Mr. Auston available as admissions not only as against himself, but as against Lilaram, under the doctrine of *R* v. *Blake* (1). But that has never been suggested throughout the course of these proceedings. In my opinion, there is no legal evidence to support this conviction, however suspicious a case it may be and agreeing with my brother Krishnan, J. I set aside the conviction of the 1st accused and order his bail bond to be cancelled.

There are two other observations, which I desire to make: first, that the trial was loaded with inadmissible evidence, the presence of which on the record, the Crown Prosecutor explains by saying that to the legitimate questions put by him answers were given by the witnesses who volunteered irrelevant matter. I refer particularly to the evidence given to the effect that Sibagtullah was an old and confirmed smuggler. I find it difficult to believe that such evidence was volunteered, merely in answer to a question, directed to show that Sibagtullah was short of funds and unable from his own resources to produce Rs. 8,000. But if it be so, it was clearly the duty of the Magistrate to keep the witness in hand and in any event, even if he could not stop him from blurting out matter of this sort, not to have put it on the record. The whole trial appears to me to have been mishandled, from start to finish, and I should be sorry to come to any other conclusion than that its

result cannot stand. I also feel constrained to point out that although the petition of the 2nd accused has been rejected and his conviction confirmed and I believe he has actually served part of his sentence he stands convicted of abetment of an offence, *viz*, that of conspiring with Lilaram, which in the judgment of the majority of this Court was never committed at all. The judgment will be forwarded to Government, to take such steps, as they may be advised, with regard to him.

No. I Accused acquitted.

1924 MADRAS 808

VENKATASUBBA RAO, J.

Kuppa Reddrar and others—In re—Petitionors.

Cr. R. C. No. 573 of 1923, (Cr. R. P. No. 445 of 1923) Decided on 20th March 1924, from the judgment of the Court of the Assistant 1st Class Magistrate of Tinnevelly in C. C. No. 5 of 1923.

(a) *Criminal P. C., S. 106—Meaning of "other offence."*

The offences intended by "other offence" are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. [P 808 C 2]

(b) *Criminal P C. S 106—The section applies "if the offence" itself constitutes a breach of the peace—There need not ensue, apart from the offence, any breach of the peace.*

The section applies when the offence amounts to or constitutes a breach of the peace; the question to be answered in each case is, does the offence brought before the individual necessarily include or imply a breach of the peace or does it constitute or amount to a breach of the peace? If it does, the section applies. Apart from the offence, there need not ensue a breach of the peace when breach of the peace is a component part or an ingredient of the offence. [P 809 C 2]

(c) *Criminal P. C., S. 106—Wrongful confinement.*

Wrongful confinement does not *per se* import breach of the peace but if the offenders using violence seize another and tie his hands it clearly involves breach of the peace and would come under S. 106. [P 809 C 2]

C. Narasimhachari— for Petitionors.

The Public Prosecutor—for the Crown.

Order.—The petitioners were convicted of an offence under S. 342 of of the Indian Penal Code, namely, that of wrongful confinement. What the accused actually did is described in the following words by the lower Court: "Accused 2 and accused 4 . . . . . dragged him (the complainant) towards accused 1, his hands were tied....."

"Again

"He.....testifies that accused 2 and 4.....beat P. W. I at the instance of accused 1 and then tied his hands and pushed him westwards. D. W. 3 testifies to the use of violence."

The Magistrate made an order under S. 106 of the Cr. P. Code directing each of the accused to execute a bond with sureties for keeping the peace during a period of 12 months,

On behalf of the petitioners it has been contended that the order directing the accused to keep the peace was improperly made as the offence in respect of which the accused were convicted does not involve a breach of the peace.

S. 106 so far as it is material for the present purpose runs thus:—

"Whenever any person accused of any offence punishable under Chapter VIII of the Indian Penal Code (Chapter VIII deals with offences against public tranquillity) . . . or of assult or other offence involving a breach of the peace.....is convicted of such offence before a High Court;

"And such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace;

"Such Court may, at the time of passing sentence on such person, order him to execute a bond....."

This section in my opinion implies that offence against public tranquillity and the offence of assault involve a b each of the peace. If nothing more is proved than that one of these offences has been committed, the section applies. The next question is what do the words "other offence" mean? In my opinion the offences intended are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. Under

the section the offence must involve a breach of the peace. These words must receive their ordinary and natural meaning. A thing is involved in another when it is necessarily included in or implied in it. In "assault" a breach of the peace enters as a necessary element. It is an ingredient of the offence. In my opinion the section applies when the offence amounts to or constitutes a breach of the peace; in other words, when breach of the peace is a component part or an ingredient of the offence. The very fact that a man commits rioting or assault constitutes a disorder, a disturbance of the King's peace, general peace of the realm. The words "breach of the peace" in the section are the antithesis of the other set of words also occurring in the section "keeping the peace." The words "keeping the peace" connote preservation of the public peace and are the direct opposite of the words "breaking the peace."

In my view, therefore, the question to be answered in each case is, does the offence brought home to the individual necessarily include or imply a breach of the peace, or, does it constitute or amount to a breach of the peace? If it does, the section applies.

I am not prepared to accept the construction placed upon the words in some of the cases cited at the bar, namely, that apart from the offence there must ensue a breach of the peace. If the legislature had intended to lay down a rule of that kind, entirely different words would have been used. It would then have said "any person accused of any offence punishable under Chapter VIII or of assault or other offence when the commission of such offence leads to a breach of the peace." In my opinion it is of the essence of the offence of which the offender is found guilty that he necessarily has also broken the peace.

Then the next question is;—

It is intended by the section that each of the offences described in the Indian Penal Code should fall under the category of either "offences involving a breach of the peace" or offences of the opposite description I do not think either is desirable or possible. The facts constituting an offence must be looked at for determining whether the offence comes within the section or not. The present case is in point and strikingly illustrates what I mean. Wrongful confinement *per se* is not an offence involving a breach of the peace If, for example a person happens to be in a room in his own house and another by locking the room on the outside, confines the person within the room and makes egress impossible, all the elements necessary for constituting the offence of wrongful confinement are present. But this involves no breach of the peace but on the contrary if, as has happened in the present case, the offenders in a cocoanut garden using violence seize another and tie his hand, I am clearly of the opinion that the offence as proved does involve a breach of the peace.

Several authorities were cited, but I do not think that any useful purpose will be served by my discussing the various conflicting rulings bearing on the subject and opposite and different interpretations placed upon the words in the section, but however I would add that I follow Cr. Appeal No. 1600 of 1922, a decision of Spencer, J., and that I respectfully dissent from *In re Tirumala Reddy* (1) decided by Kumaraswami Sastri, J.

The order therefore directing the accused to execute a bond for keeping the peace was rightly made,

As regards the merits of the case some points were urged before me, but I am not prepared to uphold any of the contentions and in the result the Criminal Revision Case fails and is dismissed.

Petition dismissed.

(1) 1923 Mad. 133—30 M. L. T. 348—25 Cr. L. J. 294.

1924 MADRAS 810

COUTTS TROTTER, C. J. RAMESAM AND WALLACE, JJ.

Bolla Guruvayya and other—Defendants—Appellants.

v.

Cherukuri Venkatarathnam—Plaintiff—Respondent.

L. P. A. No. 5 of 1923, Decided on 10th April 1924, against the judgment of Justice Phillips dated the 19th February 1923 and passed in Appeal No. 300 of 192 preferred against the decree of the District Court of Kistna at Masulipatam in O. S. No. 17 of 1920.

Registration Act, S. 77 — Document bearing sure signs of being tampered with— Registrar or the Court should only consider whether the deed is in the state in which it was executed by the parties and should not enter into an enquiry as to the probabilities of its provisions.

Where the document bears the most apparent traces of having been tampered with the Registrar has got to ask himself merely this: Is this document now tendered to me to be registered actually in the state in which it was executed by the parties to it? He would be exceeding his functions if he went into a roving enquiry to guess at the probabilities of its provisions. In a suit under S. 77 the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration.

[P. 810, C. 1 and 2]

K. Krisnamachariar—for Appellants.

N. Rama Rao—for Respondent.

Coutts Trotter C. J.—This was a suit brought under S. 77 of the Indian Registration Act which enables a person who has tendered a document for registration to bring a suit in a Civil Court against the refusal of the Registrar to register it.

In this case the plaintiff tendered a document, which is before us, for registration. The document bears the most apparent traces of having been tampered with. In one sheet all the glaze of the paper has been destroyed and there is a very deep discoloration. Others bear obvious signs of the surface of the paper having been chemically dealt with but throughout although the discoloration is marked, in the operative sheets of the document, the signature, which is admitted, and the stamp paper at the top are practically intact. Expert evidence has shown that the discoloration and the destruction of the glaze on the surface of the paper is due to chemical action. The inference that those alterations were made after the execution of the document in its original state by the defendants is almost irresistible. Naturally enough the plaintiff was asked what explanation he proposed to offer. The one he gave was so childish that hardly any of the learned Judges who considered this matter have treated it seriously. That being so, what is the position? Is this Court to enter into a roving enquiry into the probabilities and the surrounding circumstances and put itself the question: Does the document, whatever its history, represent the substance of the agreement between the parties? In my opinion, that is a wholly otiose and irrelevant enquiry. The Registrar has got to ask himself merely this: Is this document now tendered to me to be registered actually in the state in which it was executed by the parties to it? In my opinion, he would be exceeding his functions if, he went into a roving enquiry to guess at the probabilities of its provisions; and it appears that, in a suit under S. 77, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration. Indeed were it otherwise, the Court would be called upon to say, in effect that the Registrar was perfectly justified in refusing registration, but that the Court will nevertheless order it to be registered; and the result might be that the Court would order registration of the document which had been altered behind the back of the person who executed it and after its execution and signature on the ground not that he had ever executed it in its present state, but that it represented what had actually been agreed between the parties. In my opinion, such a conclusion is so absurd as to refute itself.

The appeal must be allowed and the suit dismissed with costs throughout.

I may add that, if the facts were as the plaintiff contends namely, that, although he has tampered with the

document, the agreement was that which he contended to be, he has a remedy other than by proceeding under this Act, or at any rate he had, though perhaps by now he may have lost it by limitation.

If the impugned document has been registered in pursuance of the order of the District Judge—and we are given to understand that it has—the registration stands cancelled. This order will be communicated to the Registrar of Kistna District.

Ramesam, J.—I agree.

Wallace, J.—I agree and have nothing to add.

Appeal allowed.

1924 MADRAS 811

COUTTS TROTTER AND RAMESAM, JJ

A. Rathnasabhapathy Chetty—Appellant.

v.

Lakshma Ammal and others—Respondents.

Original Side Appeal No. 13 of 1923, Decided on 6th November 1923 from the judgment and decree of the Chief Justice D/ 12th December 1921.

(a) Will—Construction.

Where a will after stating that the testator had gifted away the properties to his wife and after providing that out of the rent she was to pay some amount to the temple and have the rest for her maintenance said, "After your lifetime you shall leave the said house to R the eldest daughter of my second brother: that lady shall also do exactly what is done by you.

Held: that R got a vested remainder with an absolute right in the property and that the effect of the will was not to give a mere power of appointment. [P. 811, C. 2.]

(b) Will—Construction—Power—Gift.

Power which can and must only be exercised in one way and in favour of one donee is not known to law. [P. 811, C. 2.]

N. K. Mohanarunga Pillai and *P. Venkataramana Rao*—for Appellant.

T. R. Venkatarama Sastri and *M. Sundarasan*—for Respondents.

Coutts Trotter, J.—This is a hopeless appeal arising on the construction of a deed of gift dated the 16th of January 1888. By that the testator, one Tiruvanmiyur Murugappa Chetty, made a disposition of his properties as follows. He executed a deed of gift in favour of his wife Lakshmi Ammal and later on in the second clause, after setting out that it is his self-acquired property, he says that he brought a deed of gift into existence "in order that you may enjoy my self-acquired property, as you are my wife, and as you have no male issue." Later on he once more recites that he has gifted away this house worth Rs. 1,000 and provides that out of the rent she is to pay Rs. 5 every month to the Dharmakartha of Tiruvanmiyur temple for performing Pooja and utilise the remainder for her maintenance. Then comes the clause which is sought to be made the basis of the argument. "After your lifetime, you shall leave the said manai house and the document relating thereto to Rajammal, the eldest daughter of my second brother Samarapuri Chetty. That lady shall also do exactly what is done by the said Lakshmi Ammal. The rest of my heirs shall have no right, title or interest in the said property which you shall hold and enjoy from this day getting certificate etc.. for the property, in your name" That appears to be as clear a gift over to Rajammal absolutely on the termination of the life interest of Lakshmi Ammal, as it seems possible to frame. The argument apparently is that, because there are the words "you shall leave the house to Rajammal," that amounts to nothing more than a power I have never heard of a power which can and must only be exercised in one way and in favour of one donee. It is obvious that the language is merely accidental and that what was intended was that Rajammal could become the absolute owner after the expiration of the life interest of Lakshmi Ammal.

"That lady shall also do exactly what is done by Lakshmi Ammal," is merely a limitation of the estate, because it is perfectly obvious that it means nothing more than that she should continue to pay Rs. 5 towards the Pooja in the temple. If there were any doubt or ambiguity about the deed so far as it would be entirely re-

moved by the fact of the express exclusion from any interest in this property of the very person who now comes before us as the plaintiff and asks us to say that it really belongs to him. It is a hopeless appeal and must be dismissed with costs.

Ramesam, J.—I agree and will only add that the death of Rajammal before Lakshi Ammal has no bearing in the case as, according to the proper construction of the deed. what was given to Rajammal was a vested remainder and not a remainder contingent on her surviving Lakshmi Ammal.

Appeal dismissed.

1924 MADRAS 12

SPENCER, OG. C. J.

Souriraja Naidu and another—Defendants—Appellants.

v.

Rajagopalan (Minor) and others—Plaintiffs—Respondents.

S. A No. 27 of 1923, Decided on 9th January 1924, against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram.

Easements Act, S. 14—An apparent, continuous and necessary easement will pass to transferee unless contrary intention is expressed.

It is no answer to the plaintiff's claim that a water-course was necessary for the use of a tenement conveyed to him to say that if that supply was cut off possibly some other supply might be obtained. An easement apparent and continuous and necessary for enjoying the portions severed from the transferor's land will pass to the tran-feree, unless a contrary intention is expressed in the instrument of transfer.

Where before the plaintiff's plots were severed from the defendant's plots they were irrigated by means of the channel passing over the plot which still remained in the defendants' possession.

Held: that unless there was a stipulation to the contrary at the time of the transfer the transferees were entitled to the same facilities of irrigation that used to be attached to the land transferred before it was transferred. [P 813 C 2]

T. Narasimha Iyengar and *R. Gopalaswami Iyengar*—for Appellants.

K. Rajah Iyer—for Respondents.

Judgment.—The plaintiffs 1 and 2 and the rd plaintiff owing to adjacent plots of land instituted this suit to establish a common right of easement to take water over the defendants land by a channel marked A X Y B. They base their claims on allegations of easement by prescription and easement of necessity. The District Munsif, finding that the plaintiffs 1 and 2 had not proved any right of easement by prescription and could not claim an easement of necessity, dismissed their suit. But he granted a decree to the 3rd plaintiff on the finding that he had enjoyed the right of irrigation by means of a channel X L Y, for more than the statutory period. The plaintiffs 1 and 2 appealed against the dismissal of their suit. The defendants appealed against the decree given to the 3rd plaintiff.

The Subordinate Judge who heard the appeals found that the plaintiffs 1 and 2 had got an easement apparent and continuous and necessary, for enjoying their lands, which were obtained by means of a sale deed from the defendants in 1900. In the first Court, there was no consideration of the question whether the right of the plaintiffs 1 and 2 could fall within S. 13 (*b*) of the Easements Act. The suit, of these plaintiffs was dismissed, because the District Munsif found that the easement claimed was not absolutely necessary, for enjoying the lands, seeing that it was possible to irrigate them through another channel, which would not pass over the defendants' lands. The Second Appeal is brought against the decrees, in favour of both sets of plaintiffs. In respect of the 3rd plaintiff's case, both Courts have found that he has no means of irrigating his land, except through the channel X Y and that it was so irrigated, before it was severed from defendants' lands, and therefore nothing more can be said in second appeal, against the correctness of the decree, which is based on a finding of fact by two subordinate Courts. But as against the plaintiffs 1 and 2, it is now suggested that if the easement is to be treated, as one apparent and continuous and necessary, there should be a finding that it was apparent between the points Y

and B. The Commissioner, who went to the spot, found that there once existed a *kanni* between X and Y. But he was not able to say positively whether any water-course existed between Y and B. The Subordinate Judge has found that the channel A X Y B was in existence for a long time and irrigating the lands 9 A C and 8 A, that is, the lands of both sets of plaintiffs. The Subordinate Judge was mistaken in saying that the District Munsif had found the existence of a channel between Y and B and that the Commissioner's report supported its existence. It has been suggested, therefore, that a finding should be called for. on the evidence as to whether there was an apparent easement between Y and B. I do not consider it necessary to do so. Not only is the conclusion of the Lower Appellate Court clear, that such a channel existed, but it seems to have been the common case of both parties in the first Court, that there was a channel all the way between X and B. Not only did the plaintiffs assert the existence of this channel in their plaint, but the defendants did not deny its existence. Their answer to the plaintiffs' claim was to allege that they themselves had dug a small *kanni*, for their own irrigation purposes between X and B. The 3rd plaintiff, who was examined as P. W 1, the plaintiffs' 2nd witness, the Village Munsif, and his 4th witness, a Mirasidar of that village, speak to the *kanni* taking a bend towards the east; and the karnam examined as D. W. 2, says that the portion east of Y was seen by him and had been filled up. As there is evidence to support the Subordinate Judge's finding, as to the existence of the channel not only over X Y but also Y B, the Second Appeal can be disposed of, without referring the matter to the lower Court again. It was suggested at the trial in the lower Court that the land of the plaintiffs 1 and 2 might be irrigated from the channel at the north of their land, by taking water through the cuttings at M (1) and M and therefore it was argued that the easement was in any case not necessary for enjoying the subject of the transfer. In a recent decision of a Bench of this Court, *Morla Ganyulu* v. *Thata Jagannatham* (1), Devadoss and Coleridge, J.J. referring to *Watts* v. *Kelson* (2), observed that it was no answer to the plaintiff's claim that a water-course was necessary for the use of a tenement conveyed to them, to say that if that supply was cut off, possibly some other supply might be obtained. An easement apparent and continuous and necessary, for enjoying the portions severed from the transferor's land, will pass to the transferee, unless a contrary intention is expressed, in the instrument of transfer. It appears, as has been found by the Courts below, that before the plaintiff's plots were severed from the defendants' plots, these wet lands were irrigated by means of the channel passing over the plot, which still remains in the defendants' possession. Unless there was a stipulation to the contrary, at the time of the transfer, the transferees were entitled to the same facilities of irrigation that used to be attached to the land transferred, before it was transferred, and the defendants are not entitled now, 20 years later, to tell the transferees to look out for some new source of supply, on the ground that they do not wish to let them enjoy those irrigation facilities, which were attached to the land before it was sold. From this point of view, the judgment of the Subordinate Judge is correct and the second appeal is dismissed with costs.

Appeal dismissed.

(1) 1921 Mad. 108—45 M. L. J. 724.
(2) [1871] 6 Ch Ap., 166—43 L. J. Ch. 186—24 L. T. 209—19 W. R. 338.

1924 MADRAS 813

JACKSON, J.

Ruckmani Ammal—Petitioner.

v.

Veerasami Aiyangar and another—Respondents.

C. R. P. Nos. 400, 401, 402 and 403 of 1923, Decided on 24th March 1924, from the order of the Court of the District Munsif of Srirangam, D/-26th October 1922.

(a) *Civil P. C., O. 32, R. 2—Application by minor widow to be brought on records without next friend, can be rejected.*

Where on the death of the plaintiff in a suit his minor widow without being represented by a next friend applied to be brought on the record as the legal representative of her husband and the Court rejected her application on the analogy of O. 32, R. 2.

Held, that the Court could not be held to have acted irregularly. [P. 814, C. 2]

(b) *Civil P. C., O. 32, R. 3—Minor applying to be made plaintiff.*

Where a plaintiff dies in the course of a suit and a minor applies to be brought on record as plaintiff's legal representative the analogy to be applied is that under O. 32, R. 3. [P. 814, C. 2]

(c) *Civil P. C., O. 32, R. 3—Minor may apply in his own right to be brought on record as legal representative.*

The mere fact that an applicant to be brought on record was discovered to be a minor and that he had a plea in his own right is no reason for not considering his plea that he was the rightful representative. [P. 814, C. 2]

(d) *Civil P. C., S. 2 (2)—Order as "decree" —Civil P. C., O. 32, R. 3.*

If an order rejecting the claim of a person to be the legal representative of a deceased plaintiff is to have the character of a decree it must conclusively determine the right of the parties in the suit. [P. 814, C. 2]

(e) *Civil P. C. S. 115—Revision from order —Civil P. C., S. 90.*

An order rejecting the claim of a person to be the legal representative of a deceased plaintiff which does not conclusively determine the right of the parties in the suit is not appealable and therefore is revisable. [P. 815, C. 1]

T. V. Muthukrishna Aiyar—for Petitioner.

L. A. Govindaraghava Aiyar and *Watrap S. Subramania Aiyar* — for Respondents.

Judgment.—In O. S. No. 420 of 1919 on the file of the Court of the District Munsif of Srirangam the plaintiff Pichu Aiyar died. Both his widow, Ruckmani Ammal, the present petitioner and his daughter Seethai Ammal, the present 2nd respondent, applied to be brought on record as legal representatives. The District Munsif found that Ruckmani Ammal was a minor, who had no right to apply in her own right, and dismissed her application. Having done so he disposed, of Seethai Ammal's application by merely recording "Defendant (present 1st respondent) has no objection." Ruckmani Ammal now applies to have both orders revised.

I cannot hold that the District Munsif acted irregularly in rejecting Ruckmani Ammal's application on the analogy of O. 32, R. 2. He exercised a discretion allowed him by law, though I think he exercised that discretion very hastily: cf. *Rattonbai* v. *Chabildas Lallo Bhoy* (1). But I cannot find that the District Munsif was justified in adding Seethai Ammal as legal representative without determining the question on its merits after notice had gone to Ruckmani Ammal as she had raised the question. The mere fact that Ruckmani Ammal was discovered to be a minor was no reason for not considering her plea that she was the rightful representative. Here the analogy to be applied is that under O. 32, R. 3. The respondents do not attempt to justify the action of the Court which indeed is quite opposed to the ordinary duties of a Court in regard to minors, so much as to show that the petitioner has no right to move this Court for revision. They contend that her remedy was by way of appeal against the order, or at any rate by way of suit after reaching her majority, and in any case her application for review has been unduly delayed.

There is no statutory right of appeal against an order under O. 32, R. 3. "The legislature has chosen not to give a right of appeal against orders under that rule." *Lakshmi Achi* v. *Subbarama Aiyar* (2). But respondents rely upon *Ayya Mudali Velan* v. *Veerayee* (3) where it is held that an order rejecting the claim of a person to be the legal representative of a deceased plaintiff is appealable in cases where such orders have also the character of decrees. If it is to have this character, the order must conclusively determine the right of the parties in the suit, and it so happens that all the parties in *Ayya Mudali Velan* v. *Veerayee* (3) happened to be parties in the suit, the 2nd defendant was the person applying to be plaintiff's legal representative. In *Lakshmi*

(1) [1888] 13 Bom. 7.
(2) [1915] 39 Mad. 488=2 L.W. 403=28 M.L.J. 491=(1915) M.W.N. 327=29 I.C. 142=17 M.L.T. 385.
(3) [1920] 43 Mad. 812=39 M.L.J. 218=(1920) M.W.N. 467=58 I.C. 498=12 L.W. 188.

Achi v. *Subbarama Aiyar* (2) and in the present case the persons applying to be legal representatives were never parties to the suit and this application having been rejected, they could never have been regarded as such and it is clear from *Ayya Mudali Velan* v. *Veerayee* 3) itself that the learned Judges still regarded *Lakshmi Achi* v. *Subbarama Aiyar* (2) as good law in regard to the facts of that case (*cf.* p. 815). I therefore find that petitioner had no remedy by way of appeal, and is entitled to move for revision.

I do not think it necessary to drive petitioner to a fresh suit, nor do I think that her remedy lies that way. The lower Court having appointed a legal representative that appointment, unless it is set aside, is final, and binds the estate. "If the Court decides wrong the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision however wrong cannot be disturbed." *Malkarjuu* v. *Narhari* (4).

I do not find that there has been inordinate delay. Petitioner first sought her remedy by way of review on grounds which were certainly not frivolous. Nor do I see any reason for holding that petitioner is still a minor, and even if she were, I should not reject her petition on that account: there would only be a formal question of appointing a guardian *ad litem*. Accordingly I allow Civil Revision Petitions Nos. 401 and 402 with costs one set, I reverse the order of the lower Court and direct the District Munsif to determine the question whether Ruckmani Ammal or Seethai Ammal is or is not the legal representative of the deceased Pichu Aiyar and then proceed with the suit. Civil Revision Petitions Nos. 400 and 403 are dismissed with costs one set.

Petitions Nos. 401 *&* 402 *allowed.*

(4) [1901] 25 Bom. 337=27 I.A. 216=5 C.W. N. 10=2 Bom. L.R. 927=10 M.L.J. 368—7 Sar. 739 (P.C.)

1924 MADRAS 815

VENKATASUBBA RAO, J.

Sivapatha Mudaliar—Complainant—Petitioner.

v.

Abdul Razak — Accused — Respondent.

Cr. R. C. No. 606 of 1923, Decided on 28th February 1924, from the order of the Court of the Sub-Divisional First Class Magistrate of Saidapet in C. C. No. 37 of 1923.

(a) *Madras Dist. Municipalities Act* (*V of 1920*) *S. 54* (*b*) (*ii*)—*Offensive statement.*

It is not an offence to say of a candidate that he had failed in getting elected in his own place and came to another place expecting to be elected. [P. 815, C. 2; P. 816, C. 1.]

(b) *Madras Dist. Municipalities Act* (*V of 1920*) *S. 59* (*c*)—*Failure to establish complaint.*

Where the complainant fails but is not ordered to pay costs or compensation the deposit should be returned to him. [P. 816, C. 1.]

V. L. Ethiraj—for Petitioner.

The Public Prosecutor and *V. Visvanatha Sastri*—for Respondent.

Order.—The question to be decided is, did the accused commit an offence under S. 54 (*b*) (*ii*) of the Madras Act V of 1920? It enacts: "Every person who publishes statements which he knows to be false and which materially affect a candidate or his election shall be punished with imprisonment which may extend to six months."

The statement which the accused is alleged to have made is this:—"P.W. 1, *i.e.*, the complainant, failed in getting elected in his own place and had come to Saidapet expecting to be elected." For deciding whether this statement materially affects the candidate or his election I have first to consider the nature of the statement itself. I fail to see what bearing this statement can have upon the result of the election. If the complainant had in truth been defeated at a previous election held at another place, it does not follow that he will meet with defeat at the subsequent contest.

The second point to be considered is, whether, the persons to whom the statement is made are likely to be influenced by it. They are Municipal

Councillors and intelligent persons and as the Magistrate remarks, friends of the complainant.

I think that the Magistrate's conclusion that the act complained of does not amount to an offence under S. 54 (*b*) (*ii*) is correct and I must therefore uphold the order of acquittal.

A subsidiary question has been raised regarding the deposit of Rs. 200 made by the complainant. Under S, 59 (*c*) it is a condition requisite for the filing of a valid complaint. The complainant has failed to establish his case. The Act is silent with regard to what is to happen to this sum. Presumably the deposit is intended as security for costs incurred by the accused and compensation, if any, payable. The complainant has not been ordered to pay costs or compensation. The intention of the legislature must be taken to be that in the circumstances the amount should be refunded to the complainant. It will accordingly be paid to him. I am not called on to decide whether this is or not a fit case for the award of compensation, and I make no pronouncement on the matter.

Petition dismissed.

1924 MADRAS 816

SPENCER, J,

Narayana and others — Accused—Petitioners.

Cr. Rev. Case No 900 of 1923, (Cr. Rev. Petition No. 719 of 1923) Decided on 15th April 1924, from the Judgment of the Court of the Sub-Divisional Magistrate of Kurnool

(a) *Abkari Act (Madras Act I of 1880)—Private individual.*

Private individual has no authority to seize or detain liquor which he believes to be liable for confiscation under the Act. Only Officers of a certain rank of the Revenue, Police and Abkari Departments are empowered to enter places where liquor is illicitly sold or stored. [P. 816 C. 2]

(b) *Penal Code, S. 441—Guilty intention of the nature described in the section is necessary.*

The offence of trespass is not complete unless there is an intent to commit an offense or to intimidate, insult or annoy some one in possession of property. It is not enough that the accused should know that his act is likely to have such an effect.

Where an acting *taliari* with two others learnt that there was in the house of the complainant a pot of toddy in excess of the quantity which one might possess with ut license and went inside the house brought the toddy pot to the verandah outside and remained there waiting for the arrival of the Revenue Officials.

Held: that though the *taliari* had no authority to enter into the house, he was not liable for criminal trespass. [P. 816 C. 2]

(c) *Criminal Trial—Accused's action should be construed favourably to him if possible.*

When the action of the accused is open to two constructions, one criminal and the other honest, the Appellate Court should not assume that it was criminal. [P. 817 C. 2]

S. Venkatesa Aiyangar — for Petitioners.

J. C. Adam (*The Public Prosecutor*)— for the Crown,

Order.—The facts of this case are not disputed. They are that a pot of toddy, in excess of the quantity, which one individual may possess, without license, was brought by a woman named Hanumakka to the house of the complainant K. Lakshmiah. The three petitioners and one man, who has been discharged, came to the complainant's house. The first petitioner, who, according to the Revenue Inspector, was an acting taliari, went inside the house and brought out the pot and placed it in the verandah, and all the three petitioners remained guarding it, until the police, to whom they sent a message about the commission of an abkari offence, arrived. When the Sub Inspector of police arrived, he completely turned the table on the petitioners and prosecuted them for house trespass. They were convicted, and when they appealed to the Sub Divisional Magistrate, their appeal was dismissed. Now a private individual has no authority to seize and detain liquor, which he believes to be liable to confiscation under the Abkari Act (Madras Act I of 1886). Only Officers of a certain rank of the Revenue, Police and Abkari Departments are empowered to enter places, where liquor is illicitly sold or stored. Technically, it does not signify that the first petitioner was acting as substitute for an absent taliari, or that the 3rd petitioner's appointment as taliari had ceased two days before this case. Even if they had been

permanent taliaris of the village, they would have had no legal right to do what the 1st petitioner is said to have done, *viz.*, gone inside a private house, without the permission of its owner and fetched out a pot of toddy.

But the facts (1) that an offence under the Abkari law was apparently committed by the complainant, (2) that the petitioners may have thought that it was a taliari's duty to stop illicit transport and possession of liquor, and (3) that they sat and watched the pot till the police came, throw a flood of light on the question, whether they acted with *bona fide*, or with a criminal intention.

According to the decision of the majority of the Full Bench in *Vullappa* v. *Bheema Rao* (1), the offence of trespass is not complete, unless there is an intent to commit an offence, or to intimidate, insult, or annoy some one, in possession of property. It is not enough that the accused should know that his act is likely to have such an effect. The complainant deposed that the petitioners intended to annoy him, because he was a witness in a case against one Narasimhayya, who according to him is their friend, but he contradicted himself on the point whether he had already deposed against Narasimhayya, or whether he was about to do so. His statement that the accused announced that they had taken the toddy, because he had given evidence against Hanumayya, is improbable and is not corroborated by the woman who brought the toddy, or by the complainant's son, whose version is that the accused offered to return the pot of toddy, if complainant did not give evidence against Narasimhayya. The Complainant's statement, Ex. III, that the petitioners objected to the pot being taken away, till the toddy was measured, shows that their real object was to see that the Abkari offence which they had detected was not hushed up.

The Stationary Sub-Magistrate has not recorded a finding, as to the intention of the accused. The sub-Divisional Magistrate observes that there was no necessity for the accused to stop at the complainant's house, with the toddy, till the police came, if it were not to annoy him. I entirely disagree. I think their remaining there indicated their good faith. When the action of the accused was open to two constructions, one criminal and the other honest, I think that the appellate Court should not have assumed that it was criminal.

I therefore set aside the convictions and direct the fines imposed on the accused to be refunded.

Conviction set aside.

(1) [1918] 41 Mad. 156=33 M.L.J. 729=6 L.W. 794=43 I.C. 578—19 Cr.L.J. 162=1918 M.W.N. 81.

1924 M/103 & 104

1924 MADRAS 817

JACKSON, J.

Alliar Rowther — 1st Defendant — Appellant.

v.

Narayana Kudumban and others — Plaintiffs—Respondents.

Civil Mis. S. A. No. 110 of 1922, Decided on 7th March 1924, against the order of the Court of the Subordinate Judge of Tuticorin.

Limitation Act, Art. 166—Setting aside sale.

Where the sale is sought to be set aside on the ground of fraud, Act. 166 applies.

[P. 818 C. 1]

C V. Ananthakrishna Aiyar and *C. V. Harihara Aiyar*—for Appellant.

C. Padmanabha Aiyangar and *T. D. Srinivasachariar*—for Respondents.

Judgment.—There was an application under S. 47, Civil Procedure Code, to set aside a sale, held in execution of a decree, on the ground that no notice had been served on the judgment debtor, and the proceedings were fraudulent. Both the Munsif and the Subordinate Judge have dismissed the application and hence this Second Appeal.

The District Munsif has found that the notices were duly served and there is no reason to hold that the sale was *ab initio* void. The case where an entirely wrong notice had been sent out is not in point : *cf. Raghunath Das*

v. *Sundar Das Khetri* (1). There is ample authority for holding that, where the sale is sought to be set aside, on the ground of fraud, Art. 166 applies. See *Kamayyi* v. *Rammamma* (2) and *Rhodes* v. *Padmanabha Chettiar* (3). The appeal is dismissed with costs.

Appeal dismissed.

(1) [1914] 42 Cal. 72=41 I.A. 251=18 C.W.N. 1058=1 L.W. 567=27 M.L.J. 150=16 M.L.T. 353=(1914) M.W.N. 747—16 Bom. L.R. 814—20 C.L.J. 555=24 I.C. 304=13 A.L.J. 154 (P.C.)

(2) 1922 Mad. 95=16 M.L.W. 934=(1922) M W.N. 176.

(3) [1914] 1 L.W. 1033=(1914) M W.N. 921=26 I.C. 369=17 M.L.T. 18.

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192 MADRAS 818

WALLACE, J.

Chintakayala Thammiah Naidu—Petitioner—Plaintiff.

v.

Attili Musaliah (dead) and others.—2nd Defendant & L. R. of the 1st Defendent—Respondents.

C. R. P. No. 920 of 1922, Decided on 22nd April 1924, to revise the decree of the Court of the District Munsif of Vizagapatam in S.C. S. No 242 of 1922.

Madras Local Boards Act (V of 1884)—S. 73—"Tenant" meaning of.

A licensee under the holder of a Dhaimila inam in a zamindari for a period of 10 years with a right to tap date tress is not a tenant within the meaning of S. 73 so as to be liable to his licensor for the land cess payable by the latter under the Act. [P. 818, C. 1 & 2.]

B. Satyanarayana—For Petitioner.

P. Somasundaram—For Respondents.

Judgment,—The question in this case is whether a licensee under the holder of a Dharimila Inam in a Zamindari for a period of 10 years with a right to tap date trees is a tenant within the meaning of the S. 73 of the Madras Act V of 1884, so as to be liable to his licensor for the land-cess payable by the latter under the Act. The plaintiff is an intermediate landholder and had under decree Ex. B to pay Rs, 131 2-6 to his landlord as land-cess for Faslis 1324 to 1326 *plus* costs of suit and he seeks to recover half of that sum from the licensees, the defendants.

The word "tenant" in the Act is defined to include all persons who occupy lands under a landholder. This definition is not illuminating, and considerations of the meaning of the word as used in other enactments do not afford much assistance either. It has no doubt been held *e, g.*, that the ryotwari holder of a tree patta is an occupier of land within the meaning of S. 6 of the Madras Forests Act [see *Reference under S. 39 of the Madras Forests Act* (I)]. It would be unsafe to infer from that that a licensee of the right to tap date trees in a Zamin inam is a tenant within the meaning of the definition in Act V of 1884.

I think the question has to be looked at from a different point of view. The tax which the plaintiff has to pay to the Zamindar is a "tax on the annual rent value of land," It is calculated under S. 64 (3) of the Act on "the annual rent payable to the landholder by his tenants," and the landholder is bound to furnish the Collector under R. 65, with a statement of the annual rent value of the lands occupied by his tenants or by himself. The word "rent" is not defined in the Act, and it is not clear whether or not it is intended to mean only the rent payable by an estate tenant as defined in the Madras Estates Land Act. I think it may be taken that the Local Boards Act does not contemplate any radical difference between the method of caiculation of the rent value on ryotwari land and of the rent value on land held under any other tenure. Now in the case of ryotwari lands it is clear that the rent value is based on the assessment payable to Government for the land. Every one knows what that is, and I do not think it could be seriously argued that, if a ryotwari holder leased out date trees on his holding for tapping, the amount of that lease could be taken into account for the purpose of calculating the rent value of the land under S. 64 (1) of the Act A ryotwari holder is bound so long as he holds the land and therefore so long as he holds the right to lease out the trees upon it, to pay the assessment on the land. It is that and not

the lease amount on which the tax will have to be calculated.

I do not see why any different principle should be applied to lands in an estate. The lease of trees on these lands does not abolish the rent payable on the lands to the landholder and it is not suggested in this case that that land rent has been abolished. It is asserted that the lands are uncultivable, but only because of a tradition that people who cultivate them do not prosper. The assessed land rate then still remains to provide the basis on which the tax leviable under this Act shall be calculated and the tax can be calculated legally on nothing else. If as a matter of fact the tax has been calculated on any other basis then the landholder himself will have to take action to have the mistake rectified.

It follows then that the amount payable under a license for tapping date trees on land which is already subject to land rent is not a proper basis for calculation of the rent value of the land, and is not "rent" as used in S. 64 of the Act. Even if a licensee be, in a manner of speaking, the tenant of the licensor, the latter cannot recover from the tenant anything not taken legally from him by the Collector and, as set out above, the Collector cannot, to my mind, legally collect from the landholder as tax under S. 64 of the Act any tax based on the amount of the license

I therefore agree with the District Munsif that the suit must fail and dismiss the Revision Petition with costs.

Petition dismissed.

1924 MADRAS 819

KUMARASWAMI SASTRI, J.

Nayakammal—Plaintiff.

v.

S. Munuswamy Mudaliar—Defendant.

Civil Suit No. 740 of 1921, Decided on 20th August 1923.

(a) *T. P. Act, S. 3—Notice—Attestation of deed affecting property by person having tangible interest therein is proof of his consent—Attestation is or is not proof of consent according to circumstances of each case.*

The question whether attestation should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case. Where a person having a tangible interest in the property affected by a deed attests that deed, his attestation should be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed. It is the commonest thing in this country for attestations to be obtained from persons having a possible interest in the property with the object of binding them later on. [P 822 C 1 P 823 C 1]

(b) *Hindu Law—Alienation by Widow—Void or Voidable.*

An alienation by a widow beyond her powers is voidable and not void. If, therefore, a reversioner after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good he would lose his right of complaint. [P 823 C 1, 2]

(c) *Hindu Law—Reversioners.*

Actual reversioner can resist suit for possession by person claiming under invalid alienation by widow. [P 824 C 2]

K. Aravamuda Aiyangar and *T. K. Ramaswami Aiyangar*—for Plaintiff.

T. S Raghunatha Rao and *T. S. Srinivasa Rao*—for Defendant.

Judgment.—This is a suit by the plaintiff for a declaration that the property mentioned in the plaint belongs to her, for possession of the property from the defendant, for the recovery of arrears of rent and for mesne profits.

The plaint as amended sets out that the property set out in the plaint belonged to one Sandar Ramalinga Mudaliar, who died on the 15th of December, 1903, leaving a daughter Gnanasundarammal who obtained letters of administration on the 14th of March, 1905, such letters being granted after contest by the reversioners, that by a registered deed of release dated the 9th of December, 1905, the reversioners to the estate including the defendant's father, who also represented the defendant released their interest in the properties left by Ramalinga Mudaliar, in favour of his daughter Gnanasundarammal, that Gnanasundarammal transferred the suit property to one Samarapuri Mudaliar on the 21st of February, 1920, by a deed which, though called a

deed of gift, was for consideration and necessity, that the said deed was attested by the defendant's father, in token of his assent to the transaction, that Samarapuri Mudaliar mortgaged the suit property to one S. V. Subramania Aiyar for Rs. 600 on the 26th of May, 1916, out of which Rs. 250 was given to the defendant for his marriage and the rest for the payment of debts, binding on the estate, that the defendant with full knowledge of the contents of the document attested the same, that by a registered deed of mortgage dated the 2nd of February, 1920, Samarapuri Mudaliar mortgaged the property with the defendant for Rs. 200, that Samarapuri Mudaliar dealt with and enjoyed the property as absolute owner, with the knowledge and consent of the defendant, that the defendant, having with full knowledge of the above facts, accepted the said transaction and received benefits thereunder, is now estopped from denying the title of Samarapuri Mudaliar that Samarapuri Mudaliar left a will, dated the 19th of March, 1920 bequeathing the property to the plaintiff, that the defendant both by reason of his consent and estoppel and also by reason of the fact that he is not the nearest reversioner to the estate is not entitled to question the plaintiff's title, that the defendant is occupying a room in the house, having agreed to pay a rent of one rupee per mensem, that when a notice to quit was sent to him, the defendant sent a reply denying tenancy and setting up title in himself and hence this suit.

The defendant filed a written statement, stating that he is entitled to the suit property as the nearest reversioner, that Gnanasundarammal acquired no title to the property, by reason of the grant of letters of administration to her, that the deed of release, even if executed, is not valid and does not bind him, as his father predeceased Gnanasundarammal and any act he did purporting to bind the defendant would be invalid, that the deed of gift executed by Gnanasundarammal is not valid and binding on the property, that he had no knowledge of the mortgage deed, dated the 2nd of February, 1920 and was not a party to that transaction, that Samarapuri Mudaliar, though he borrowed Rs. 200 from the defendant, did not execute any mortgage deed, that the will of Samarapuri Mudaliar is not valid and binding and that he never agreed to pay any rent, nor was he a tenant under the plaintiff. In his supplemental written statement, filed in answer to the amended plaint, the defendant denies that there was any necessity or consideration for the deed of gift, dated the 21st of February, 1910, and that Rs. 250 was borrowed for the purpose of his marriage and states that the mortgage document of the 26th of May 1916 executed in favour of Subramania Aiyar by Samarapuri Mudaliar is only a nominal document.

The following issues were settled:—

1. Whether the release deed, dated 9th December, 1905, relied on by the plaintiff is true, valid and binding on this defendant?
2. Whether the deed, dated 21st February, 1910, is a deed of gift or an alienation for legal necessity and in any event whether it is legal and binding on this defendant?
3. Whether the plaintiff acquired any rights under the will of the late Samarapuri Mudaliar and whether the plaintiff is entitled to set up any right under it, without obtaining probate?
4. Whether the defendant is estopped from denying the title of the plaintiff, for any of the reasons set out in the plaint?
5. Whether the defendant agreed at any time to pay rent and, if so, how much?
6. Whether the plaintiff is entitled to the declaration and possession prayed for?
7. To what relief, if any, is plaintiff entitled?

The property in dispute belonged to Sandar Ramalinga Mudaliar, who died leaving, Gnanasundarammal his only daughter and legal representative. He died intestate and Gnanasundarammal obtained letters of administration to his estate, by a decree dated the 28th of February, 1905, in T. O. S. No. 14 of 1904, to which the then reversioners were parties. It appears from the evidence that the defendant's father and a brother of his were living in the suit house. After the termination of the testamentary proceedings, in favour of Gnanasundarammal, they left the house. On the 9th of December, 1905, the defendant's father acting for himself and on behalf of the defendant, who was said to be 15 years at the time and the defendant's elder brother exe-

cuted a deed of release, which has been marked as Ex. F, in favour of Gnanasundarammal. The deed recites that she is according to the Hindu Law entitled to the properties left by her father, and that she obtained letters of administration. It then proceeds as follows:—

"As we are the divided *pangalies* of the aforesaid Ramalinga Mudaliar and as we have reversionary right in his properties, we intended to relinquish in your favour alone the rights which we possess and in return therefor Santhar Santhiappan, *alias* Santhilinga Mudaliar and his sons Santhar Muthukalathi Mudaliar and Santhar Munuswami Mudaliar out of us have received Rs. 200 and Santhar Karunai Sivaprakasa Mudaliar and his younger brother Santhar Murugesa Mudaliar out of us who are the sons of Santhar Kumaraswami Mudaliar, have received Rs. 200 from you. Having received in this manner, we have relinquished to you, yourself, the reversionary right which we possess in all the moveable and immoveable properties of the aforesaid Ramalinga Mudaliar, that is, in the house described in detail hereunder and in other moveable properties. So you shall yourself get also with full rights all the rights which we possess in all kinds of properties of the aforesaid Santhar Ramalinga Mudaliar and shall hold and enjoy the aforesaid properties, with power of alienation, such as by gift and sale, so long as the sun and moon endure. To this effect is the release, otherwise called the deed of relinquishment of reversionary right, written and given out of our free will."

It appears from the evidence that Ramalinga Mudaliar, the father of Gnanasundarammal, left immoveable properties, consisting of lands and the suit house. The plaintiff states that the lands had already been sold to meet the expenses of the testamentary proceedings and for paying off other debts and the recital in this document that the only property remaining is the suit house supports the view that at the date of the release deed the lands had already been sold. On the same date, *viz.*, 9th of December, 1905, the defendant's father and his elder brother executed a rental agreement, in favour of Gnanasundarammal, which has been marked as Ex. G. It recites that they agreed to pay her 8 annas a month, for occupying a room in the suit house. The tenancy is a monthly tenancy, terminable by a month's notice. The evidence is that under this rental agreement the defendant and his father continued in the house and that the defendant's father died in the suit house. On the 21st of February, 1910, Gnanasundarammal executed the deed Ex. B. in favour of Santhar Samarapuri Mudaliar. It recites that she has become old and infirm and has no other person except Samaratpuri Mudaliar to protect, her and that she gives the property mentioned in the deed to him, subject to the conditions mentioned therein. The material portion of the deed runs as follows:—

"In the same manner as you protected me by giving food and clothing, before I got my father's property, you should continue to supply me even hereafter with the necessary food and clothing, so long as I live, and you yourself should perform the obsequies to be done for me and meet the expense thereof. If there be inconvenience for you to perform the aforesaid obsequies, the aforesaid ceremonies should be got performed by my brother-in-law's daughter Nayakammal. According to the maintenance decree, obtained on the (charge of) house No. 19. in O. S. No. 205 of 1905, in the Madras City Civil Court, filed against me by Papammal, you yourself should continue to pay Re. 1-8-0, month after month, to that lady during her life time. The aforesaid lady should be given the western middle room of that house for her residing therein, so long as she lives. If she does not reside in that room, but brings in any other of her people to reside therein as tenant, accomodation should not be given to them. You should yourself pay Rs. 200, being the amount of small sums borrowed by me from outsiders for repair of the aforesaid house No. 19 and for paying its taxes and for paying maintenance to the aforesaid Papammal and Rs. 24 being the balance of maintenance now due by me to the aforesaid Papammal and relieve me from debt. You should spend not less than Rs. 5 and conduct the *Annabhishekam*, which is being conducted, year after year, on the full moon day in the month of Arpisi to Valleswara Swamigal in Thengur Selva Vinayagar Sannidhi in the aforesaid Mylapore."

This deed is attested by the defendant's father Santhalinga Mudaliar. Although the deed states that it is a deed of gift, there can be little doubt that the gift was an onerous one, involving payment of monies by the donee. It is really a conveyance by Gnanasundarammal, in consideration of the payment of Rs 200, for debts due by her and the maintenance payable by her and of the performance of the charity mentioned in the deed. As I said before, the defendant and his father were living in this house. On the 26th of May, 1916, Samarapuri Mudaliar, the grantee under Ex. B, executed a mortgage deed (Ex. D), in favour of Subramania Aiyar for Rs. 600. It refers to the deed of gift

(Ex. B) and recites that the property is in his possession and enjoyment and that in consideration of this mortgage he received Rs. 250 for the expenses of the marriage of Santhar Munuswami Mudaliar (defendant), Rs. 50 for paying the balance of maintenance due to Papammal, who is referred to in Ex. B the gift deed, and Rs. 300 for effecting repairs to the house, which is said to be in a dilapidated condition. It appears from the endorsement on Ex. D that Subramania Ayyar received the principal and interest due on this mortgage, on the 17th of August, 1918. Ex, D is attested by the defendant. On the 19th of July, 1918, Samarapuri Mudaliar agreed to sell a portion of the suit house to one Shanmuga Mudaliar and executed an agreement Ex. E. The sale was to be for Rs. 900. This document recites that the property was obtained by a deed of gift executed by Gnanasundarammal in his favour and that the sale was to be for Rs. 900. The evidence adduced on the plaintiff's side is that Rs. 250 borrowed on the mortgage was not enough for the marriage expenses and that more monies were required. This document is attested by the defendant. The defendant admits that Samarapuri Mudaliar got his marriage performed On the 2nd of February 1920. Samarapuri Mudaliar borrowed Rs. 200 from the defendant and executed in his favour the deed of mortgage Ex. C. The material portion of the deed runs as follows:

"I hypothecated to you the tiled building bearing door No. 19 comprised in old Survey No '1325, new Survey No. 3085, and certificate No. 294 and having an extent of 2 grounds 692¾ square feet, which was given to me through a registered deed, dated 21st February, 1910, by Thandava Gnanasundarammal, which is in my possession and enjoyment and which is situated in the eastern row of Thengur Selva Vinayagar Koil Street, Tiru Mylapore, South Madras, etc. * * * In respect of this sum of Rs. 200, I shall pay interest at rupee one per cent per mensem. Within 31st January, 1923, I shall pay to you this principal amount and interest discharge this debt and receive this bond * * * I hypothecated this house to you and have kept it in my possession."

The defendant admits in his written statement that he lent Rs. 200 to Samarapuri Mudaliar, but he wants to make out that he never got a mortgage deed. Execution of this mortgage is proved by the attesting witnesses and this document is registered. I have no hesitation in disbelieving the evidence of the defendant that he did not get any mortgage document for the money he lent. It is difficult to believe that the deceased would have fraudulently created a mortgage, for the loan he received, especially as he was treating the defendant with affection and had gone to the extent of getting him married. The defendant states that he was giving his earnings to the deceased, but his earnings would have been hardly sufficient to meet the expenses of himself, his wife, and family. Samarapuri Mudaliar died on the 10th of June 1920, having left his will, dated the 19th of March 1920, whereby he appointed the plaintiff as executor and bequeathed to her the suit property. Probate of the will has been marked as Ex. A ; so that if the property belonged to Samarapuri Mudaliar, she has acquired full title. There can be little doubt on the evidence that the defendant and his father were fully aware of the deed, executed by Gnanasundarammal in favour of Samarapuri Mudaliar, that Samarapuri Mudaliar was in possession and enjoyment of the property, as absolute owner from 1910, the date of Ex. B, in his favour, that he executed mortgages as the absolute owner of the property, which mortgages were attested by the defendant, and that the defendant himself, after the death of Gnanasundarammal, when he would have been the reversioner, if his case is true, accepted Samarapuri Mudaliar as the absolute owner and got a mortgage deed from him. I have little doubt that both the defendant and his father were fully aware of the nature and contents of the documents, which they attested. It has no doubt been held that attestation does not *prima facie* import knowledge. In *Lakhpati* v. *Rambodh Singh* (1), it has been held that the question whether attestation should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case. As pointed out in *Gu udayaldas*

(1) [1915] 37 All. 350=13 A.L.J 616=29 I.C. L. 218.

v. *Nathu* (2) where a person, having a a tangible interest in the property affected by a deed, attests that deed, his attestation should be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed Having regard to the circumstances that the reversioners in this case contested the right of Gnanasundarammal when she applied for letters of administration and subsequently executed a release in her favour, there can be little doubt that they must have enquired into and known the contents and seen the deeds, which they attested. It is the commonest thing in this country for attestations to be obtained from persons having a possible interest, in the property, with the object of binding them later on and I have rarely come across a case, where a person having an interest present or contingent in the property has attested the deed, without enquiring into its contents. The facts proved show that the defendant's father acting for himself and as guardian of the defendant and the defendant's elder brother obtained Rs. 200 from Gnanasundarammal, as consideration for the release deed. Having regard to the value of the property, as mentioned in the release deed, the reversioners got Rs. 400, in respect of a property, which was worth Rs. 600 at the time. It has also been proved beyond all doubt that Samarapuri Mudaliar acting as the owner and with the knowledge and consent of the defendant mortgaged the house for the purpose of meeting the expenses of the defendant's marriage and the defendant got the benefit of a substantial portion of the mortgage money. These transactions were before the death of Gnanasundarammal. After her death, the defendant lent Rs. 200 and got a mortgage in his favour. Even assuming that the alienation by Gnanasundarammal, in favour of Samarapuri Mudaliar, is invalid beyond her life time, it is clear that an alienation by a widow beyond her powers is voidable and not void. I need only refer to *Modhu Sudan Singh* v. *Rooke* (3) and *Rangaswami Gounden* v. *Nachiappa Gounden* (4), where their Lordships of the Privy Council observe as follows:—"No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hyper-criticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable: *Bijoyi Gopal Mukerji* v. *Krishna Mahishi Debi* (5) Now in all cases of voidable contracts, there is a general equitable doctrine, common to all systems, that he who has the right to complain must do so, when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right of complaint. This may be spoken of. though scarcely accurately, as a ratification. In some cases, it has been expressed as an election to hold the deed good: *Madhu Sudan Singh* v. *Rooke* (3). In *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (6), it was held by a Full Bench of the Allahabad High Court that a reversioner, who expressly assents to an alienation of property, forming part of an estate, cannot on succeeding to the estate, after the widow's death repudiate his action and sue for possession of the property alienated by the widow. The authorities are all discussed and having regard to the decision in that case, I think that the defendant is estopped from disputing the validity of the alienation by Gnanasundaramma, in favour of Samarapuri Mudaliar, in 1910, as I think it is clearly proved that during the life time of Gnanasundarammal the defendant and his father acknowledged the validity of the transaction

(2) [1919] 50 I.C. 274.
(3) [1898] 25 Cal. 1=22 I.A. 164=1 C.W.N. 433=7 M.L.J. 127=7 Sar 194 (P.C)
(4) [1919] 42 Mad. 523=46 I.A. 72=26 M.L.T. 5=36 M.L.J. 493=17 A.L.J. 536=29 C.L.J. 539=21 Bom. L.R. 640=10 L.W. 105=23 C.W.N. 777=1919 M.W.N. 262=50 I.C. 498 (P.C.)
(5) [1907] 34 Cal. 329=34 I.A. 87=11 C.W.N 424=5 C.L.J. 334=9 Bom. L.R. 602=2 M.L.T. 133=17 M.L.J. 154=4 A.L.J 329 (P.C.)
(6) 1923 All. 387=46 All. 339=21 A.L.J. 3 4 L.R.A. Civ. 392 (F.B.)

and after her death the defendant dealt with Samarapuri Mudaliar as the absolute owner of the property and took a mortgage. There can be little doubt from the evidence that Samarapuri Mudaliar altered his position for the worse. He borrowed monies on the mortgage of this house for performing the defendant's marriage, for effecting repairs to this house and for paying the maintenance due to Papammal. It is hardly likely that he would have executed the mortgages and borne the expenses of the defendant's marriage, if the defendant had at any time asserted his right to set aside the transaction on the death of Gnanasundarammal. In fact, Gnanasundarammal was at the time old and she died a few months prior to Samarapuri Mudaliar and it cannot be said that this is a case of an alienation by a young widow, where the alienee expects a long term of possession and enjoyment. before he is compelled to relinquish the property. The defendant and his father, having obtained considerable benefit, cannot now turn round and repudiate the transaction. It is also in evidence that the plaintiff relying upon the fact that she was provided for did not press her rights against her husband's relations for maintenance. Under these circumstances, I am of opinion that the alienation by Gnanasundarammal is binding on the defendant and that the plaintiff is entitled to possession of the property.

It has been argued that the transaction, evidenced by the deed of gift Ex. B, amounts in law to a surrender of the estate by Gnanasundarammal, in favour of the reversioners and a regrant by them to Gnanasundarammal and that therefore Gnanasundarammal had an absolute estate. If this contention were sound, it will be unnecessary to go into the question of estoppel; but I do not think that, having regard to the terms of the document and the evidence adduced in the case, the transaction can be viewed as a surrender to the reversioners and a regrant by them. It is no doubt true that the persons, who executed the release, were the whole body of reversioners and the property released was the only property existing at that date, which belonged to Gnanasundarammal's father and was in her hands, as his heir with the limitations imposed by Hindu Law and that there is no form required to effect a surrender. But the terms of the document suggest that what took place was merely a release by the reversioners and not a surrender and a regrant. I am therefore unable to accept the contention that Ex: B can be taken to have conferred an absolute estate on Gnanasundarammal.

As regards the tenancy set up in the plaint, I do not think there is any proof of any tenancy. It is no doubt true that the defendant's father executed a rental agreement, in favour of Gnanasundarammal; but there is nothing to show that the defendant continued to live in the house or paid any rent. During her lifetime, it was open to Gnanasundarammal to let the property to the reversioners as tenants; but it cannot be said that the tenancy continues, when the reversioners on her death acquired title to the property. If therefore the deed of gift Ex. B is invalid, as not binding on the reversioners and if there is no estoppel, it seems to me that the defendant, at least as one of the reversioners, would be entitled to remain in possession, as against the plaintiff. I may also state that there is no evidence adduced at the trial to show that the defendant is not one of the next reversioners, though it is clear that he is not the sole reversioner.

It follows from my findings that the plaintiff is entitled to a declaration that she has an absolute right to the suit property. The defendant will quit and deliver possession of the property to the plaintiff and pay her the costs of this suit. Time 2 months for possession.

Suit decreed.

✱ 1924 MADRAS 825

COUTTS TROTTER, C. J. AND RAMESAM, J.

K. V. K. M. Kunhibi—Plaintiffs—Appellants.

v.

The Secretary of State—Defendants-Respondents.

S. A. Nos. 949 and 1341 of 1921, Decided on 26th March 1924 against the decree of the District Court of South Malabar.

(a) *Madras Land Encroachment Act (III of 1905) S. 14—Cause of action.*

A person who receives notice to quit under S. 6 and in spite of it remains in undisturbed possession cannot be held to be evicted from the land. [P. 825, C. 2.]

An aggrieved person can elect as to which stage of the proceedings to complain against, so that if two different notices to quit are served on him, though he has shown his being aggrieved by the earlier one, he can make the later one the cause of action for his suit in Civil Court and limitation should be calculated only with reference to this notice. [P. 826, C 1 & 2.]

✱ (b) *Specific Relief Act S. 42—Cause of action.*

Per Ramesam, J.—A person who wishes to file a declaratory suit has the right to say which of several proceedings taken against him (not amounting to adverse possession or enjoyment) is the particular proceeding by which he deems himself aggrieved for the purpose of filing a declaratory suit. [P. 826, C, 2; P. 827 C. 1.]

T. S. Viswanatha Aiyar and A. Krishnaswami Aiyar—for Appellants.

The Government Pleader—for Respondents.

S. A. No. 949 *of* 1921.

Coutts Trotter, C. J.—In this case, the plaintiff was in occupation of some land cultivating it by a tenant. Government claimed that it was their land, and on the 17th of April, 1919, they sent her a notice to quit under S. 6 of the Land Encroachment Act, III of 1905. Nothing happened for a time. In May 1919, the plaintiff put in a petition for a review of this notice to the Deputy Collector. On the 18th September, 1919, the Deputy Collector dismissed the review petition. On the 2nd of October, 1919, an order which amounted practically to a notice to quit went to the plaintiff. On the 22nd December, 1919 the plaintiff filed the present suit for vindicating her alleged rights of ownership in the Civil Court.

The Courts below have declared that suit to be barred by limitation, by reason of S. 14 of the Act which says:

"Nothing contained in this Act shall be held to prevent persons deeming themselves aggrieved by any proceedings under this Act, except as herein provided, from applying to the Civil Courts for redress."

(That is what this woman has done)

"Provided that the Civil Court shall not take cognisance of any suit instituted by such persons, for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose."

Then follow two explanations:

"The cause of action shall be deemed to have arisen—(*a*) in respect of any assessment or penalty," (that is a provision under another section which I have not dealt with), "on the date on which such assessment or penalty was levied; (*b*) in respect of eviction or forfeiture, on the date of eviction or forfeiture."

S. 6 contains the machinery for eviction and it is provided that a notice shall be served on the person in occupation requiring him to vacate the land and, if such notice is not obeyed, by removing or deputing a subordinate to remove any person who may refuse to vacate the same, the Collector may give effect to it. How in the teeth of that provision anybody can venture to argue that a person who has had notice under S. 6 and in spite of it remains in undisturbed possession has been evicted from the land. I cannot understand; and I do not think it can fairly be said that any judgment of this Court has gone that length. But the case is put in another and a slightly—I will not say more plausible—but a slightly less unarguable way. It is said that the illustrations contained in the Explanation to S. 14 of the Act were not exhaustive and that a person may be aggrieved by proceedings under this Act, when these proceedings do not amount to an assessment, penalty, eviction or forfeiture. Assuming that argument to be sound, the plaintiff in this case put forward as the thing, which she deemed to be aggrieved by, not the notice at all which might have been a mere *brutum fulmen*, which might have resulted in nothing whatever in the future, but by a tangible definite order of the Deputy Collector received by her on the 2nd of October, 1919, ordering her to quit. How it can be said that

the plaintiff must be deemed to be aggrieved by the earliest stage of the proceedings, when she did not choose to be aggrieved by it, I cannot appreciate. It is argued that though she says she was not aggrieved by the notice, she obviously was aggrieved by it, because she petitioned the Deputy Collector to withdraw it, or to review it. It seems to me that, assuming that to be so, it does not in the least preclude her from saying.

"Well, if I was aggrieved by the notice in the sense that I put in a petition against it, that is not what I am questoning in this suit here. I am aggrieved and for the purposes of this suit I am solely aggrieved by the order of the Deputy Collector of the 2nd of October, 1919."

How anybody can deny her the right to elect as to which stage of the proceedings she should complain against passes my comprehension. In my judgment, the Full Bench decision in *The Secretary of State for India* v. *Assan* (1) has no bearing on this point whatever, because there was a question as to when there had been an infringement of the plaintiff's right; and the plaintiff had a continuous chain of proceedings which began by his actually paying money out of his pocket in answer to a demand. To my mind, the Full Bench decision has no bearing on this point whatever.

The appeal must be allowed and the suit remanded for retrial. The appellants will have their costs of this appeal and in the Lower Appellate Court in any event. The Court fee will be refunded to the appellants.

Ramesam, J. — I entirely agree. Assuming that all the causes of action that may arise under the Act are not exhausted by the Explanation to S. 14 and assuming that a declaratory suit filed on account of proceedings taken under the Act also falls under S. 14, it is open to the plaintiff to deem herself aggrieved by whichever one of several proceedings taken against her she may choose.

In the case in *The Secretary of State for India* v. *Assan* (1) the plaintiff actually made a payment. In a case where a penal assessment has been paid, it may be that it is not open to a plaintiff to say that he does not deem himself aggrieved by that payment, that he can ignore that payment and that he deems aggrieved by a later proceeding, because payment of money to another person in token of his proprietorship is practically a loss to himself and a recognition by him of the adverse title of the other. But in a case where there are a series of proceedings, being mere notices without any further attack against the title and enjoyment of the plaintiff, it is open to the plaintiff to choose the last of these things and say that he deems himself aggrieved by this and not by the earlier proceedings. I am aware there are some cases, which though they may not arise under the Act, imply that it is not open to a person seeking a declaration to so choose, but I do not agree with them. In this case, in paragraph 9 of the plaint, the plaintiff has clearly stated that the dismissal of her petition by the Deputy Collector and the communication of the 2nd of October, 1919, is the proceeding on which the cause of action arose, which means that she felt herself aggrieved only by this and not by any earlier proceeding, for a declaratory suit. That being so, this second appeal must be allowed and I agree to the order proposed by my Lord the Chief Justice.

S. A. No. 1341 *of* 1921.

Coutts Trotter, C. J.—Same judgment as in the connected S A. No. 949 of 1921. There will be a similar order as to costs and refund of Court fee.

Ramesam, J.—I agree. It is contended by the learned Government Pleader in this case that there is an admission in paragraph 4 of the plaint that the plaintiff deemed herself aggrieved on the 19th of March, 1919; but seeing that a declaratory suit is an optional one and not compulsory, the view I take in such matters is that a person who wishes to file a declaratory suit has the right to say which of several proceedings taken against him (not amounting to adverse possession or enjoyment) is the particular proceed-

(1) [1916] 39 Mad. 727—30 M. L. J. 255—19 M. L. T. 157—32, I. C. 755—(1916) 1 M. W. N.167—3 L. W. 228.

ing, by which he deems himself aggrieved, for the purpose of filing a declaratory suit. In this case, it may be that the plaintiff was aggrieved by several proceedings; but of these she chooses only the proceeding of the 26th of May, 1919, as the one by which she felt herself aggrieved for the purpose of filing the declaratory suit and not the earlier proceeding of the 19th of March, 1919. That being so, this second appeal is governed by the judgment in Second Appeal No 949 of 1921.

Appeals allowed.

1924 MADRAS 827

COUTTS TROTTER, C. J. AND RAMESAM, J.

Venkatramana Pai—Plaintiff—Appellant.

v.

Sampa alias Santappa Mallayya and others—Defendants 2 to 4.-Respondents

S. A. Nos. 410 and 411 of 1921, Decided on 26th February 1924, against the decrees of the Court of the Subordinate Judge of South Kanara

Religious endowment–Lease by trustee of endowed properties is valid for his lifetime or the period of his holding office.

It is quite common for persons in the position of trustees of religious and charitable endowments to make lease of such property. These can be recognised as being valid for the life of the lessor or the trustee or what is equivalent to his life his continuance in the trust and to construe words apparently wider in import as limited to the lifetime of the lessor *qua* trustee. Where there are no extravagant words in the instrument indicating a permanent lease such as mulgeni etc. or other technical phrases of that import the transfer should be deemed to end at the trustee's death or his ceasing to hold office. Courts should strive, where they can, to put a liberal construction upon the instrument *ut res magis valeat quam pereat* so as to uphold it and carry into effect the intention of the parties. [P. 827 C. 2]

B. Sitarama Rao—for Appellant.

S. T. Srinivasagopalachari—for Respondents.

Coutts Trotter, C. J.—I desire to say not one word more than is necessary for the decision of this case, because I am free to admit that I do not understand what the judgment of their Lordships of the Privy Council in *Vidya Varuthi Thirtha* v. *Baluswami Iyer* (1) enjoins upon us; but it appears to me that this much is clear that the real line of cleavage in this case is—Are we to treat this instrument as being absolutely clear and, therefore fettering us in its construction, or as something capable of passing a qualified estate in the property to the tenant ? It is quite common for persons in the position of trustees of religious and charitable endowments to make lease of such property and the common current of decisions in this presidency has always been to recognise those as being valid for the life of the lessor or the trustee, or, what is equivalent to his life, his continuance in the trust and to construe words apparently wider in import as limited to the lifetime of the lessor *qua* trustee. That is what we propose to do here. There are no extravagant words in this instrument indicating a permanent lease such as mulgeni, *etc.*, or other technical phrases of that import and we think that the Courts should strive, where they can, to put a liberal construction upon the instrument *ut res magis valeat quam pereat* so as to uphold it and carry into effect the intention of the parties. That being so, no question of limitation arises, and we must reverse the decision of the Court below and give a decree to the plaintiff for possession of the suit land with mesne profits from the date of the District Munsif's decree at the rate awarded by him until possession is given. The Appeal is allowed with costs throughout.

There will be a similar decree in Second Appeal No. 411 of 1921.

Ramesam, J..—I agree

Appeal allowed.

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(1) 1922 P. C. 123=44 Mad 831=48 I. A. 302=41 M. L. J. 346=(1921) M. W. N 449=30 M. L. T. 66=15 M. L. W. 78=26 C. W. N. 537=20 A. L. J. 497=24 Bom. L. R. 629=3 P. L. T. 245 (P. C.).

✱ 1924 MADRAS 828

KRISHNAN, J.

Bandaru Chellamma — Plaintiff — Appellant.

v.

Dungala Pentayya — Defendant — Respondent.

S. A. No. 852 of 1921, Decided on 15th February 1924, against the decree of the Court of the Subordinate Judge of Vizagapatam.

✱ (a) *Landlord and Tenant — Occupancy rights—Burden of proof is on party setting up —Mere length of tenancy is no proof as also mere reclaiming jungle land in zemindari.*

A tenant who sets up an occupancy right has to establish it. By mere length of tenancy, no occupancy right can be acquired. Because a man reclaimed some land in a Zamindari and made it cultivable land he thereby does not get permanent occupancy rights

[P. C. 1. 828, 2 P. 829, C. 1.]

✱ (b) *Zamindar—Forest—Land Tenures.*

Zamindar owns absolute estate in forests in zemindary. [P. 828, C. 2.]

Y. Suryanarayana—for Appellant.

B. Satyanarayana and *R. Narsimham* —for Respondent.

Judgment.—In this case the plaintiff is a pattahdar under the Zamindar of Vizianagaram. He brought this suit for the recovery of rents from the defendant as well as for ejecting him from his holding. The land is situated in Jeroyiti village within the Zamindari Estate. The first Court granted a decree both for the rent and for ejectment, but, on appeal, the Subordinate Judge has reversed the decree so far as the claim for ejectment goes, on the finding that the defendant has occupancy right in the land and that he is not therefore liable to be ejected. The question argued before me is as to the existence of the defendant's occupancy rights.

According to the rulings of the Privy Council, the latest of which is in appeal No. 46 of 1922 in a case which went up from this Court, a tenant who sets up an occupancy right has to establish it. The facts appear to be that the lands in question in this case were originally forest lands in the Zamindary. As regards such lands it was laid down by this High Court in *Arunachala Ambalam* v. *R. G. Orr.* (1) that the Zamindar owns an absolute estate in it. The lands in question seem to have been reclaimed by the defendant's father somewhere in 1868 and converted into cultivable lands and the evidence also shows that he had been in possession of the lands till his death and was succeeded in possession by the present defendant, his son, who has continued in possession ever since. The occupants paid rent first of all to the *Muslajari* or lease holder from the Zamindar and since 1898, when the plaintiff obtained his *patta* they have been paying rent to the plaintiff. The rents have not been invariable as would appear from the receipts that are produced, exhibit 1 series in 1814. The rent was enhanced from Rs. 35 to Rs. 55 by the plaintiff, and as the defendant did not pay that, a Small Cause suit was brought for the purposes and a decree obtained. The rent was enhanced, because it would seem that some of the lands were converted from dry lands into wet lands. There is no other circumstance in this case from which any inference as regards the permanent occupancy right can be drawn. It seems to me that these circumstances are not sufficient to justify an inference that the tenants had originally an occupancy right which is continuing. By mere length of tenancy no occupancy right can be acquired.

The circumstances which have been proved here do not seem to me to justify any conclusion that the tenants have obtained occupancy rights in the land, but it is contended before me, on the authority of the ruling in *Cheekati Zamindar* v. *Ranasoorn Dhora* (2) and similar cases, that I must presume that as soon as a person enters upon a Zamindari land and converts that land into a cultivable land by that fact alone he acquires a right of permanent occupancy. Whatever the old view might have been on the point, that view can hardly be supported now after the Privy Council ruling in *Suryanarayana* v. *Patanna*

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(1) [1917] 40 Mad. 722—29 I.C. 634—32 M.L. 407.

(2) [1900] 23 Mad. 318.

(3) where their Lordships say at page 1019 that the assumption that the ownership of the soil in India was not in the sovereign or ruler and that the right of the ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator is an assumption that no Court is entitled to make and in support of which there is no reliable evidence. They also point out that such an assumption as contended for, in that case, was not recognised in Regulation XXXI of 1802 and the words of that regulation are quoted by their Lordships. It has been held by this Court in *Nandigam Subbarayulu* v. *Kannain Saheb* (4) that this observation of their Lordships of the Privy Council which referred to Reddi kings refers equally well to the Zamindars. In view of this ruling of the Privy Council and the subsequent ruling of the Madras High Court I do not think I can support the position that, because a man reclaimed some land in a Zamindari and made it cultivable land, he thereby got permanent occupancy rights. What then is the basis of this claim for permanent occupancy right that the defendant puts forward? The mere fact of the length of his possession will not do. The Estates Land Act cannot be said to have given him a right of occupancy at all; for at the time the Act came into force it was the plaintiff, and not the defendant, who had a right in the land under the patta he got from the Zamindar and was holding the land. Though the defendant was in actual occupation of the land he was occupying it only as a tenant of the plaintiff, and he would be only an under tenant of the plaintiff, the ryot, and could not therefore claim to have any occupancy rights at all.

In these circumstances it seems to me that the only decree that can be passed in this case is a decree allowing the ejectment of the defendant. The decree of the Subordinate Judge to the contrary must therefore be set aside and that of the District Munsiff restored with costs throughout,

Decree set aside.

(3) [1918] 41 Mad. 1012—45 I.A. 209—25 M. L.T. 30—(1918) M.W.N. 859—23 C.W.N. 273—9 L.W. 126—29 C.L.J. 153—36 M.L. J. 585—48 I.C. 689—21 Bom. L.R. 547—(P.C.)

(4) [1919] M.W.N. 836—54 I.C. 22.

✱ 1924 MADRAS 829

JACKSON J.

Rajagopala Iyer — Plaintiff—Petitioner.

v.

Thathayya Arunachala Iyar and others—Defendants-Respondents.

Civil Rev. Petition No. 155 of 1921, Decided on 10th March 1924, from the decree of the Court of the Subordinate Judge of Tanjore.

✱ *Contribution — Co-defendants are liable for contribution.*

Whenever joint defendants fail in a suit they should not in all cases be treated as tort-feasors. They are entitled to contribution as between them where they are not joint tort feasors. [P. 830, C. 1]

T. L. Venkatarama Aiyar, *V. Narayanaswami Aiyar* and *R. Sethurama Sastri*—for Petitioner.

K. Rajah Aiyar—for Respondents.

Judgment.—In Small Cause Suit No. 1494 of 1919, on the file of the Court of the Subordinate Judge of Tanjore, Plaintiff sued for contribution. In O. S. No. 409 of 1906, on the file of the Court of the District Munsif of Tiruvadi, he has sued as defendant No. 6, along with defendant's deceased father of the present defendants, Nos. 3 to 8, and defendant Nos. 1 and 2 who are also defendants Nos. 1 and 2 in this suit. The costs were recovered from plaintiff and he sued for contribution. The lower Court has dismissed the suit, on the ground that defendants Nos. 2, 5 and 6, in O. S. No. 409 of 1906 were joint tort-feasors, and plaintiff files this petition for revision (1st defendant pleaded payment and the point was found against him).

There is authority for holding that there can be no decree for contribution among joint tort-feasors: *vide* *Manja* v. *Kadugochen* (1), *Gobind Chunder Nundy* v. *Srigobind Chow-*

(1) [1884] 7 Mad. 89

dhry (2). though that authority is shaken by the observations of Lord Herschell in *Palmer* v. *Wickand Pulteneytown Steam Shipping Co.* (3), quoteed in *Siva Panda* v. *Jujusti Pan a* (4). However, assuming that the authority holds good, there remains the question of fact whether these defendants in O. S. No. 409 of 1906, are proved to have been joint tort-feasors.

The 2nd defendant actually pleads, in his written statement, that he made a fraudulent defence, but that plea has no evidentiary value. and can be ruled out, on the principle *nemo allegors turpitudinem anam est andiendus.*

Respondents Nos. 3 to 8 are children of defendant No. 5 in O. S. No. 409 of 1906. In his judgment, in that suit, the Munsif held that defendants Nos. 5 and 6 were estopped under S. 317 of the old Code of Civil Procedure from pleading that the purchase of certain items was benami. He also found that the story was untrue. and did not believe that the father of 6th defendant paid a moiety of the purchase money. The appellate Court found that plaintiff's evidence was defective, and that of defendants Nos. 5 and 6 was not sufficient to justify an affirmative conclusion. The Munsif also found that 2nd defendant acted under the influence of defendants Nos. 5 and 6. On these findings, it would be impossible to have a definite charge of perjury against defendants Nos. 5 and 6. The most that can be said is that they failed to convince the Court that their contention was true, and no one suggests that whenever joint defendants fail in a suit. they should be treated as tort-feasors. Accordingly, I find that plaintiff is entitled in law to claim contribution as sued for. The petition is allowed with costs to petitioner throughout.

Petition allowed.

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(2) 1897) 24 Cal. 330=1 C. W. N. I79.
(3) (1894) A. C. 318.
(4) (1902) 25 Mad. 599=12 M. L. J. 1

1924 MADRAS 830

KRISHNAN AND ODGERS, JJ.

Kumaraswami Nadar—Appellant.

v

Venkataswamy Koundan and another—Respondents.

A. A. O, No. 406 of 1921, Decided on 11th October 1923, against the Order of Dt. Court Madura in C.M.P. No. 281 of 1920.

Provincial Insol. Act, (V of 1920)—Official Receiver is not a necessary party in appeal though he may, if he chose, claim to be heard—D. J. can act on evidence recorded by him.

Other creditors opposed a claim of one creditor in proceedings be ore the official Receiver. The creditor on failure appealed to the District Court without making the Official Receiver a party.

Held. that there was no illegality and that the District Judge could act on the evidence recorded by the official receiver who however could, if he chose, appear and claim to be heard. [P 831 C 1]

K. S. Champagesa Aiyangar—for Appellant.

K. V. Venkatasubramania Aiyar—for Respondents.

Judgment.—This appeal arises from an application, made by the 7th creditor, in the Insolvency proceedings, of one Thirumula Gounden. The seventh creditor claimed to prove for Rs. 7,000. The Official Receiver allowed the claim in part but disallowed it in respect of the amount claimed under the promissory note Ex. B. The creditor then applied to the District Judge, under S. 68 of the Insolvency Act, against the order of the Official Receiver and prayed that the whole of his claim may be allowed. The learned District Judge, after considering the circumstances of the case and the evidence, has granted him his prayer and the present appeal is by the 15th respondent, another of the creditors.

Two points have been taken before us, as vitiating the order of the District Judge altogether The first is that the order was passed without making the Official Receiver a formal party to the applicatior, before the District Judge. The creditors apparently were all made parties and notice had been given to all the cre-

ditors ; including the 15th respondent, the appellant now before us. He appeared before this District Judge and opposed the claim of the 7th creditor. Apparently the Official Receiver was not made a formal party respondent to the application before the District Judge, but we do not think that that can be treated as in any way materially affecting the order of the District Judge. It was open to any of the creditors, either to appear themselves as the 15th creditor did, to oppose the proof tendered by the 7th creditor before the District Court, or to have moved the Official Receiver to represent the whole party of creditors before that Court and to state their objection to the proof tendered. The Official Receiver is after all an officer of the Court and there is no provision in the Insolvency Act, so far as we can see, which makes it obligatory on the District Court to have the Official Receiver made a formal party to these proceedings. If the Official Receiver wanted to be heard, there would have been no difficulty whatsoever in the matter, as we have no doubt that the District Judge would have heard him. The Official Receiver has been made a party to this appeal before us, but he has not come here, and complained that he has been prejudiced in any way by his not being heard on this matter in the lower Court. Reliance has been placed on *Manglury Sivaramiah* v. *Singumahanti Bhujanga Rao* (1), by the Appellant's Vakil in favour of his contention ; but there we notice that the Official Receiver was directed to execute a document in favour of the creditor who required that the whole of the assets of the insolvent should be transferred to him, in accordance with an agreement, which he entered into with the insolvent before insolvency. Whether, in such a case as that, the Official Receiver should be formally made a party and his objection heard or not, we need not consider it here ; for, in the present case, we see no reason why the Official Receiver should have been made a formal party as, in the circumstances of this case, it was as already stated, open to him to have come up and stated any objections that he might have had to the proof tendered. We may state that he knew of the proceedings that were going on in the Insolvency Court itself. In these circumstances, the first objection is not a valid one and is overruled.

The next objection is that District Judge acted upon some statements, made by the party before Official Receiver. Here again, the District Jugde was considering the propriety of the action of the Official Receiver, who had taken the evidence that was laid before him and the question which the District Judge had to decide was whether, on that evidence, the Order of the Official Receiver was a right one and should be supported. The case cited by the Appellant's vakil, *Chinna Meera Rowther* v. *Kumarachakravarthi Aiyangar* (2), had reference to an application under S. 36 of the old Insolvency Act and related to the annulment of a document, which the Official Receiver had applied to the Court to annul. The Official Receiver was himself the applicant and it was held that any statement taken by him could not be treated as evidence, because the matter itself was being tried before the District Court, as a matter between the alienee on the one side and the Official Receiver on the other. Such is not the position here at all. Here the District Judge is merely co nsidering the correctness of the order of the Official Receiver ; and in such a case as this, we do not see any objection to the District Judge acting on the evidence given before the Official Receiver. Nor is there any provision in the Act itself for necessitating the District Court to take fresh evidence in such matters. We do not say that it would not have been open to the District Court to take such evidence, if it thought it desirable to do so ; but there is no provision laying down any obligation on the District Court to do so. In these circumstances, the two objections that have been raised to the order of the Lower Court fail.

(1) [1916] 39 Mad. 593 —30 I, C. 703—18 M. L. T, 200.

(2) [1916] 36 I . C. 906.

On the merits, the only argument addressed to us is that, as in a previous amendment proceeding, this creditor has given up his interest in the land, so far as his mortgage was concerned and agreed to treat himself as an unsecured creditor, for the amount of consideration, which, he should prove like any other creditor, his claim must be looked upon with suspicion. What the exact reason for his doing so was we do not know ; but the fact that he did so cannot be taken as conclusive on the question that the money was not due as a personal debt.

No other ground has been alleged against the order of the District Judge. We therefore confirm that order and dismiss this appeal with costs of the 7th creditor to be paid by the 15th creditor.

Appeal dismissed.

1924 MADRAS 832

KRISHNAN, J.

A. Subbayya — Defendant—Appellant.

v.

Sree Raja Venkataramiah Apparao Bahadur Zamindar Garu and another—Plaintiffs—Respondents.

S. A. No. 1105 of 1921, Decided on 19th February 1924, against the decree of the Sub. Judge of Kistna Ellore.

Madras Estates Land Act, S. 162 (2)—Waste land that can be cultivated is not raiyati land—Mesne profits therefore can be determined by Civil Court.

When the definition of raiyati lands speaks of cultivable lands it means land that is ordinarily and usually cultivated and it does not refer to waste land though even waste land can at times be cultivated with labour and expenditure of money. Mesne profits of such waste lands can therefore be ascertained by the Civil Court. [P. 832, C. 2]

K. Kammanna—for Appellant.

T. Ramachandra Rao—for Respondents.

Judgment.—In this case the point taken before me is that Civil Courts have no jurisdiction to grant mesne profits in the way the lower Courts have done as the plaintiff's are entitled only to such profits as can be claimed under clause 2 of S. 163 of the Madras Estates Land Act under which mesne profits have to be ascertained by the Collector under S. 45, and reliance is placed upon the ruling in *Kotikalapudi Rattayya* v. *Venkataramayya Appa Rao* (1), if the land in question were ryoti land the argument may be sound, but the finding of both the lower Courts is that this land is not ryoti land because, it is not ordinarily cultivable. The learned appellate judge says that it is a sort of waste land usually submerged in water in the rainy season and not under cultivation at all. On that finding S. 163 will not apply and there will be no ground for objecting to the Civil Courts ascertaining the mesne profits due. It is however contended before me that as the land has been actually cultivated by the appellant for some years, it must be taken to be cultivable land, and being in a zamindari estate, it must be treated as a ryoti land and the findings to the contrary by the District Judge should not be accepted. Ryoti land is defined in the Estates Land Act as meaning cultivable land in an estate other than private land but does not include tank beds, thrashing floor etc. It certainly does not include waste land where no cultivation is ordinarily carried on. In S. 6 clause 4 waste land and grazing land are treated as lands in which a person cannot get permanent rights of occupancy. This has been pointed out by the learned judge in *Raja of Venkatagiri* v. *Ayyappa Reddi* (2). Their observations are found at pages 740 & 741. When the definition of ryoti land speaks of cultivable land it seems to me that it means land that is ordinarily and usually cultivated and does not refer to waste land though even waste land can at times be cultivated with labour and expenditure of money. I think that the finding of the lower Court that this land is not ryoti land is correct.

The second appeal fails and is dismissed with costs.

Appeal dismissed.

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(1) [1920] 39 M L.J. 571=1920 M.W.N. 702=12 L.W. 573=28 M.L.T. 279.

(2) [1913] 38 Mad. 738=14 M.L.T. 405=21 I.C. 532=(1913) M.W.N. 919=25 M.L.J. 578.

1924 Madras 833.

VENKATASUBBA RAO, J.

Chidambara Gurukkal—Plaintiff-Appellant.

v.

Sivagnanasundaram Pillai and others——Defendants-Respondents.

S. A. No. 362 of 1921 decided on 8th February 1924 against the decree of the 2nd Additional Sub-Judge of Coimbatore in A. S. No. 5 of 1920.

(a) *Inam—Presumption as to grant.*

There is no presumption that an Inam grant is grant of the land revenue only and each case must be decided with reference to the circumstances connected with it. [P. 833, C. 2.]

(b) *Land Tenure—Permanent tenancy—Evidence—Nature of tenancy at inception is the best proof.*

Acts and conduct of parties indicating permanency, such as continuance of land in same hands for a long time at a low and unvarying rent are proof of permanent tenancy.

The Court has to find whether the tenants' predecessors possessed occupancy rights at the inception of the relation of the parties, and not whether there was a subsequent change in those relations. When the origin of the tenancy is not known, evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy. The court is entitled to infer from the continuance of land in the same hands at a low and unvarying rent, permanent rights of occupancy. [P. 834, Cls. 1 and 2.]

S. T. Srinivasagopalachariar—for Appellant.

T. M. Krishnaswamy Aiyar—for Respondent.

Judgment.—This appeal arises out of a suit by an Inamdar against his tenant.

The first question to be decided is whether the grant to the predecessor of the plaintiff was of the land, or, the grantee not owning the Kudivaram, of the land revenue only. Section 3 (d) of the Estates Land Act does not in terms apply because the suit concerns not a village but only a small plot of land. The point has however to be decided with reference to considerations similar to those that would apply if the case fell within that section. If the grant were forthcoming it would be the most valuable evidence but unfortunately the grant is not before the Court, although it is agreed that the land was granted some centuries ago during the period of the Madura Kings. The learned Subordinate Judge has on a consideration of the materials before him come to the conclusion that the Inamdars were entitled only to the Melvaram. I agree with him. Proceedings connected with the Inam enquiry are relied upon by both the parties. At the enquiry, the Inamdar made the statement that the land was let to ryots for "Kandayam" cultivation. The Subordinate Judge is of the opinion that this supports the defendants' case. The word, Kandayam, is defined as being either a fixed portion of the tax payable or rent paid in money as distinguished from rent paid in kind (see Mc.Lean's Manual of Administration of the Madras Presidency). The Judge presumably thinks that the word is used in the Inam statement in the former sense and I am not prepared to say that he is wrong. The Inam title deed is inconclusive. It acknowledges the title of the Inamdar to the Inam and says that it has been subject to a quit rent of Rs. 2-4-0, that the Inam has been hereditary but not alienable and liable to lapse on failure of lineal heirs. It then recites "on your agreeing to pay an annual quit rent of Rs. 4 4-0 your Inam tenure will be converted into a permanent freehold in which case the land will be your own absolute property." On behalf of the plaintiff it is argued that the use of the word "land" denotes that the original grant was of the soil. This contention, I am not prepared to accept. The word "land" is not used with special reference to the subjects of the grant. The words "Inam and 'Land' are used indifferently and in the context no significance attaches to the use of the particular word "Land." The tenants are not parties to this document and there was no occasion to refer to the rights of the Inamdar as distinguished from those of the tenant. The plaintiff next relies upon a receipt for rent executed by himself. It refers to "My Inam Vengayam Kadu which belongs to me." It is said that this contains an assertion by the Inamdar that he was the owner of the land. A similar argument was advanced with reference to the statement of the Inamdar made at the Inam enquiry "the lands are let to ryots." Even where the tenant is admittedly possessed of the Kudivaram the landholder refers to his Melvaram right as land and therefore no inference favourable to the plaintiff can be drawn from the circumstance. It is true that there is no presumption that an Inam grant is

grant of the land revenue only and that each case must be decided with reference to the circumstances connected with it. But the Subordinate Judge has on a consideration of all the circumstances come to the conclusion that the grantee was not the owner of both the Varams, and I am not prepared to interfere with this finding.

Granting that the Inamdar was possessed of both the Varams, the next question to be decided is whether the defendants have proved the existence of a permanent tenancy. The Court has to find whether the defendant's predecessors possessed occupancy rights at the inception of the relation of the parties, not whether there was a subsequent change in those relations; the latter alternative not having been suggested; (see *Seturatnam Ayyar* v. *Venkatachala Goundan* (1) and when the origin of tenancy is not known evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy (see *Ismail Khan Mahomed* v. *Jaigun Bibi* (2). It has been contended that permanence, if claimed, must be established and that the burden of proof lies on the tenants. The learned Subordinate Judge has found that the true inference from the facts proved is that the tenure is permanent and not precarious. Granting that the *onus* is on the tenant the Subordinate Judge has found that the defendants have made out their case and I am not prepared to disturb his finding. For at least three generations the defendant's family have been occupying the land without any alteration in terms and during that period the rent has been far below the economic rent and a uniform and fixed rent has been paid. The plaintiff has not been able to give any evidence that at any time a different rent was paid or the rent was ever enhanced. It is suggested on behatf of the plaintiffs that they were absentee landlords, that when they went to the village of the defendants, the latter who were karnams attended to the wants of the plaintiffs and that it was likely that a low rent was fixed on account of these considerations. This has not been accepted by the lower appellate Court as an explanation. The facts suggested on the one side and the uniform and low rent on the other have not been shown to be related as cause and effect. It is quite as likely that because the defendants and their ancestors have been tenants of the plaintiff's family the former have from time to time rendered small services to the latter. The Judge was entitled to infer from the continuance of the land in the same hands at a low and unvarying rent, permanent rights of occupancy *Ponniah Nadan* v. *Deivanai Ammal* (3) and *Palaniandi Malavarayan* v. *Vadamalai Odayan* (4). In the result the second appeal fails and is dismissed with costs but subject to the following reservation. The defendants do not object to a decree being passed in favour of the plaintiff for the rent admitted by them to be due, and I accordingly pass a decree for Rs. 54. With this modification the lower Appellate Court's decree will be confirmed.

Appeal dismissed.

(1) (1920) 43 Mad. 567=47 I.A. 78=(1920) M.W.N. 61=27 M.L.T. 102=11 L.W. 399=38 M.L.J. 476=22 Bom. L.R. 578=56 I.C. 117=18 A.L.J. 707 (P.C.)

(2) (1900) 27 Cal. 570=4 C.W.N. 210.

(3) (1916) 36 M.L.J. 463=9 L.W. 453=52 I.C. 247=26 M.L.T. 311.

(4) (1915) 2 L.W. 723=48 I.C. 956.

1924 Madras 834.

VENKATASUBBA RAO, J.

Kuppakkal—Defendant-Appellant

v.

Mathan Chettiar and others—Respondents.

S. A. No. 1176 of 1921, decided on the 6th March, 1924, against the Decree of the District Court of Coimbatore, in A. S. No. 92 of 1921.

Easement—Right of way—Sale-deed describing southern boundary of the land conveyed as pathway to be reserved—Vendee is entitled to right of way on the land forming southern boundary though no pathway might actually have been set apart by vendor—Deed—Construction—Easements Act, S. 13.

Where in a sale-deed the southern boundary of the site conveyed was described to be "pathway 18 feet in breadth which I am going to set apart".

Held, that the vendee was entitled to an indefeasible right of way on the land which formed the southern boundary, though no pathway might have been actually set apart by the vendor. [P. 835, C. 2.]

T. R. Venkatrama Sastry and *C. V. Mahadeva Aiyar*—for Appellant.

A. Krishnaswamy Aiyar and *K. V. Ramachandra Aiyar*—for Respondents.

Judgment:—One Rangaswami Chetty sold to the 1st defendant under Exhibit I, dated 26th June, 1917, a strip of land about 102 feet long and 21 feet wide having a frontage on a public road out of a large block of building vacant site of which he was the owner. The portion purchased by the 1st defendant I shall call site No. A. The land exclusive of site No. A may, for the purposes of this appeal, be regarded as consisting of two parts: (1) The portion south of and contiguous to what was sold to the 1st defendant opening also on the public road (this I shall call site No. B), and (2) the bulk of the property at the back of the site No. A and the site No. B to which access from the road was over the said site No. B. (this I shall call site No. C).

Three days subsequent to the sale of site No. A, Rangaswami Chetty sold the remainder of the block, sites Nos. B and C, to certain persons from whom the present plaintiffs derive title. On the site No. C the plaintiffs constructed a ginning factory. The 1st defendant, to start with, built a small house facing the road on her own site, site No. A, leaving the rest of her land at the back of her house as an open space. She then built another house on the vacant land and as it has no frontage on the road, she claimed a right of way over the site No. B.

The short question to be decided is, whether she is entitled to this right of way? The basis of her claim is the fact that in the sale-deed executed in her favour the southern boundary of the site conveyed to her is described to be "Pathway 18 feet in breadth which I am going to set apart." The lower Courts having negatived her right, she has preferred this second appeal. It is found that there were negotiations at the same time in regard to the sale to the 1st defendant as well as to the plaintiff's predecessors-in-title. Whether the 1st defendant has acquired the right she claims, depends entirely upon the construction of the conveyance in her favour. In regard to the surrounding circumstances, two facts seem, in my opinion, to be of outstanding importance. (1) The land sold to the 1st defendant was about 102 to 105 feet in length and it was vacant building land. It was not to be expected that the 1st defendant would only build one house upon it. If more than one house was to be built, the access to the house at the back of the first house would naturally be over the site No. B. (2) The sites B and C were not laid out in building plots, but on the contrary they were regarded as forming one block to be conveyed to one purchaser. That being so, there was no significance in describing site B as an intended pathway unless it was a pathway intended also for the use of the 1st defendant.

These two circumstances strongly support the 1st defendant's case. On a construction of the words relied on I am of the opinion that her contention must prevail. In *Espley* v. *Wilkes* (1), Kelly, C. B., quotes with approval the following observations of Mansfield, C. J., in *Roberts* v. *Karr* (2);—

"If you (the lessor) have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road."

In the same case the observations of Lawrence, J. are also cited:—

"If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?"

The facts of *Espley* v. *Wilkes* (1) are these: The plaintiff demised by a lease under which the defendant claimed "All that plot of land bounded on the east and north by the newly-made streets a plan whereof is indorsed on these presents." On the indorsed plan the site of the new street was shown and was marked as "new streets." The lease contained covenants by the lessee to build two houses on the land. The plaintiff afterwards granted to the defendant a lease of the land comprised in the site of one of the proposed new streets and the plaintiff inclosed the land so that the defendant was unable to reach the east side of his premises. In an action against the defendant for pulling down this obstruction, it was held that under the defendant's lease a right of way was granted along the site of the proposed new streets to his premises. Kelly, C. B. observed that the grantor was estopped from denying that the strips of land, his property, were what he described them to be, that is to say, "streets" which they could not be unless there is a way through and along them. In *Roberts* v. *Karr* (2) which is referred to in *Espley* v. *Wilkes* (1), it was held that the grantor

(1) (1872) L.R. 7 Ex. 298=41 L.J. Ex. 241=26 L.T. 918.
(2) 1 Taunt. 495=10 R.R. 592.

and those claiming from him were concluded from preventing the grantee to come out into the road over the strip of land then in question.

In *Furness Railway Company* v. *Cumberland Co-operative Guilding Society* (3), the land which was conveyed was at the date of the conveyance waste building land on the outskirts of a town. The plan showed C and M streets. The site of the intended streets was the property of the vendor. It was held that the conveyance granted to the purchaser a right of way.

In *Gogarty* v. *Horkins* (4) of the two plots demised to the lessee, plot A was described as bounded on the east by "an intended road to be 38 feet wide intersecting the said lot from lot B", and lot B was described as being bounded on the west "by the said intended road 38 feet wide intersecting the said lot from lot A." Upon the map annexed to the lease the aforesaid intersecting passage was delineated as being 38 feet wide and was described as "the proposed new road reserved by the lessor." It was held that from the words of the lease there was to be implied a grant of an easement of way across the intersecting space. *Harding* v. *Wilson* (5) is an old case which is somewhat inconsistent with the rulings referred to above. But its authority has been doubted both in *Furness Railway Company* v. *Cumberland Co-operative Guilding Society* (3) and *Gogarty* v. *Horkins* (4). I have therefore come to the conclusion that the 1st defendant ought to succeed. The plaintiffs propose to construct a wall on both sides of the pathway. This they cannot do. They cannot have an injunction restraining the 1st defendant from resisting the construction of this wall. In the plaint it is said that the 1st defendant has been tying her cattle in the pathway and placing tubs and pots on the way and committing several acts of nuisance. It is clear that the 1st defendant cannot use the pathway for these purposes. Subject to this reservation the plaintiff's suit must fail.

The Second Appeal is allowed with costs throughout.

Second Appeal allowed.

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3) 52 L.T. 144=49 J. P. 292.
4) (1906) 1 Ir. R. 173.
(5) 2 B. & C. 96=3 D. & R. 287=1 L.J (O.S.) K. B. 238=26 R. R. 287.

1924 Madras 836.

PHILLIPS AND ODGERS, JJ.

P. S. Ramanadhan Chettiar (deceased) and another—Appellants.

v.

M. G. Mohideen Saheb—Respondent.

A. A. O. Nos. 47 and 48 of 1922, decided on 28th February, 1924, against the orders of the City Civil Court, Madras, dated 6th September, 1921.

Civ. Pro. Code, S. 48—Evasion by judgment-debtor of arrest when able to pay is fraud and extends limitation.

When a judgment-debtor is able to pay and evades arrest in execution of the decree, he is guilty of fraud within the meaning of S. 48. [P. 837, C. 1.]

A. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar and *V. Rajagopala Aiyar*—for Appellants.

S. Srinivasaraghavan and *V. Thyagarajan*—for Respondents.

Judgment:—In this case the appellant is decree-holder in O. S. No. 428 of 1907 in the Madras City Civil Court. He attempted to execute the decree on several occasions in 1911, 1914, 1917 and finally just as the decree was about to be barred by limitation, he filed the present petition E. P. No. 152 of 1920. In that he asked for the arrest of the judgment-debtor and also for the appointment of a Receiver in order to collect a debt due to the judgment-debtor. The arrest was ordered and apparently batta was paid for this arrest on five different occasions but on no occasion was the debtor found. Meanwhile an order had been made appointing a Receiver for the collection of the debt. After these many attempts at arrest had failed, the petition was rejected on the 29th of October, 1920, but it was restored to file on the 2nd of December, 1920, so far as the application for the appointment of Receiver was concerned, but the Judge refused to issue any further warrants for arrest. An appeal was made against that order but was dismissed by this Court on the ground that the appellant had other remedies. He finally obtained a certain sum of money by filing a suit against the judgment-debtor's debtor but only realised a sum of Rs. 754, the decree amount being over Rs. 4,000. He then put in another petition praying that the judgment-debtor might be arrested,

C. M P. No. 813 of 1921, but that petition was dismissed on the ground that it was a fresh application and not a continuation of the former application and was therefore barred as being more than twelve years from the date of the decree. An appeal has been filed against that order as well as against the final order dismissing the execution petition and it is urged that, firstly, C. M. P. No. 813 must be treated as a continuation of E. P. No. 152 and it is therefore in time and secondly, that it is in time by reason of the fraud of the judgment-debtor who has been evading arrest.

The first point is one of considerable difficulty and we have been referred to a number of decisions dealing with the point, but we think that it is unnecessary to determine it in these proceedings because the appellant must succeed on the second point. It has been held so far back as in *Annamalai* v. *Rangaswami* (1) that, when a judgment-debtor is able to pay and evades arrest in execution of the decree, he is guilty of fraud within the meaning of S. 48 or S. 230 as it then was, of the Civil Procedure Code. This was affirmed in *Syed Muhamad Rowther* v. *Somasundaram Chettiar* (2) and the only case to the contrary is *Seshachalam Chetty* v. *Rajam Chetty* (3) which was expressly dissented from in *Syed Muhamad Rowther* v. *Somasundaram Chettiar*. (2) We agree with the view taken in *Syed Muhammad Rowther* v. *Somasundaram Chettiar* (2) that the evasion of arrest is fraud within the meaning of S. 48 and the question is whether there has been such an evasion in the present case. It must be conceded that in the lower Court this point was not specifically urged, for it is not dealt with at all in the judgment, but there is a ground taken in the Memorandum of Appeal and there have been assertions of this evasion of arrest in the course of the proceedings, more especially in the affidavit of the 29th of November, 1920, in which it was alleged that the judgment-debtor was evading arrest and that when steps were taken to enter his house a plea that gosha ladies were inside was raised and no one was allowed to enter. Apart from this affidavit we have the fact that a warrant was taken out on five occasions and returned unexecuted. It is suggested now that the judgment-debtor was unaware of these proceedings and was not in any way evading arrest and in fact, the judgment-debtor has appeared here and has asked for permission to file an affidavit to the effect that he was in Madras at the time the warrants were issued and was living quietly in the mosque and never attempted to evade arrest. We see, however, that notice of the execution petition was sent to him and it is quite clear that he received that notice and was represented by a Vakil in the lower Court who applied for an adjournment for putting in a counter-affidavit on the 27th of August, 1920. On the adjourned date, the Vakil reported that he had no instructions and the judgment-debtor was still absent. Two further warrants were issued after that and again the judgment-debtor could not be found. In these circumstances, we think that it is conclusively proved that the judgment-debtor was keeping out of the way in order to avoid arrest, and it would be useless to allow him now to put in any affidavit with a view to showing that he was perfectly innocent of any idea of fraud. We must hold that he was evading arrest in execution of this petition, and consequently under S. 48, the period of limitation is extended and this petition is in time. The appeal is therefore allowed. C. M. P. No. 813 will be referred for fresh disposal. Respondent will pay appellant's costs in C. M. A. No. 47 of 1922. No orders are necessary in C. M. A. No. 48 of 1922.

Appeal allowed.

(1) (1883) 6 Mad. 365.
(2) (1920) 12 L.W. 710=60 I.C. 630=(1920) M.W.N. 786.
(3) (1898) 8 M.L.J. 203.

1924 Madras 837.

VENKATASUBBA RAO, J.

P. Kanakkan—Complainant-Petitioner

v.

Amir Bi and others—Accused Respondents.

Cr. Rev. Case No. 453 and Cr. Rev. Pet. No. 353 of 1923, decided on 27th February, 1924, to revise the Order of the District Magistrate of Chingleput, dated 25th, April, 1923.

Crim. Pro. Code, S. 439—Acquittal is unrevisable save in case of urgent necessity in interests of public justice—Omission to serve notice of appeal on complainant or officer appointed under S. 422, Crim. Pro. Code, is no ground for interfering in revision when no injustice has been done.

It is settled law that the High Court ought not to interfere in revision with an order of acquittal,

unless interference is urgently demanded in the interests of public justice. The fact that notice of appeal was not served on the complainant or on the officer appointed under S. 422, Crim. Pro. Code is no ground for such interference. [P. 838, C. 1.]

V. C. Seshachariar—for the Petitioner.

K. P. Ramakrishna Aiyar—for Respondents.

Public Prosecutor—for the Crown.

Order:—I assume that the notice of appeal was not served on the complainant. Nor was it served upon the officer, appointed under section 422, Criminal Procedure Code. It is to be regretted that the provision is so often disregarded, but it is settled law that the High Court ought not to interfere in revision with an order of acquittal, unless interference is urgently demanded in the interests of public justice: *Faujdar Thakur* v. *Kasi Chowdhury* (1), *Vellayanambalam* v. *Solai Servai* (2) and *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (3). I accepted this view in the judgment I delivered this morning in Criminal Revision Cases Nos. 699 to 701 of 1923. I am not satisfied that in the present case any injustice has been occasioned. The Sub-Divisional Magistrate in a very full judgment has dealt with the question from various standpoints and has come to the conclusion that in any event the accused had no dishonest intention and that there was a *bona fide* assertion of claim of right.

The revision case fails and is accordingly dismissed.

Petition dismissed.

(1) (1915) 42 Cal. 612=19 C.W.N. 184=21 C.L.J. 53=27 I.C. 186=16 Cr. L.J. 122.
(2) (1916) 39 Mad. 505=28 M.L.J. 692=16 Cr. L.J. 600=30 I.C. 152=(1915) M.W.N. 540.
(3) (1922) Mad 502=45 Mad. 913=31 M.L.T. 342 =16 M.L.W. 413=43 M.L.J. 369=(1922) M.W.N. 579=23 Cr.L.J. 583 (F.B.).

1924 Madras 838.

PHILLIPS, J.

N. C. Rajagopalachariar — Plaintiff-Appellant

v.

Bhashyachariar and others—Defendants-Respondents.

Second Appeal No. 1370 of 1921, decided on 27th March, 1924, against the decree of the District Judge of South Arcot, in A. S. No. 18 and 35 of 1920.

Civ. Pro. Code, O. 8, r. 5—Evasive reply—Civ. Pro. Code, O. 8, r. 4.

Defendants' statement that they do not admit plaintiff's allegation as to the date of a certain event is not evasive denial or admission notwithstanding that defendants do not give their own date for the event. [P. 839, C. 1.]

T. R. Ramachandra Aiyar and *S. Ramaswami Aiyar*—for Appellant.

S. Varadachariar, T. D. Srinivasachariar, K. S. Krishnaswawi Aiyangar and *V. Krishnamachariar*—for Respondents.

Judgment:—The plaintiff brings this suit as a reversioner to recover properties which were in the possession of the widow of the last male holder. He brought the suit on the 7th of September and alleged in his plaint that the widow had died on the 28th of September, 1906, thus bringing his suit within time. The defendants in their written statement pleaded as follows: "The plaintiff should prove that the said Seshammal died on 28th September, 1906, and these defendants do not admit that date as the date of her death." Later on in the written statement they say: "The plaintiff's suit is barred by limitation also." The 5th defendant in a separate written statement also took the plea that the suit was barred by limitation. Issues were accordingly framed. the 6th issue being "whether the suit is barred by limitation?" and subsequently an additional issue was framed: "When did the widow Seshammal die?" The District Judge has found that Seshammal did not die on the date alleged by the plaintiff and that consequently the suit was barred by limitation and now in Second Appeal it is urged that this finding, although a finding of fact, cannot be accepted, because there was an admission in the defendant's pleadings of the allegations by the plaintiff. The provision of the Civil Procedure Code relating to this is O. 8, r. 5, which states that "Every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendants, shall be taken to be admitted except as against a person under disability". In the present case the defendants distinctly stated that they did not admit the plaintiff's allegation as to the date of Seshammal's death. It is argued that inasmuch as they did not make a counter-allegation as to what that date exactly was, it must be

deemed to be an admission within the meaning of r. 5 and reliance is placed on several English cases, i.e., *Thorp* v. *Holdsworth* (1), *Tildesley* v. *Harper* (2) and *Rutter* v. *Tregent* (3). These cases, however, appear to me to be based not on the corresponding provision to r. 5 but to the provision corresponding to rule 4 of Order 8 which says that "Where a defendant denies an allegation of fact in the plaint he must not do so evasively." In these cases there were several circumstances set out in the plaint as constituting the details of certain transactions and instead of denying these several circumstances specifically, the defendants denied them as a whole and as pointed out in one of the judgments such denial would be perfectly justified, provided any one of these circumstances was not strictly accurate, but that did not amount to a denial of each and every one of those allegations. In the present case there is no question of evasive denial, for here there is only one fact alleged and that has been stated to be not admitted. Whether the defendants actually know the date of Seshammal's death or not at the time thay made this pleading does not seem to be material.

It was understood by all the parties that this plea of limitation was taken and that the ground of the plea was that the suit was not brought within twelve years of Seshammal's death. There is no question of the plaintiff being taken by surprise and consequently, there being no admission as to the date, the finding of the District Judge must be accepted. In that view this Second Appeal fails and is dismissed with costs, two sets.

Appeals dismissed.

(1) (1868) 3 Ch. D 637 = 45 L.J. Ch. 406.
(2) (1871) 7 Ch. 403 = 47 L.J. Ch. 263 = 38 L.T. 60 = 26 W.R. 263.
(3) (1879) 12 Ch. 758 = 48 L.J. Ch. 791 = 41 L.T. 16 = 27 W.R. 902.

1924 Madras 839.

SPENCER, O.C.J. AND RAMESAM, J.

Thilla Rukmani Ammal—Petitioner-Appellant.

v.

Rajagopala Aiyar and others—(Respondents)-Respondents.

A.A.O. No. 312 of 1922, decided on 29th July, 1924, against the order of the District Court of West Tanjore, dated 4th September, 1922 in I.P. No. 6 of 1922.

Provincial Insolvency Act (V of 1920), S. 9—Creditor consenting to arrangement by debtor for benefit of all creditors, cannot apply for adjudication on basis of that arrangement.

A creditor who is a consenting party to a deed of arrangement executed by the debtor for the benefit of all the creditors cannot apply for the adjudication of the debtor as an insolvent on the basis of that deed. [P 840, C. 2.]

A. Krishnaswamy Aiyar—for Appellant.

R. Kuppuswamy Aiyar, T. M. Krishnaswamy Aiyar, for *T. Narasimha Aiyangar, K. Narasimha Aiyangar* and *R. Jagannatha Aiyangar*—for Respondents.

Ramesam, J.:—This appeal under section 75 of the Provincial Insolvency Act arises out of a petition by a creditor to adjudge the 1st respondent an insolvent. The learned District Judge found that the petitioner was a consenting party to the deed of arrangement executed on 3rd December, 1921, (Ex. 1) for the benefit of all the creditors and on this ground she was disentitled from filing this petition and dismissed it. The petitioner appeals.

On the evidence we have no hesitation in finding that the petitioner was a consenting party to the deed. She is a markswoman but there is evidence to show that she was present and put her mark along with that of another lady. The petitioner is the aunt of the 1st respondent who still lives in her house and it seems to be probable that the petition has been filed in collusion with him.

The question of law argued for the appellant is, that there is a difference between the law in England and in India on the question of the disability of a creditor who assented to a deed of arrangement. The contention of Mr. Krishnaswami Iyer is that when section 9 of the Provincial Insolvency Act now in force (V of 1920) was enacted, the Indian Legislature had before it, the English Act of 1914, but did not choose to enact the clause relating to deeds of arrangement towards the end of sub-section (1) of section 4.

The right of the creditor to apply for adjudication was dealt with in section 6 of the Bankruptcy Act of 1883. That section has been adopted by the Indian Legislature as Section 6 (4) of the Indian Act III of 1907. The English Consolidating Act of 1914 was then enacted with the additional clause relating to deeds of arrangement after section 4 (1) (*d*).

The Indian Act of 1920, section 9, was then enacted repeating the language of Act III of 1907. In England, a 'Deed of Arrangement Act' was passed in 1887, and another in 1913 and they were consolidated by the Act of 1914 (4 and 5 Geo. V, c. 47).

Now, in England, it was the established law since 1785 that a creditor who assented to a deed of arrangement could not set it up as an act of bankruptcy, *Bamford* v. *Baron* (1). In 1826, the Bankruptcy Act, 6 Geo. IV, c. 16, was passed and this was followed by 1 and 2 Will. IV. c. 56. It was held that there was no alteration in the law in *Marshall* v. *Barkworth* (2). In 1849 the Bankruptcy Law Consolidation Act was passed. With reference to that Act, it was held in *Ex parte Alsop* (3), that, though a deed of arrangement is an act of bankruptcy so far as non-consenting creditors are concerned, the consenting creditor cannot found a petition for adjudication on it. This was followed by Lord Cairns in *Ex parte Stray*, (4) (*See* Williams on *Bankruptcy Practice*, 12th Edition, p. 4 and Baldwin's *Law of Bankruptcy*, 9th Edition, pp. 101-2). On the Bankruptcy Act of 1883, we have got the cases of *In re Brindley* (5), *In re Sunderland* (6) and *In re Jones Bros*, (7). The section of the Bankruptcy Act of 1883 has been adopted in India in 1907 and repeated in 1920 and these decisions apply.

We do not see how the addition of a clause in section 4 (1) (*d*) in the English Act of 1914 the effect of which seems to extend the disability to a non-assenting creditor also "in cases where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement" (*See* section 24 of the Deeds of Arrangement Act, 1914, according to which any creditor is prohibited from applying, after the expiration of one month from the receipt of a notice from the trustee under the deed) can affect the law in India. This extension to non-assenting creditors is not available in India and this seems to be the only effect of the addition in the English Act. The old law is not affected either in England or in India as to assenting creditors [see also *Kheta Mal* v. *Chunni Lal* (8)].

This contention of the appellant is therefore disallowed.

His next contention that the District Judge erred in not considering the other grounds alleged in the petition is legally correct. But he seems to have abandoned the other grounds in the Court below and on the facts as disclosed in the case there is no substance in them. The result is that the appeal fails and is dismissed with costs of respondents 2 to 6. It follows that the injunction, dated the 4th October, 1922, in C. M. P. No. 2326 of 1922 is dissolved.

Appeal dismissed.

(1) (1788) 2 T.R. 594 N=1 R.R. 551 N.
(2) (1833) 4 B. & Ald. 608=1 N & M. 279.
(3) (1859) 1 Deg. F. & J. 289=29 L.J. B.K. 7=6 Jur. (N.S.) 282=1 L.J. 285=8 W.R. 106.
(4) (1867) 2 Ch. 374=36 L.J. B.K. 7=16 L.T. 250=15 W.R. 600.
(5) (1906) 1 K.B. 377=75 L.J. K.B. 211=94 L.T. 116=54 W.R. 301=13 Manson 1=22 T.LR. 155.
(6) (1911) 2 K.B. 658=80 L.J. K.B. 825=105 L.T. 233=18 Manson 123=55 S.J. 568=27 T.L R. 454.
(7) (1912) 3 K.B. 234=81 L.J., K.B. 1178=107 L.T. 236=19 Manson 349=56 S.J. 751.
(8) (1879) 2 All. 173.

* **1924 Madras 840.**

PHILLIPS, J.

Parthasarathi Appa Rao—Appellant.

v.

Turlapati Subba Rao and others—Respondents.

S. A. No. 96 of 1923 decided on 2nd April 1924, against the decree of Subordinate-Judge of Kistna at Ellore in Appeal Suit No. 65 of 1922.

(a) *Legal Practitioner has no general relationship of a standing character to his client—Pleader engaged in revenue suits is not general agent in respect of all revenue litigation but agency applies only to each suit separately.*

There is no such thing as a standing relation of a legal practitioner to a man. A man is a pleader for another only when that other has occasion to employ him as such. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required; but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes. [P. 841, C. 2.]

(b) *Hindu Law—Debts by Father-Sons' liability arises even before father's death.*

It is now well settled that a son's liability to pay his father's debts arises even before the death of the father and consequently their estate would be liable equally with their father's estate. [P. 841, C. 2.]

(c) *Limitation Act, Art. 89—Agent's death—Suit against his legal representatives—Limitation Act, Art. 120.*

Where the cause of action arises before agent's death in a suit against his legal representatives, limitation has no fresh starting point after the agent's death—Arts. 89 and 120 apply to such cases. [P. 842, C. 1.]

P. Venkataramana Rao—for the Applt.

V. Suryanarayana—for the Rest.

Judgment :—The plaintiff in this case employed one Sobhanadri, father of the defendants, as his vakil in revenue suits, and he has now brought the present suit after Sobhanadri's death against defendants as legal representatives for an account of their father's agency. The learned Subordinate Judge has found that Sobhanadri acted as plaintiff's agent in each of the suits in which he appeared as vakil and has held that the plaintiff's claim is barred except in respect of suit the proceedings in which terminated less than three years before the suit.

The first point taken in appeal is that the Subordinate Judge is wrong in treating Sabhanadri's agency as being an agency in respect of each of the suits, and it is argued that he was a general agent for the plaintiff in respect of all revenue litigation. The order appointing him is Exhibit B (2) under which he was appointed by the plaintiff to conduct revenue suits in the District Munsif's Courts and before Revenue officers, but this document does not in itself constitute Sobhanadri as agent, for Sobhanadri could not appear as such agent without a vakalat in each suit. It was an appointment as standing vakil, and until a vakalat was given to the vakil there was no agency distinctly constituted. There was no contract which bound him to appear in each and every suit, nor was there any contract binding the plaintiff to appoint him in every suit, and it is in evidence that the plaintiff employed several other vakils for similar litigation. There can, therefore, be no question of general agency, but the agency was merely in respect of each individual suit. In this connection I may refer to *Saffron Waldon Second Benefit Building Society* v. *Raynir* (1), where it was sought to treat a solicitor who was appointed for trustees as agent of the trustees in receiving a notice and I would quote a passage at page 415.

> "As Lord Justice James said, there is no such thing as a standing relation of a solicitor to a man. A solicitor does not stand in a permanent relation to his client as a chaplain does to a nobleman or body having a chaplain. A man is a solicitor for another only when that other has occasion to employ him as such. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required; but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes."

These remarks are in my opinion strictly applicable to the present case if we merely substitute the word "pleader" for "solicitor". The Subordinate Judge was therefore right in rejecting the plea that the agency was one and indivisible.

The next question relates to the period of limitation and it is argued that the plaintiff having come into Court within three years of the death of defendants' father his suit is within time as regards all the agencies. Reliance is placed on several cases in the Allahabad and Calcutta Courts *Kalee Kishen Pal* v. *Jagathera*(2), *Bindraban Behari* v. *Jamuna Kunwar* (3) and *Girraj Singh* v. *Raghubir Kunwar* (4). In the first of these cases the agent died before his agency terminated and it was held that as against his legal representatives the article of limitation applicable was 120, but the question is not discussed in any detail. In 25 All. 55 the plaintiff sued to recover a definite sum of money which was in his agent's hands and which he said passed to his legal representatives the defendants in the suit. Here also it was held that article 120 was applicable. A similar case is the one reported in *Gurudas Payne* v. *Ram Narain Sahu* (5) and these two cases were followed in 31 All. 429. It will be seen that in none of these cases was there really a suit for an account, but they were suits to recover certain monies in the agents' hands for which that agent was liable to account. It is true that the Courts seem to hold that the cause of action against the agent is a distinct cause of action from that against his legal representatives. This may possibly be based on the idea that the sons under Hindu Law are only liable, for their father's debts after the father's death, but it is now well-settled law that a son's liability to pay his father's debts arises

(1) (1880) 14 Ch. D. 406=49 L.J. Ch. 465=43 L.T. 3=28 W.R. 681.

(2) (1869) 2 B.L.R. 139=11 W.R. 76.
(3) (1903) 25 All. 55=(1902) A.W.N. 191.
(4) (1909) 31 All. 429=2 I.C. 118=6 A.L.J. 667.
(5) (1886) 10 Cal. 860=11 I.A. 59=4 Sar. 548.

even before the death of the father and consequently their estate would be liable equally with their father's estate.

In *Shapajhannissa Bibi* v. *Bama Sundari Choudhurani* (6) it was held that a suit for an account lies against the legal representatives of a deceased agent, but it was held that article 115 applied because " after the agent's death the law presumes that there is always an implied contract by which the heirs of the deceased agent are bound to give an account of whatever they may have received from the agent at the time of his death." It was held therefore that defendants committed a breach of this contract by not rendering accounts. But if an implied contract is the basis of the cause of action, with all respect it would appear to be the contract referred to in article 89, *i.e.*, that of an agent to render account. Article 89 would then be applicable. In *Kumeda Chara Bala* v. *Ashutash Chattopadhiya* (7) it was held that a similar suit was really one to recover money misappropriated by the deceased agent, but the article of limitation applicable was not definitely decided. It is rather difficult to understand how the cause of action against the legal representatives is a different one to that against the agent and it appears to me that at any rate in cases where the cause of action had accrued before the agent's death the mere fact of his death would not give a fresh starting point of limitation against the son and in this view I am supported by the decision of this Court in *Arunachalam Chetty* v. *Raman Chetty* (8). There Sankaran Nair, J., remarked as follows " it is then argued that though the claim against the father may be barred, it is not barred against the sons. This argument proceeds on the basis that the cause of action against the sons is different. The decisions are against the appellant. The defendants are sued as the representatives of their deceased father and as the suit would be barred against him if he had lived, it is also barred against the defendants." Spencer, J. also remarked. " There is no reason why article 120 of the Limitation Act should be applied to a suit brought against the representative of a deceased agent when the article applicable to a suit against the agent for acts committed during the continuance of his agency would be article 89 and limitation would run from the termination of his agency; and the article applicable in respect of money payable by him after the termination of his agency would be article 62."

This decision is binding on me and with all respect I agree with the views therein expressed, for I do not see how the mere facts that the father has died and that his assets have legally passed to his representatives can give the plaintiff any new cause of action against the defendants, unless it is alleged that defendant wilfully misappropriated a definite sum of money left by their father to be given to plaintiff. This being so, the cause of action accrued before the father died and consequently time having begun to run would expire at the same time whether the father had died or not. In this view, the lower Court's decision is correct and this second appeal must be dismissed with costs.

Appeal dismissed.

(6) (1912) 16 C.W.N. 1043=16 I.C. 414=16 C.L.J. 288.
(7) (1916) 17 C.W.N. 5=16 I.C. 742=16 C.L.J. 282.
(8) (1914) 16 M.L.T. 614=1915 M.W.N. 23=27 I.C. 807.

1924 Madras 842.

VENKATASUBBA RAO, J.

Arunachella Goundan—Petitioner.

v.

Katha Goundan and others—Respondents.

C. R. P. Nos. 212 and 213 of 1923, decided on 11th March, 1924, against the orders of District Court of Coimbatore in C. M. A. Nos. 65 and 67 of 1922.

Civ. Pro. Code, O. 5, r. 1, sub. cl. (2)—Applies to plaintiff also.

Though the provision refers in terms only to a defendant the same rule applies also to the plaintiff. If the pleader who appears in Court says he has no instructions, he should be held not to have appeared. [P. 843, C. 1.]

Watrap S. Subramania Aiyar and *A. S. Srinivasa Aiyar*—for the Petitioner.

T. Ramachandra Aiyar—for the Respondents.

Judgment.—There were two suits before the District Munsif, the one he dismissed for default on account of the non-appearance of the plaintiff, and in the other he passed an *ex parte* decree on account of the defendant not having appeared. The

plaintiff in the first suit and the defendant in the second suit happen to be the same person. Applications were made to the District Munsif to set aside the order of dismissal for default in the first suit and to set aside the *ex parte* decree in the second suit. The District Munsif refused to allow these applications, but on appeal the District Judge made orders favourable to the applicant. The propriety of these orders is challenged in the revision petition before me.

A vakil appeared for the party in default and stated he had no instructions. It is argued that notwithstanding this, the pleader must be held to have appeared on his client's behalf and, therefore, the provisions of Order 9 do not apply. I am utterly unable to follow this argument. Order 3, rule 1, so far as it is material for the present purpose, runs thus:—"Any appearance in any Court required by law to be made by a party may be made by a pleader duly appointed to act on his behalf." Order 5, rule 1, sub-clause (2) provides:—"A defendant to whom a summons has been issued under sub-rule (1) may appear (*a*) in person, or (*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or (*c*) by a pleader accompanied by some person able to answer all such questions." This provision no doubt refers in terms to a defendant, but in principle there seems to be no distinction for this purpose between a defendant and a plaintiff, and I am quite clear that the same rule is to be applied in regard to both. When a pleader appears and says he has no instructions, I take it that he intends to inform the Court that he has no instructions to conduct the case either wholly or partially; in other words, he tells the Court that, though he has filed an appearance, he does not propose to appear for his client. It seems to me to be a contradiction in terms to hold that a person who says he does not appear, does, in fact, appear. It has been argued that it is necessary for a pleader to say in such circumstances that he severs his connection with the case, or that he withdraws his vakalat. I do not think any set form of words is necessary to convey to the Court the information that he has ceased to appear and that he, in fact, does not appear for his client. There is no magic in the words "I have ceased my connection with the case." In my opinion the mere attendance of a pleader who, for want of instructions, is unable "to answer all material questions relating to the suit" is not an appearance on behalf of his client. Another case may arise where the pleader appears and says that he applies for an adjournment and on the adjournment being refused, informs the Court that he has no instructions. Here again, I am perfectly clear that there is no appearance on behalf of the party. Then a third contingency may arise. The pleader may be duly instructed and be able to answer all material questions, but still he may tell the Court, "I have no instructions." This conduct may render him liable at the instance of his client, but the question that is material for the present purpose is, was there or was there not an appearance? Supposing that a pleader who has been retained is actually engaged in another Court and fails to appear, can it be said that there is an appearance on behalf of his client? *Failure to appear* and *refusal to appear*, do, I think, stand on the same footing. In neither case can there be said to be an appearance. The matter seems to be simple in the extreme and but for the large body of conflicting decisions on the point, I should have had no difficulty in deciding the case. There is abundant authority in favour of the proposition, as I have stated it. *Gopala Row* v. *Maria Susaya Pillai* (1), *Soondarlal* v. *Goorprasad* (2) and *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (3); and I am not prepared to follow the decisions which take a different view.

The Civil Revision Petitions, therefore, fail and are dismissed; No. 212 with costs. In No. 213, the petitioner will pay the counter-petitioner only the printing charges, no vakils' fee is allowed.

Petitions dismissed.

(1) (1906) 30 Mad. 274=17 M.L.J. 225.
(2) (1898) 23 Bom. 414.
(3) (1907) 34 Cal. 403=5 C.L.J. 247=11 C.W.N. 329=2 M.L.T. 123 (F.B.).

1924 Madras 844.

MADHAVAN NAIR, J.

S. Peddappa—Plaintiff-Appellant.

v.

Venkatappa and others—Defendants-Respondents.

S. A. No. 1394 of 1921, decided on 22nd April, 1924, against the decree of Sub-Judge of Anantapur in A. S. No. 183 of 1920.

Provincial Small Cause Court Act, S. 15—Test to see whether the suit is of a Small Cause nature is to consider its nature as it was presented in the Court of first instance and not the shape which it subsequently took—Suit for specific performance of contract or in alternative for damages is not Small Cause—Presidency Small Cause Court Act, S. 18.

In deciding the question whether a suit is of a Small Cause nature or not, attention has to be paid to the nature of the suit, as it was presented to the first Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts.

Where the suit was for the specific performance of a contract or in the alternative for damages.

Held, that such a suit is not of a Small Cause nature. [P. 844, C. 1.]

A. Venkatarayaliah—for the Appellant.

V. C. Seshachariar—for the Respts.

Judgment:—Plaintiff is the appellant. Plaintiff's suit was for the enforcement of an agreement to sell and in consequence for the establishment of his right to four-ninths share in the Zamin described in the schedule or in the alternative for damages. The learned District Munsif gave him a decree for damages, but on appeal that has been set aside by the learned Subordinate Judge. This second appeal is against the decree dismising the plaintiff's suit and is valued at Rs. 160, the damages disallowed by the lower appellate Court.

Mr. Sesbachariar, the respondents' vakil, raised a preliminary objection that there is no second appeal in this case as the suit is one of a Small Cause nature for a sum below Rs. 500. In deciding the question whether a suit is of a Small Cause nature or not, attention has to be paid to the nature of the suit, as it was presented in the first Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts. The suit in this case was clearly for the specific performance of a contract or in the alternative for damages. Such a suit is not a suit of a Small Cause nature. See *Lakshmandas* v. *Anna* (1), *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (2). I overrule the preliminary objection. Going to the merits the first question for consideration is whether the agreement of November, 1915 has been proved by the plaintiff. The facts relevant for the decision of that question may be thus shortly stated. The deceased brother of the 1st defendant, Thimmayya by name, agreed to convey the property to the plaintiff and the plaintiff is alleged to have given him the consideration for the transaction. The 1st defendant afterwards executed the agreement Exhibit B. He died in the course of the suit and after his death the other defendants 2 to 4, his children, have been brought on record as his legal representatives. Evidence has been given by the plaintiff as P. W. 1 in support of the facts of his case, and P. W. 2 proves Exhibit B. These witnesses have not been cross-examined by the defendants. All the same the learned Judge came to the conclusion that the contract has not been proved by the plaintiff. The fact that the witnesses have not been cross-examined by the defendants cannot in any way affect the truth of the plaintiff's case. The question is whether from the plaintiff's evidence it becomes clear that there was an agreement as alleged by him in his plaint. The learned Judge says :—

> "I cannot uphold the arguments of respondents' vakil to the contrary as there is an utter absence of proved cogent circumstances upon which the question of 1st defendant having been a party to Ex. B. in a representative capacity cannot be decided".

I believe what he means to say in this sentence is that there may be evidence given by the plaintiff's witnesses in support of his case but he is not prepared to act upon that evidence. The plaintiff is an interested witness speaking about facts, which are in his favour and the Subordinate Judge has elected not to believe him, though he has not specifically stated so in his judgment. In hearing a second appeal I am precluded from weighing the evidence which has not been believed by the lower appellate Court I have therefore to dismiss the second appeal with costs.

Appeal dismissed.

(1) (1908) 32 Bom. 356.
(2) (1911) 35 Bom. 29=7 I.C. 955=12 Bom. L.R. 723.

1924 Madras 845.

VENKATASUBBA RAO, J.

N. Achyutam and others—Defendants-Appellants

v.

V. Surayya—Plaintiff-Respondent.

S. A. No. 937 of 1921, Civ. Rev. Petn. No. 612 of 1924, decided on 6th February, 1924, against the decree of the Additional Subordinate Judge, Rajahmundry, in A. S. No. 7 of 1921.

(a) *Pleading—Out and out division is altogether a different plea from plea of severance in status and when one has been pleaded, the other can't be raised for first time in appeal—Hindu Law—Partition.*

Where the plea of out and out division was raised and proved false in the lower Court.

Held, that it could not be pleaded for the first time in appeal that there was at least a severance in status. [P. 845, C. 2.]

(b) *Hindu Law—Debts by father—Trade debts.*

Trade debts incurred by the father are just claims on son's shares. [P. 845, C. 2.]

(c) *Appeal—New plea.*

A new plea should not be allowed to be raised for the first time in appeal. [P. 845, C. 2.]

T. M. Krishnaswamy Aiyar—for Appellant.

G. Lakshmanna and *A. Satyanarayana*—for Respondent.

Judgment :—This appeal arises out of a suit instituted for the recovery of a certain sum of money from the 1st defendant and defendants 2 to 4 who are his sons. The 1st defendant carried on business in brass utensils and in the course of that business became indebted to the plaintiff. The debt was disputed by the 1st defendant, but the first Court found that his plea was false. Defendants 2 to 4 pleaded that before suit there was an out and out division between their father, the 1st defendant and themselves. The learned District Munsif held in favour of the partition. In consequence of that finding he dismissed the suit against the sons giving effect to the rule enunciated in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (1); the learned Subordinate Judge on appeal disagreed with the District Munsif and found that there was in fact no partition. It was then argued on behalf of defendants 2 to 4 that there was at any rate a division in *status*, and to prove it they relied upon Exhibit I, a notice which was sent by the 2nd defendant to the 1st defendant. The lower appellate Court did, I think, give a finding that there was no *bona fide* severance at all effected. But I am not going to base my decision upon that circumstance alone. Defendants 2 to 4 did not plead a division in status, and I do not think that in a case of this nature, they should be permitted to advance that plea for the first time in appeal. The claim was obviously a just claim as the debt was incurred in the course of trade and it was not tainted with illegality or immorality and nevertheless the defendants might rely on any legal defence if it had been properly pleaded and thus defeat the claim. But when the plea specifically set up was found to be false they should not be permitted in the circumstances to put forward in appeal a case not suggested in the written statement nor even at the trial. The difficulty that may arise by the new plea being permitted to be advanced will become apparent by a perusal of the notice Exhibit I. One of the questions that may arise is, was Exhibit I intended to be given on behalf of the 2nd defendant alone or on behalf of the 2nd defendant and his minor brothers ? Secondly, if it was intended to be also on behalf of the minor brothers, would it be operative so far as the shares of the minors are concerned ? Then a question of fact may arise, was the severance in status effected *bona fide* or was the object to defraud the plaintiff and other creditors? These are considerations which would become relevant if the plea of division in status should be admitted. The defence taken by the defendants 2 to 4 having been found to be false, the plaintiff must have a decree. I therefore, confirm the decision of the Subordinate Judge and dismiss the Second Appeal with costs.

It follows that C. R. P. No. 612 of 1921, is also dismissed but, in the circumstances, without costs.

Petition dismissed.

(1) (1918) 41 Mad. 136=33 M L J. 519=22 M.L. T. 334=6 L.W. 649=43 Ind. Cas. 225=(1918) M.W.N. 55.

1924 Madras 846.

WALLACE, J.

K. V. Ramachari—Petitioners

v.

K. V. Krishnamachari and another—Respondents.

C. R. P. Nos. 86, 87 and 116 of 1924, decided on 4th April, 1924, against the orders of the Second Additional Subordinate Judge of Madura, dated 1st December, 1923.

(a) *Civ. Pro. Code, S. 115—Revision should not be granted during pendency of suit except for strong reasons.*

Interference by the High Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good. In the present case revision was granted, partly on the ground that the lower Court had not properly understood the provisions of O. 11, r. 14 of the Civ. Pro. Code, and partly on the ground that the result of its orders might be wholly unnecessary and cause irremediable damage to 1st defendant's business interests. [P. 846, C. 2.]

(b) *Civ. Pro. Code, O. 11, r. 14—Inspection of documents should not be allowed to party who has not established his right thereto nor at a stage at which the exercise of that right is not proved to be legitimate.*

When a party has produced in Court under O. 11, r. 14, documents in his possession but has urged that inspection should not be allowed before hearing his objections, the Court has no right to ignore that protest and the other party has no legal right to inspect all documents relating to all issues and to all stages of the trial of the suit, *i.e.*, the mere production by one party does not give an immediate and indefeasible right of inspection to the other. The Court should first determine whether the party who seeks to inspect the documents is entitled to do so and if so, whether he is entitled to the right at that stage of the proceeding. [P. 846, C. 2.]

The Court can and must exercise discretion as to whom it is going to permit to conduct an inspection of the documents produced by a party. Inspection by a power of attorney agent (who is employed by a party not because of his skill as accountant but because of his exclusive and intimate acquaintance with all the business of a certain firm) should not be allowed unless the party employing him proves his right to inspect the accounts of the firm. [P. 847, C. 2.]

A. Krishnaswami Aiyar and *T.M. Ramaswami Aiyar*—for the Petitioner.

K. Rajah Aiyar and *V. Ramaswami Aiyar*—for the Respondents.

Judgment:—First defendant in O. S. No. 8 of 1923 on the file of the Second Additional Subordinate Judge's Court, Madura, has put in two revision petitions Nos. 86 and 87 of 1924 asking for revision of two interlocutory orders of the Subordinate Judge with reference to inspection of his documents by plaintiff. Interference by this Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good, but in the present case, I think that the revisional powers of this Court must be exercised, partly on the ground that the lower Court has not properly understood the provisions of Order 11, rule 14, of the Civil Procedure Code, and partly on the ground that the result of its orders may be wholly unnecessary and cause irremediable damage to 1st defendant's business interests.

There are two main contentions in the suit —(*a*) that plaintiff is really a partner in 1st defendant's firm and trade, (b) that plaintiff is therefore entitled to a taking of the partnership accounts. In his written statement 1st defendant referred, without giving particulars, to a number of documents on which he proposed to rely. Later on he filed various lists of them at various times and produced about 1,400 documents and put in a final affidavit of documents on 20th September, 1923, in which he prayed the Court that it should not allow inspection of any document by plaintiff without specific orders and without notice to him. On 24th October, 1923, plaintiff, without filing any affidavit, put in a memo, asking for inspection of all documents filed in Court by defendant and followed that up on 1st November, 1923, by an affidavit in which he requested that one Mannar Aiyar be permitted to inspect on his behalf. On that the lower Court on 2nd November, 1923, passed the first order now under revision, permitting plaintiff to inspect 212 documents, but refusing to allow Mannar Aiyar to inspect as he was not a power-of attorney agent for plaintiff.

I cannot assent to the proposition that when a party has produced in Court under Order 11, rule 14, documents in his possession but has urged that inspection should not be allowed before hearing his objections, the Court has a right to ignore that protest and the other party has a legal right to inspect all documents relating to all issues and to all stages of the trial of the suit, *i.e.*, that the mere production by one party gives an immediate and indefeasible right of inspection to the other. I do not read Order 11, rule 14 as justifying any such

conclusion. As the Court was proceeding according to the usual practice in the moffussil, to allow inspection in Court under Order 11, rule 14, and not under rule 15, I hold it was bound to consider 1st defendant's objections to inspection and especially bound to consider whether plaintiff was entitled to inspect all these documents *at that stage of the case, viz.*, before trial had begun. As pointed out above, the first point to be decided in the case is, whether plaintiff is or was a partner in 1st defendant's trade. Until that is decided, in plaintiff's favour, obviously plaintiff has no right whatever to be allowed to inspect the trade accounts, apart from those which bear on the question of partnership. The Court has no right to assume that plaintiff is a partner, and, if it must hold that he is not unless and until he proves that he is, clearly it is unjustified in law in allowing a stranger, merely on the allegation that he is a partner, permission to inspect all the trade accounts of 1st defendant. The conduct of business would be impossible under such conditions and the Court has clearly lent itself to a course which is wholly opposed to public policy, and it is therefore necessary for this Court to interfere.

On this part of the case then, *viz.*, on C. R. P. No. 87 of 1924, the proper order is that plaintiff cannot be allowed, unless and until he has established that he is a partner, to inspect any documents which do not bear on this question of partnership, and that as regards documents which do bear on it the lower Court must hear 1st defendant's objections before it passed its order. If and when plaintiff has established his partnership, then the lower Court will similarly consider if plaintiff is entitled to inspect the remaining documents. I reverse the order under revision in C. R. P. No. 87 of 1924 and order accordingly.

In C. R. P. No. 86 of 1924 the lower Court has still further wandered from what I regard as the first principles of public policy. Following on its order of 2nd November, 1923, it passed a further order on 1st December, 1923 permitting Mannar Aiyar to inspect all 1st defendant's documents (Mannar Aiyar having by then obtained a power-of-attorney from plaintiff) provided plaintiff undertook not to examine Mannar Aiyar as a witness. Plaintiff in his turn has filed C. R. P. No. 116 of 1924 against the imposition of this condition. Now without going into the details of affidavits on the relations of 1st defendant and Mannar Aiyar, the following points are clear :—(*a*) this Mannar Aiyar was employed in 1st defendant's firm for at least 20 years from 1898 to 1918, writing up and keeping the firm's accounts; (*b*) he left 1st defendant's service in 1918 and reverted to plaintiff's side in the dispute between the plaintiff and 1st defendant and is now actively supporting plaintiff under circumstances which indicate that he is personally ill disposed towards 1st defendant; and (*c*) that plaintiff wants Mannar Aiyar to inspect the accounts and Mannar Aiyar himself wants to inspect them because he already knows the firm's business so thoroughly that he will be able to detect if there has been any tampering with the accounts.

As *supra*, the Court is for the present to assume that plaintiff is an outsider to the firm, who has been able to gain over to his side a disgruntled former employee of 1st defendant and has given him a power-of-attorney for the express purpose of setting him to a roving inspection of 1st defendant's accounts and this is what the lower Court is permitting him to do. Such a course seems to me in the highest degree objectionable and contrary to public policy. That any outsider by mere allegations in a plaint should be able to obtain from a Court the power of inspection of all firm's books by a former employee of the firm who knows the firm's business for over 20 years and who is employed by the plaintiff for the purpose of that inspection, not because of his skill as accountant and auditor, but because of his exclusive and intimate acquaintance with all the firm's business, is a position that cannot be defended, and to permit it would be to put an end altogether to any privacy and confidential dealings in business.

The various rulings of English Courts which have been cited to me clearly establish the proposition that a Court can and must exercise discretion as to whom it is going to permit to conduct such an inspection and the case in *Enamul Huq* v. *Ekramul Huq* (1) is to the same effect. The absence of a power-of-attorney (as in that case) does not alter the personality of the proposed inspecting agent. I am

(1) (1897) 25 Cal. 294.

strongly of opinion that, until and unless plaintiff establishes that he is a partner of the firm, Mannar Aiyar is, from his previous connection with the firm, a wholly undesirable person to allow to inspect the accounts for plaintiff. If, however, plaintiff establishes that he is and was a partner, then as such partner he is entitled to the fullest scrutiny and knowledge of the firm's accounts and affairs, and the objection to an inspection of all the firm's books on his behalf by Mannar Aiyar, who would then in his connection with the firm have been servant of plaintiff as much as of 1st defendant, would disappear.

I must therefore reverse the order under revision in C. R. P. No. 86 of 1924 also and order that unless and until plaintiff establishes his plea of partnership, inspection on his behalf by Mannar Aiyar cannot be permitted and such inspection as the lower Court permits must be by some one else.

First defendant will get his costs on both these petitions. C. R. P. No. 116 of 1924 is dismissed with costs, Rs. 50 being allowed for printing.

I must impress on the lower Court that such a privilege as inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself, but with reference also to the stage of the case at which such right is to be permitted, and that it is to be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.

Order reversed.

1924 Madras 848.

PHILLIPS, J.

Muthusami Naidu—Plaintiff-Appellant.

v.

Rayalu Naidu—Defendant-Respondent.

Second Appeal No. 1041 of 1921, decided on 31st March, 1924, against the decree of the District Court of Trichinopoly, in A. S. Nos. 226 and 246 of 1920, dated 21st January, 1921.

Contract Act, S. 146 — Liability to allow co-surety benefit of counter-security.

Where one surety has received from the principal debtor a counter-security for the liability which he undertook jointly with the plaintiff, he is liable to bring in for the benefit of his co-sureties, whatever he has received from that source. *Steel* v. *Dixon* (1881) 17 Ch. D. 825, *relied on.* [P. 848 C. 2.]

K R. Narayanaswami Aiyar for T. Narasimha Aiyangar—for the Appellant.

V. C. Seshachariar—for the Respondent.

Judgment:—In this case the plaintiff, the defendant and one Subba Konar were sureties for one Muthukrishna Naidu, in respect of two promissory notes for Rs. 500 each. Subsequently the defendant obtained a hypothecation bond from the principal debtor, Muthukrishna Naidu, for Rs. 3,500. Part of the consideration was an undertaking by the defendant to discharge the promissory notes for which he and the plaintiff were jointly sureties. Subsequently a suit was filed on these promissory notes, and a decree was obtained and in execution, Rs. 615 was realised from the plaintiff. Meanwhile the defendant obtained a decree on his hypothecation bond and has purchased most of the properties belonging to the mortgagor. The plaintiff's suit is to recover the money which he had to pay on account of the suretyship. The District Munsif decreed the suit on the ground that the defendant having undertaken by the hypothecation bond B-1 to discharge the promissory notes was bound to contribute the money to the plaintiff. The District Judge on appeal has dismissed the plaintiff's suit on the ground that it was based on unfounded representations and arrangements and was misconceived. On the finding that the defendant has received from the principal debtor a counter security for the liability, which he undertook jointly with the plaintiff, he is liable to bring in, for the benefit of the plaintiff and his co-sureties, whatever he has received from that source. This principle is laid down in *Steel* v. *Dixon* (1) and it is not suggested that the above facts would not be applicable in this case. In neither of the lower Courts does this particular aspect of the case seems to have been considered, although apparently there were the necessary materials for it. It is now argued for the respondent that certain other facts might have been elicited if the parties had known exactly the case they had to meet. In view of the fact

(1) (1881) 17 Ch. D. 825.

that the plaint is not very clearly drafted, and does not in terms contain the plea which is taken here, I think it is only fair to the defendant to give him an opportunity of meeting the case, by adducing further evidence, if he thinks fit. The District Judge's decree is set aside and the appeal is remanded for fresh disposal. If necessary the Judge can send it back to the trial Court for further evidence.

Costs to abide the result. Court-fee paid on the second appeal to be refunded.

Appeal allowed: Case remanded.

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*1924 Madras 849.

KRISHNAN, J.

I. Brahmayya Lingam — Plaintiff-Appellant

v.

Kamisetti Mallamma alias *Kanakamma* and *another* — Defendants-Respondents.

Second Appeal No. 1058 of 1921, decided on 14th March, 1924, against the decree of Sub-Judge of Kistna at Ellore, in A.S. No. 374 of 1920.

Justice, equity and good conscience.

Transferee of property for illegal purpose cannot get transfer annulled if intended purpose has been carried out—Contract Act, S 24. [P. 849, C. 2.]

V. Ramadoss and *V. Krishna Mohan*—for Appellant.

A. Venkatarayaliah and *L. Venkatanarasiah*—for Respondents.

Judgment:—In this case, the plaintiff sues to recover certain items of property which he conveyed to the 1st defendant under Exhibit I. The finding of the lower Court is that though a consideration of Rs. 800 is recited in it and it purports to be a sale for that consideration, the transaction was really one by which the plaintiff made a gift of the property to the 1st defendant for past cohabitation and for future cohabitation with her, which she promised. The plaintiff is the appellant before me and the contesting defendant is a transferee for value from the 1st defendant. The 1st Court decreed the suit in favour of the plaintiff, holding that the sale to 1st defendant by the plaintiff was an invalid transaction, as the consideration was an immoral and illegal one and that the 2nd defendant was a transferee for value, but with notice and was thus not a *bona fide* purchaser. On appeal the Subordinate Judge, though he agreed in the first finding that the consideration for the sale was past and future cohabitation of the woman with the plaintiff, he held that it was not shown that the 2nd defendant was not a *bona fide* purchaser and hence he dismissed the suit against him. In second appeal, it is contended before me that in deciding the 2nd point, the Subordinate Judge has laid the burden of proof wrongly on the plaintiff and that the 2nd defendant should have been called upon to prove that he was a *bona fide* purchaser. But before considering this question, it is necessary to decide what plaintiff's rights are on the finding that the sale-deed Exhibit I was for past and future cohabitation. The sale, no doubt, is invalid but it is a different question whether any relief should be given to the plaintiff in the circumstances of the case, even as against the 1st defendant. There can be no doubt that if the principles laid down in *Ayerst* v. *Jenkins* (1) apply, the plaintiff cannot set aside this transaction as he was a party to it. The principle of that case was given effect to in a very similar case in *Deivanayaga Padayachi* v. *Muthu Reddi* (2), where it is laid down that it is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out. There can be no doubt that, in the case before me, the purpose has been carried out as part of the consideration was for future cohabitation and the woman continued as a concubine of the plaintiff for at least six or seven months after the sale deed was executed. On the other side, my attention has been drawn to the ruling in *Thasi Muthukannu* v. *Shanmugavelu Pillai* (3), where it was laid down that the plaintiff there, who was a young and inexperienced man and assigned to the defendant, a dancing girl, a mortgage for Rs. 1,500, the consideration stated in the deed being payment in cash and jewels to the plaintiff and the discharge by the defendant of debts due by the plaintiff, was entitled to have the assignment set aside, on the ground that no consideration really passed as recited therein, but

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(1) (1873) 16 Eq. 27 = 42 L J. Ch. 690 = 29 L.T. 126 = 21 W R. 878.

(2) (1921) 44 Mad. 929 = 12 L W. 291 = (1920) M.W N. 547 = 39 M.L.J. 525 = 59 I.C. 1003 = 28 M.L.T 265.

(3) (1905) 28 Mad. 413 = 15 M.L.J. 286.

that the real consideration was the future continuance of immoral relations between himself and the sister of the defendant. The attention of their Lordships was drawn to the case in *Ayerst* v. *Jenkins* (1), but their Lordships were of opinion that the case related only to gifts of property and that the principle laid down by Lord Selbourne in it would not apply to cases of sales and assignments like the one they were dealing with. They were in that case able to hold that the transaction was not a gift but a sale. Whether that is right or wrong I need not pause to consider and I need not also consider whether their Lordships' ruling that the case in *Ayerst* v. *Jenkins* (1) should be confined to cases of gifts alone and would not apply to cases of sales and other transfers, should be followed or not; for, I think that the present case is distinguishable from that case. Here it is perfectly clear that the transaction between the plaintiff and the 1st defendant was in reality a gift and nothing else. According to the plaintiff, the transfer was without any consideration whatsoever and the recital of consideration in the document was a false recital. In fact, his case was that he made over the property to the 1st defendant, solely in consideration of her past cohabitation and future cohabitation with him and that it was not intended that he should receive any other consideration for the transfer. It follows therefore that even if the way in which *Thasi Muthukannu* v. *Shunmugavelu Pillai* (3) distinguishes the case of *Ayerst* v. *Jenkins* (1) is correct, this case fails. The principles recognised in *Ayerst* v. *Jenkins* (1) are followed in the case of *Deivanayaga Padayachi* v. *Muthu Reddi* (2). In *Thasi Muthukannu* v. *Shunmugavelu Pillai* (3), it must also be noted that their Lordships do not express a confident opinion but say at page. 419:

"Even if this conclusion (that is, the case of *Ayerst* v. *Jenkins* (2) is confined to a case of gift) were not right, it must be held that the case of the plaintiff is hardly one in which he can be said to be *in pari delicto*."

They were able to arrive at that conclusion, on a consideration of the fact that the plaintiff in that case was a youth of about 20 years of age and that the assignment was brought about by the influence of persons acting in complicity with the defendant and her sister, who led the plaintiff into evil ways. There is no such evidence in this case. The plaintiff is a man of about 30 or 31 and on the facts here, it cannot be said in any way that he was not in *pari delicto* with the 1st defendant in this transaction. That being so, his case even as against the 1st defendant should have failed. It is not necessary therefore to consider whether, if the plaintiff was entitled to succeed against the 1st defendant, he could succeed against the 2nd defendant. The question whether the 2nd defendant was a purchaser for value without notice does not really arise.

The second appeal is dismissed with the costs of the 2nd defendant.

Appeal dismissed.

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* 1924 Madras 850.

RAMESAM, J.

E. Sundaram Chetty, and another—Appellants

v.

B. Damodaram Chetty and another—Respondents.

City Civil Court Appeal No. 123 of 1923, decided on 31st March, 1924, against the decree of the City Civil Court, Madras, in Original Suit No. 156 of 1923:

Evidence Act, S. 92—In suit on promissory note, defendant can plead that it was only a security for future advances—Promissory note.

In a suit on a promissory note, it is open to the defendant to plead that the note was not executed for cash or other consideration but was executed only as a security to cover the advances to be made by the payees and that they (the defendants) are liable only for such sums as may be found due on taking accounts between the parties. [P. 850, C. 2 and P. 851, C. 2.]

W. V. Rangaswamy Aiyangar—for Appellants.

A. Srinivasa Aiyangar—for Respondents.

Judgment:—This appeal arises out of a suit on a promissory note. The defendants are the son-in-law and wife of one Errappa Chetty and their plea was and is that the note was not executed for cash or other equivalent consideration but was executed only as a security to cover the advances to be made by the payees B. Kuppuswamy Chetty and Sons to Errappa Chetty and that they are liable only to such sums as may be found due on taking accounts between the payee firm and Errappa Chetty. The City Civil Judge without taking the evidence tendered by the defendants, decreed the suit. The

exact legal ground on which he refused to take evidence is not clear. At one place he remarks that the suit note is a negotiable instrument. The plaintiffs being the trustees in bankruptcy of the payee firm are not holders in due course. Again he says "I do not see how I could direct the taking of accounts between him (*i. e.*, Errappa Chetty) and the plaintiffs." I do not see what the difficulty is. In paragraph 4, he suggests that the defence is extraordinary. I do not think so. It is a common thing for a borrower from a banker giving a promissory note to cover over drawings from the banker by himself or by another. The circumstances relating to the payment of Rs. 500 (Five hundred) can be considered only after the defendants adduce all their evidence including that relating to the payment.

Before me, the learned vakil for the respondents, Mr. A. Srinivasa Iyengar contended that the plea is not admissible under section 92, Indian Evidence Act. I do not agree. Cases deciding that it is not open to one of two or more joint makers of a note to plead that he is only a surety have no bearing on this, for, here, the plea is not that the defendants are mere sureties, for they admit their liability on the taking of the accounts, but plead want of consideration.

In *Subbayya* v. *Subarayulu Iyer and Son* (1), the consideration was admitted but the respondents pleaded an agreement by which, if the mills excused the plaintiffs should excuse the defendants. This is different from a plea of want of consideration. So also, in *Visnu Ram Chandra* v. *Ganesh Krishna* (2) the consideration was admitted but the plea was that the plaintiff agreed not to present the note until he paid off some encumbrances. In *Sri Ram* v. *Sobha Ram Gopal Rao* (3) the note was for sums due on accounts and stated that the accounts had been looked into. The plea was that the accounts should be reopened. Here also the note was for an existing (and not a future) consideration such as advances to be made. In *Hill* v. *Wilson* (4) it was found that, though the father-in-law wished to make a gift, the son-in-law insisted on a loan. The loan was admitted but the plea was that only interest should be paid during the lifetime of the payee. This was rightly held inadmissible. In *Kishomal Kirpomol* v. *Kishindas Sukramdas* there was no defence to the note itself but the suit was objected to on the ground that it is an item of dealing between the parties who were partners and the whole partnership account should be taken. This has no resemblance to the defence before me.

I think the defendant's plea is legally open to them. The onus is on them and their evidence will have to be taken. I reverse the judgment and decree of the Court below and remand the suit for disposal according to law.

Costs to abide the result. Court-fee paid by appellants will be refunded.

Case remanded.

(1) (1921) 41 M.L.J. 541 = (1921) M.W.N. 626 = 68 I.C. 758.
(2) (1921) 45 Bom. 1155 = 63 I.C. 673 = 23 Bom. L.R. 489.
(3) (1922) All. 213 = 44 All. 521 = 20 A.L.J. 315.
(4) (1873) 8 Ch. 888 = 42 L.J. Ch. 817 = 29 L.T. 238 = 21 W.R. 757.

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* 1924 Madras 851.

JACKSON, J.

Pulipati Venkiah — Accused-Petitioner.

Cr.R.C. No. 1 and Cr. R.P. No. 1, of 1924, decided on 5th August, 1924, against the judgment of the Sub-Divisional Magistrate of Guntur, in C.C. No. 121 of 1923.

Penal Code, S. 161—Motive of accused must relate to official act.—What is departmentally reprehensible merely is distinct from what is criminal—Karnam taking bribe for getting darkhast commits no offence.

In a charge under S. 161, it must be shown that the accused took the bribe as a motive for doing an official act.

There is a nice distinction between what is criminal and what is departmentally reprehensible.

Receiving a bribe of Rs. 20 from a villager on the understanding that the accused would get him some land on darkhast in his capacity as Karnam is no offence as getting darkhast is not the official act of a Karnam. [P. 852, C. 1].

Dr. Swaminathan—for Petitioner.

The Public Prosecutor—for Crown.

Order:—The petitioner has been sentenced to six months' rigorous imprisonment and a fine of Rs. 100 for "receiving a bribe of Rs. 20 from a villager on the understanding that he would get him some land on darkhast in his capacity as Karnam, an offence punishable under section 161, Indian Penal Code (*vide* 'Charge')."

The villager (prosecution 1st witness) says that he gave the Karnam Rs. 20 as he promised that he would get Government land for him. He got the land but only half as much as he expected. The learned Sessions Judge takes the complaint to be that the Karnam was given the bribe in the hope that he would recommend the grant of land. He managed to convince the parties that the land was as good as got, and so the charge is proved that the Karnam promised to get the land for the villager.

It is difficult to say from all this exactly what the Karnam is supposed to have done. In a charge under section 161, Indian Penal Code, it must be shown that the accused took the bribe as a motive for doing an official act. But getting darkhasts is not the official act of a Karnam. He may have cheated the villager into thinking that he was the official who granted darkhasts; but that does not come out clearly from the evidence, and the Sessions Judge seems to be right in holding that only his recommendation was bought.

But even if the charge had run that in his capacity of Karnam he would recommend the darkhast, that still would not be an official act. He might have been charged perhaps with offering to influence the Tahsildar or some higher official, but it is not clear on the facts that he ever did so offer. Anyhow a charge that a Karnam took a bribe as a reward for doing the official act of granting darkhasts in the capacity of Karnam cannot stand, and this proposition is not controverted on behalf of the Crown. It was not made clear to the petitioner what criminal offence he had committed and the conviction must be quashed. There is a nice distinction between what is criminal and what is departmentally reprehensible and this distinction must be carefully borne in mind. A public servant can only be punished under the Penal Code when his act fulfils all the conditions of an offence as therein defined.

I allow this petition and reverse the sentence. The fine to be refunded. The petitioner's bail is released.

Petition allowed: Sentence reversed.

* 1924 Madras 852.

MADHAVAN NAIR, J.

Manjunath Shanbhaga—Plaintiff-Appellant.

v.

Samayya and others—Respondents.

S. A No. 1284 of 1921, decided on 8th July, 1924, against the Decree of Subordinate Judge of South Kanara, in A.S. No. 30 of 1921.

Transfer of Property Act, S. 72—Usufructuary mortgagee being assigned "to avoid litigation," prior mortgage without personal covenant, is not entitled to interest on account of prior mortgage.

Where a prior mortgage which contained no personal covenant was transferred to a usufructuary mortgagee "to avoid the trouble of litigation."

Held that the usufructuary mortgagee was not entitled to interest on the amount of the prior mortgage from the date of the transfer. [P. 853, C. 1.]

B. Sitarama Rao—for Appellant.

K.Y. Adiga—for Respondent.

Judgment:—The plaintiff appellant is transferee of the suit properties from the original mortgagors. He seeks to redeem a usufructuary mortgage (Exhibit A.) dated the 16th of June, 1875, executed to the 1st defendant's father. There was a prior mortgage over the same properties (Exhibit B.) dated the 24th January, 1872 for Rs. 320. By means of Exhibit D, dated the 20th of August, 1877, this was transferred to the 1st defendant's father. Exhibit B does not contain any personal covenant.

The only question arising in this second appeal for decision is whether the plaintiff is bound to pay the 1st defendant interest under the mortgage Exhibit B, from the year 1877 up to the time of redemption. The lower appellate Court has held that the 1st defendant is entitled to get interest on the strength of the decisions in *Kirat* v. *Debi Singh* (1) and in *Abdul Qayyam* v. *Sadr-ud-din Ahmed Khan* (2). It is unnecessary to discuss the applicability of these decisions to the facts of this case as the learned Vakil for the respondents has very fairly stated that these decisions do not lend him any support; and he seeks to support the judgment on other grounds which I shall presently notice. It seems to me that both on principle and on authorities it is not

(1) (1905) 27 All. 308 = (1904) A.W.N. 268.
(2) (1905) 27 All. 403 = 2 A.L.J. 23.

incumbent on the appellant at the time of redemption to pay the interest claimed by the defendant in this case. The cases in *Ramkrishna Kukkilaya* v. *Nekker Kuppayanna* (3), *Kesar Kunwar* v. *Kashi Ram* (4) *Athankutti* v. *Subhadra* (5), *Ramiray aningar* v. *Maharajah of Venkatagiri* (6) *Kunhimaikutty Beari* v. *Halkote Aisabi* (7) and *Narain Rao* v. *Shiva Rao* (8) cited by Mr. Sitarama Rao, the learned Vakil for the appellant, show that the transferee from the mortgagors at the time of redemption is not bound to pay a claim for interest which has become barred by limitation. In this case even if there is a personal covenant, the right to enforce it is admittedly barred. Apart from this, it seems to me that since the mortgagee has been in enjoyment of the property, he must be considered to have realized the interest from out of the profits of the property, and a mortgagor in such cases seeking to redeem the property can be compelled only to pay the mortgage money. I think, therefore, the mortgagee in this case is not entitled to get interest on the principal amount of Rs. 320 from the year 1877.

Mr. Adiga, the learned Vakil for the respondents, has tried to support the lower Court's judgment on two grounds. Firstly he has relied upon section 72, clauses (*b*) and (*d*). Obviously clause (*d*) does not apply, and as regards clause (*b*) it is only the last part of it that is pressed into service in support of the argument. According to the arguments of Mr. Adiga, the amount claimed by the 1st defendant must be considered to have been the amount spent by him in preserving the property from sale; and this is sought to be supported by reference to a fact that is found mentioned in the transfer deed to the effect that the transfer was made "to avoid the trouble of litigation," and reference to a possibility of litigation is found in the written statement also.

Mr. Adiga argues that, if the prior mortgagee's possession is disturbed as it must be considered to have been in this case when the second mortgage was executed, he is entitled to bring a suit, and all these complications were put an end to by the first defendant taking an assignment of the first mortgage. This is altogether a new argument and opens up a new line of defence which had not been considered by the lower Courts with reference to the facts of the case. One cannot say whether the reference to litigation vaguely mentioned in the assignment deed and in the written statement would really have led to the sale of the property and whether it would have been necessary to make any payment for preserving the property from such sale. I cannot deal with this argument without the findings of the lower Court on facts involved in it, and I, therefore, cannot allow the learned Vakil for the respondents to raise this argument for the first time in second appeal. Since the argument was not even faintly suggested in either of the Courts below and since sufficient facts do not appear on the record to support it except the vague reference in the assignment deed and the written statement, I do not think that I would be justified in framing an issue about the question that is now raised and calling for a finding upon it from the lower Court.

The second argument of Mr. Adiga is this that since the usufructuary mortgagee under Exhibit A has to realize his interest from the profits of the property, it cannot be imagined that the same amount of profits will be enough to pay for the interest on the first mortgage as well; and therefore it must follow that provision has to be made for this interest at the settlement of accounts during the time of redemption. No authority is cited in support of this proposition. Reference in this connection is made to the last sentence in Exhibit D, which says that "you (the mortgagee and transferee) should recover the consideration of the said mortgage due to me from the Mulgars together with interest *being the value of* (translated in Court as in "return for") the produce commencing from the current year". The meaning of this sentence is not very clear. It does not in my opinion authorise the transferee to ask the Mulgars (mortgagors) for the interest. The sentence in my view means that the transferee should get the consideration of the mortgage from the Mulgars and interest from the value of profits. It has also to be

(3) (1918) M.W.N. 75=6 L.W. 621=33 M.L.J. 581=22 M.L.T. 422=43 I.C. 286.
(4) (1915) 37 All. 634=30 I.C. 777=13 A.L.J. 389.
(5) (1917) M.W.N. 9=32 M.L.J. 317=37 I.C. 756 =5 L.W. 461.
(6) (1921) 44 Mad. 301=12 L.W. 695=28 M.L.T. 234=61 I.C. 612=40 M.L.J. 236.
(7) (1921) 13 L.W. 434=62 I.C. 723.
(8) (1918) 41 Mad. 1043=35 M.L.J. 414=24 M.L.T. 370=8 L.W. 405=49 I.C. 123=(1918) M.W.N. 917.

remembered that the plaintiff is not a party to this document.

Under these circumstances, I set aside the decree of the lower Court awarding interest to the respondents. In other respects the decree of the lower Court will stand. Time for re-redemption is extended to three months from this date. The parties will pay and receive proportionate costs in this Court.

Decree varied.

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* 1924 Madras 854.

DEVADOSS, J.

Authinarayana Aiyar and others—Defendants-Appellants

v.

A. Krishnaswami Aiyar—Plaintiff-Respondent.

Second Appeal No. 279 of 1922, decided on 16th July, 1924, against the decree of the Court of the Sub Judge of Mayavaram, in A. S. No. 56 of 1920.

(a) *Transfer of Property Act, S. 55 (4) (b)-Vendor's acceptance of bond by vendee to pay purchase-money on happening of given event does not exclude vendor's charge for unpaid purchase-money.*

Where the arrangement is that vendee should execute a bond for the unpaid purchase money, undertaking to pay the amount, on the happening of a certain event, it cannot be said that the vendor accepts the bond, as consideration for the price of the property sold, so as to exclude the statutory charge in favour of the unpaid vendor. [P. 854, C. 2.]

(b) *Limitation Act, Art. 132.*

Suit to enforce statutory charge for unpaid purchase-money should be brought within 12 years of the sale unless parties have by proper instrument clearly expressed their intention to extend the period. [P. 854, C. 2.]

K. Bashyam Aiyangar and *P. J. Kuppanna Rao*—for Appellants.

T. V. Muthukrishna Aiyar and *V. Sundaresa Aiyar*—for Respondent.

Judgment:—The first question argued in this second appeal was that Ex. B. was the consideration for Ex. A; and the plaintiff was not entitled to claim a statutory charge for the unpaid purchase money. From a perusal of Exs. A and B, it is clear that the vendor did not accept Ex. B, as consideration for the sale. According to Exs. A and B, the arrangement was that the vendee should execute a bond for the unpaid purchase-money, undertaking to pay the amount, on the happening of a certain event namely, the attaining of majority of Dharmaraja Iyer. It cannot be said that the vendor accepted the bond, as consideration for the price of the property sold. The vendee undertook to pay the price of the land sold to him, on the happening of a certain event. I find against the appellant, so far as this contention is concerned.

The next contention is that the suit is barred by limitation, as more than 12 years have elapsed from the date of the sale. The plaintiff's case is that he had a statutory charge; and by Ex. B, the date of payment was fixed as 17th July, 1905 and that he therefore has 12 years from that date. The plaint was filed no doubt within 12 years from that date. But the real question is whether in the case of statutory charge for unpaid purchase-money, the vendor can claim the purchase-money more than 12 years after the date of sale. It is settled law that in the case of a claim for unpaid purchase-money, article 132 of the Limitation Act applies: *vide Ramakrishna Ayyar* v. *Subrahmania Ayyen* (1). The further question is when does the money become payable? The 3rd column of the first schedule against article 132 contains the words: "When the money sued for becomes due." The price of the land sold is payable on the date of the sale. So the money becomes payable to the vendor on the date of the sale. The suit therefore has to be brought, within 12 years from the date of the sale.

On behalf of the plaintiff it is urged that Exs. A and B should be considered as parts of one transaction, and by Ex. B, time for payment was postponed and that therefore the plaintiff's suit is within the period of limitation. No doubt in the case of a contract between two persons, it was open to the obligor to extend the period of limitation by a subsequent document. But in this case, the charge was not created by the act of the parties. The charge was a statutory charge and unless the parties clearly expressed their intention to extend the period of limitation by a proper instrument a document like Ex. B cannot extend the period of limitation given by law. The respondent relied upon a judgment of this Court, in *Kavanoor Velayuda Reddy* v. *Reddyvari Narasimma Reddy* (2). I do not see how that case can help the

(1) (1906) 29 Mad. 305.
(2) (1917) 21 M.L.T. 105=5 L.W. 111=39 I.C. 240=32 M.L.J. 263.

plaintiff. There the charge or mortgage was created by the act of the parties; it was open to the parties to vary the terms of a prior document by a proper subsequent instrument. Here as I have said, the charge is given by law and the parties cannot extend the time given by law for the enforcement of such a charge, by simply putting off the date of payment. As I said, it was open to them to create a charge by a proper document and fix a period for the payment of the amount due. Ex. B is not such a document and therefore the contention of the appellant ought to prevail.

In the result, I allow the appeal and dismiss the plaintiffs' suit with costs throughout.

The memorandum of objections is dismissed, but without costs.

Appeal allowed.

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* 1924 Madras 855.

PHILLIPS and ODGERS, JJ.

Yellappa—3rd Defendant-Appellant.

v.

Golla Swami and others—Plaintiff and Defendants 1, 2, 4 and 5-Respondents.

Appeal against Order No. 311 of 1922, decided on 12th February, 1924, from the Order of the Subordinate Judge, Kurnool, in A. S. No. 14 of 1922, dated 30th March, 1922.

Hindu Law—Will—Construction — Devise to son's daughter in terms—"You shall enjoy after my death all properties moveable and immoveable" passes absolute estate.

Where words used are sufficient to create absolute estate there is no presumption that a woman, even the testator's widow takes only a life-estate.

Where a Hindu bequeathed his properties to his son's daughter, by a will in the following terms :—

"You shall enjoy after my death all the properties moveable and immoveable.....You can enjoy all the said properties attending to my obsequies after my death and settling the matters of the debts, etc., incurred by me."

***Held* that the will conferred an absolute estate, and that where the words used were sufficient to create an absolute estate, there was no presumption with regard to a distant female connection or even the testator's widow that a gift or immoveable property passed only a life estate.. *Held further* where the language of a will is clear and consistent, it should receive its literal construction unless there is something in the will itself to suggest a departure from it. The question is really whether the words used are of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership. [P. 855, C. 2 and P. 556, C. 1.]**

B. Sitarama Rao—for Appellant.

Krishna Arya and *Veeraraghavalu*—for Respondent.

Odgers, J. :—In this case, I have to determine the quantum of interest taken by the son's daughter of the testator by his will Ex. A. The operative words are :—

"You shall enjoy after my death all the properties moveable and immoveable" ..... "You can enjoy all the said properties attending to my obsequies after my death and settling the matters of the debts, etc., incurred by me."

The testator further recites that the properties left by him are his divided properties. The District Munsif has held that the legatee took an absolute estate and the Subordinate Judge that only a life-estate was taken. The reason for the latter decision are first that the word 'enjoy' could not confer an absolute estate, and secondly that as the legatee is a female, there is no presumption that she takes an absolute estate by the word 'enjoy'. In the case in *Gurusami Pillai* v. *Sivakami Ammal* (1), the words were "shall enjoy for their lives" as opposed to "shall enjoy the whole property." The expressions were applied to females and the Privy Council laid down that where the language of a will is clear and consistent, it should receive its literal construction unless there is something in the will itself to suggest a departure from it. In *Kamarazu* v. *Venkataratnam* (2), the will applied to daughters, who were directed to take possession of certain immoveable properties and "enjoy the same happily as they please" It was held that the daughters took an absolute estate there being nothing in the instrument or surrounding circumstances to point to an intention to limit the gift to a life-estate. The question is really whether the words used are in the language of the Privy Council *Ramachandra Rao* v. *Ramachadra Rao* (3) explaining *Surajmani* v. *Rabi Nath Ojha* (4) "of sufficient amplitude

(1) (1895) 18 Mad. 347=22 I.A. 119=5 M.L.J. 106=6 Sar. 610 (P.C.).
(2) (1897) 20 Mad. 293.
(3) 1922 P.C. 80=45 Mad. 320=49 I.A. 129=30 M.L.T. 154=35 C.L.J. 545=16 M.L.W. 1=(1922) M.W.N. 359=26 C.W.N. 713=20 A.L.J. 694=24 Bom. L.R. 963=43 M.L.J. 78 (P.C.).
(4) (1908) 30 All. 84=35 I.A. 17=5 A.L.J. 67=12 C.W.N. 231=18 M.L.J. 7=10 Bom. L.R. 59=7 C.L.J. 131=3 M.L.T. 144 (P.C.).

to convey in the terms of the gift itself the fullest rights of ownership, etc." In my opinion they are. The words are not cut down in any way and there is no disposal of the residue as would be usual if only a life-estate were intended. The testator says he has no male issue and apparently there was nobody at all nearly connected with him save the legatee. The surrounding circumstances do not therefore point to any such limitation or restriction. Further there is the direction to pay the debts, etc. These would probably have to be paid by realising the immoveable property or some portion of it, which the holder of a mere life-estate could not do. I think there is no doubt that the words used are capable of passing an absolute estate.

The question remains whether there is anything against such a construction of the words from the fact that the legatee is a woman. It is contended that it must be presumed that the testator intended to confer a life-estate as that would be consonant with his notions as to the quantum of interest a woman would ordinarily take. In *Ramachandra Aiyar* v. *Parameswaren Unni* (5), which was on a different point reversed by the Privy Council, Wallis, C.J., stated that the trend of later decisions here, *i e.*, since *Sambasiva Aiyar* v. *Venkataswara Aiyar* (6), is against making any assumption that only a widow's estate should pass in the absence of any indication to give a larger estate and that the rule in *Mahomed Shumsool* v. *Shewukram* (7), which construed the intention of the testator to have been against the gift of an absolute estate is a rule of construction only to be applied where there is some uncertainty or ambiguity in the language of the instrument. As Seshagiri Iyer, J., pointed out in the same case, the decision of the Privy Council in *Surajmani* v. *Rabi Nath Ojha* (4) shows that their Lordships thought that no difference should be made between a male and a female provided the words of gift are sufficiently clear to convey the property. The same learned Judge in *Namasivayam Pillai* v. *Kuthalalingam Pillai* (8) held that if apt words are used no matter who the transferee is, whether male or female, the estate conveyed would be an absolute one. Further, it is to be noted that the legatee, in this case, is not an heir in the ordinary sense. In *Ramasami* v. *Papayya* (9) the presumption relied on in argument that a gift to a female is only a life-estate was rejected, it not being shown that the female legatee was a widow, when her father gave his property to her. In *Atul Krishna Sirkar* v. *Sanyasi Churn Sircar* (10), a single learned Judge of the Calcutta High Court held that such a presumption did not exist in the case of a mother, but only in the case of a widow. With this I am disposed to agree, subject however to this, the presumption may even in the case of widows be rebutted by the employment of words of "sufficient amplitude" to create an absolute estate. It is, I think clear, that no such presumption exists with regard to a distant female connexion as in the present case and if, as I hold, the words are sufficient to create an absolute estate, there is no reason from the point of view of Hindu sentiment or intention why it should be cut down to a life-estate.

In my opinion, the Subordinate Judge was wrong on both the grounds and the appeal must be allowed with costs here and in the lower appellate Court.

Phillips, J.:—I agree.

Appeal allowed.

(4) (1916) 5 L.W. 211=41 M.L.T. 30=38 I.C. 840=(1917) M.W.N. 78

(5) (1919) 42 Mad. 360=36 M.L.J. 396=25 M.L.T. 304=9 L.W. 492=50 I.C. 693=(1919) M.W.N. 370.

(6) (1908) 31 Mad. 179=3 M.L.T. 369.

(7) (1874) 2 I.A. 7=22 W.R. 409=14 B.L.R. 226 (P.C.).

(8) (1916) 5 L.W. 211=41 M.L.T. 30=38 I.C. 840=(1917) M.W.N. 78

(9) (1893) 16 Mad. 466=3 M.L.J. 205.

(10) (1903) 31 Cal. 1051=2 C.L.J. 50=9 C.W.N. 784.

1924 Madras 856.

JACKSON, J.

T. Satyanarayanamoorthy— Defendant-Appellant

v.

M. Ramireddy and another— Petitioners-Respondents.

A.A.A. O. No. 100 of 1922, decided on 22nd July, 1924, against the Order of the District Court of Kistna, in A.S. No. 327 of 1920.

Limitation Act, S. 19—Acknowledgment—Debtor's statement that debt is due, but that creditor promised not to proceed against person is an acknowledgment.

Where the debtor's statement was: "The debt due to the creditor was a mortgage debt. It

ripened into a decree. He gave me a letter that he would proceed against the mortgaged properties only and would not proceed against my person," together at the end with :—" These debts are due by me along with others, but they were paid by me alone. I therefore owe no debt to any of my creditors."

Held, that the statement was an acknowledgment, within the meaning of S. 19. [P. 857, C. 1.]

P. Somasundaram and *P. Satyanarayana*—for the Appellant.

G. Lakshmanna—for the Respondents.

Judgment:— This is an appeal from the order of the District Judge of Kistna at Masulipatam, in A.S. No. 327 of 1920, preferred against the order of the Court of the Subordinate Judge of Ellore, in E. P. No. 92 of 1919, in O. S. No. 80 of 1910.

The sole point for determination in this appeal is whether the learned District Judge has correctly held that the statement made by the appellant Exhibit A, amounted to an acknowledgment of liability, within the meaning of section 19 of the Indian Limitation Act, so as to save the bar of limitation.

The statement is as follows :—

"The debt due to the creditor, K. Basava Reddi was a mortgage-debt. It ripened into a decree. It was in O S. No. 80 of 1910, on the file of the Ellore Sub-Court. He gave me a letter that he would proceed against the mortgaged properties only and would not proceed against my person."

At the end of the same statement, he says "These debts are due by me along with others, but they were paid by me alone. I therefore owe no debts to any of my creditors".

There can be no doubt that this must mean that the debt is due to K. Basava Reddi; but in as much as he has undertaken to satisfy it by proceeding against the mortgaged properties only, there is no claim against the person of the appellant. And this is the sense in which it has been taken by the learned Subordinate Judge and the learned District Judge. I agree with them that the deposition is a clear admission that the appellant was in debt to the plaintiff.

The appellant has cited three cases all of which can be distinguished. Firstly, *Hingan Lal* v. *Mansa Ram* (1). There the statement relied upon was merely the fact that the judgment-debtor had been declared liable to pay a certain sum of money by a certain decree. There was no statement that the debt was due. So too in *Muthukumara Mudaliar* v. *Chockalinga Mudaliar* (2) the statement is :

"I am the 3rd defendant. I and the 2nd defendant purchased some land from the 1st defendant. For the balance of price due to her, Ex. A was executed."

It is not stated that any debt under Exhibit A was still due.

And lastly in *Kandasami Reddi* v. *Suppammal* (3), the passage runs thus :—

"The first plaintiff and his brother, the second plaintiff, namely, Suppa Reddy, jointly executed to him (first defendant) on the said date a hypothecation deed for Rs. 200, after deducting the sums paid towards the said *othi* amount of Rs. 275. Along with the said deed, the deed of *othi* executed in the year 1888, and the *othi* deed of 1907 were also given to the first defendant."

Again there is no admission that any debt under these deeds was due.

The rulings lay down that each case is to be considered on its merits and having regard to the exact language used, I have no doubt that in this case, there is an acknowledgment of debt and hence no bar of limitation.

The appeal is dismissed with costs.

Appeal dismissed.

(1) (1896) 18 All. 384 = 1896 A.W.N. 101.

(2) 1923 Mad. 634 = 17 M L W. 674.

(3) 1922 Mad 101 = 45 Mad. 443 = 42 M L.J. 268 = 15 M.L.W. 325 = (1922) M.W.N. 168.

1924 Madras 857.

KRISHNAN AND WALLER, JJ.

S. D. Annamalai Desikar —Petitioner-Appellant.

v.

M. R. Govinda Rao—Respondent-Respondent.

Appeal against Order No. 359 of 1923, decided on 21st November, 1923, against the order of the Addl. Sub-Judge of Madura, dated 21st September, 1924.

Civ. Pro. Code, (V of 1908), O. 39, r. 3—Order for notice—Civ. Pro. Code, O. 43, r. 1 (r).

An order merely ordering notice under O. 39, r. 3, Civ. Pro. Code, is not appealable.

A. C. Sampath Aiyangar—for Appellant.

T. L. Venkataramo Aiyar—for Respondent.

Judgment:—The objection is taken that no appeal lies. The order of the Subordinate Judge is one merely ordering

notice as required by rule 3, Order 39. There is no appeal against such an order under Order 43, rule 1, clause (r).

There is no other provision pointed out, under which an appeal lies. We uphold the preliminary objection and dismiss the appeal against the order with costs.

Appeal dismissed.

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* 1924 Madras 858.

RAMESAM AND REILLY, JJ.

P. Venkobacharlu — Defendant-Appellant.

v.

S. Radabayamma and others—Defts. Nos. 2 and 3 and Plff.-Respondents.

Appeal No. 212 of 1922, decided on 9th July, 1924, against the decree of Sub-Judge, Anantapur, in O.S. No. 6 of 1920.

Civ. Pro. Code, S. 20—Where suit is dismissed, findings in judgments as between co-defendants not embodied nor implied in decree are not res judicata *nor appealable—Civ. Pro. Code, S. 96.*

Though for an appeal to lie, it is not necessary that the finding should be actually embodied in the decree, yet where a suit is dismissed and the judgment contains some findings as between co-defendants which are not embodied in the decree nor implied therein, such findings do not amount to *res judicata* and are not appealable. Case law discussed. [P. 858, C. 2,]

L. A. Govindaraghava Aiyar—for the Appellant.

The Advocate General—for the Respondents.

Judgment:—The 1st defendant is the appellant in this appeal. The appeal relates to findings on certain issues which were raised as between the 1st defendant on the one hand and 2nd and 3rd defendants on the other. The plaintiff sued for partition and the suit was dismissed. The Advocate General appearing for defendants 2 and 3 raises a preliminary objection that no appeal lies. He argues that the findings now complained against by the appellant are not necessarily implied in the decree nor are they embodied in the decree. They have no operative force. He argues that they will not be *res judicata* and the appellant has no right to appeal against such findings when the decree is a decree dismissing the suit.

The learned Vakil for the appellant refers to the cases in *Ranganathan Chetty* v. *Lachimiammal* (1), *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) and *Muthu Pillai* v. *Vedavyasa Chariar* (3). In the first of these cases the decision in the first suit on a point arising between the defendants was necessary for the dismissal of the plaintiff's suit. The matter was therefore *res judicata* in the later suit and the defendant (in the first suit) against whom the Court decided ought to have appealed. This decision does not help the appellant except to this extent, *viz*, for an appeal to lie, it is not necessary that the finding should be actually embodied in the decree. In the present case, Issue 7 could well have been left undecided by the Sub-Judge, if he so chose, and he could have dismissed the plaintiff's suit. The decision on the genuineness of the will is not necessary for the dismissal of the plaintiff's claim. The fact that the Sub-Judge refused to expunge the issue has really no bearing on the matter. At the time he decided to retain it, it was impossible to say how the suit would have ended. We think the Sub-Judge disallowed the costs of the 1st defendant because he thought he instigated the suit and not because of the findings on the issues. The case in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) contains observations about the application of *Run Bahadur Singh* v. *Lacho Koer* (4), which are opposed to the view of this High Court in other cases, e.g., *Keru Nambiar* v. *Chathu Nambiar* (5). Whatever difficulties there may be in reconciling *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) with the latter case, in which it was held that, where the decision is one based on a finding not necessary for the decision of the suit, the finding is not *res judicata* and in applying it to a case between plaintiff and defendant, those difficulties do not present themselves in this case, which is a case of co-defendants. It may be that the case in *Run Bahadur Singh* v. *Lucho Koer* (4) and *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) can

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(1) (1913) 14 M.L.T. 189=25 M.L.J. 379=21 I.C. 15=(1913) M.W.N. 690

(2) (1918) 36 M.L.J. 641=25 M.L.T. 89=52 I.C. 34=(1919) M.W.N. 7=9 L.W. 180.

(3) (1920) 12 L.W. 277=60 I.C. 397.

(4) (1884) 11 Cal. 301=11 I.A. 23=4 Sar. 603 (P.C.).

(5) (1918) 25 M.L.T. 66=9 L.W. 84=52 I.C. 258=(1919) M.W.N. 34.

(6) (1875) 1 Cal. 144=2 I.A. 283=25 W.R. 1=3 Sar. 559 (P.C.).

be reconciled, not on the ground suggested by Sadasiva Aiyar, J. in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2), *viz.*, that *Run Bahadur Singh* v. *Luch Koer* (4) should be confined to a case when the finding is contradictory to the final decree in the case, but on the ground that in *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) an appeal and a second appeal were preferred against the finding, argued without any objection and the appellant having chosen to insist on a decision, is bound by it. This view is supported by *Midnapore Zamindari Co., Ltd.* v. *Kumar Naresh Narayan Roy* (7), where the Privy Council observe that the findings in the earlier suit would not be *res judicata*. In the present case the matter is stronger for the appellant as the finding is between co-defendants. In *Muthu Pillai* v. *Vedavyasa Chariar* (3) Sadasiva Aiyar, J. held that the matter was *res judicata* because there was an appeal against the finding in the first case. It was not between co-defendants.

We are, therefore, of opinion that there is no decree against the 1st defendant—either express or implied—against which it is his duty to appeal and the appeal is, therefore, incompetent. On this ground we dismiss the appeal with costs (on the one-fourth scale, as no notice of objection was given by respondent, subject to the minimum rule).

Appeal dismissed.

(7) (1921) 48 Cal. 460=48 I.A. 49=14 L.W. 265=64 I.C. 231 (P.C.).

1924 Madras 859.

JACKSON, J.

K. Pallayya—1st Counter-Petitioner Plaintiff-Appellant

v.

K. Bhimaraju and another—2nd Counter-Petitioner and Defendant-Respondents.

A. A. A. O. No. 16 of 1923, decided on 1st August, 1924, against the Order of Additional Sub-Judge in A.S. No. 17 of 1922.

(a) *Limitation Act, Art. 181—Applicability.*

Art. 181 applies to application to set aside sale in execution. [P. 859, C. 2.]

(b) *Limitation Act, S. 18.*

Period of limitation for application to set aside execution sale where notice of the sale was fraudulently suppressed runs from the date when the applicant came to know of the sale. [P. 859, C. 2.]

C. Rama Rao—for Appellant.

P. Somasundaram—for Respondents.

Judgment:—Appeal from the order of the Additional Subordinate Judge of Cocanada in Appeal No. 17 (*a*) of 1922 in C. M. P. No. 1390 of 1921 of the Court of the District Munsif of Ramachandrapur.

Petitioner applied to set aside the sale of property sold under the decree in O. S. No. 554 of 1912 of the Cocanada District Munsif's Court. So far as his share is concerned, the lower Courts allowed the application. Counter-petitioner appeals.

The petitioner had been exonerated from the decree, but nevertheless his property was sold and there must admittedly be restitution unless his application can be shown to be time-barred. The sale was in 1915 and the application in 1921. There can be no doubt in the light of *Rajagopala Aiyar* v. *Ramanujachariar* (1) that Art. 181 of the Limitation Act applies and petitioner will be time-barred unless he has pleaded and establi hed facts which save him from the bar. agree with the appellant that he cannot set up a new case in appeal but the point for determination is whether that was actually done, and whether a case under section 18, Indian Limitation Act, has been established. In the 5th paragraph of his petition, the petitioner sets forth that in spite of the compromise which exonerated him from the decree, the counter-petitioner fraudulently proceeded against the entire property without serving notice on the petitioner. As notice was thus fraudulently suppressed the petitioner only came to know of the sale in August 1921. This contains all that is necessary to attract the provisions of Section 18, Indian Limitation Act, to petitioner's case, and I cannot hold it to be a fatal flaw that he has not specifically referred to this section. The counter-petitioner then contends that even supposing there was fraudulent suppression of notice at the time of the sale, no subsequent fraud is alleged and therefore petitioner was not fraudulently kept out of knowledge of the sale. This point was taken in the lower appellate Court and I agree with the learned Subordinate Judge

(1) 1924 Mad. 431=47 Mad. 288=46 M.L.J. 104=19 M.L.W. 179=34 M.L.T. 37=(1924) M.W.N. 182 (F.B.).

that there was a continuing fraud up to the date of petitioner's knowledge. The case cited by appellant, *Payidanna* v. *Lakshminarasamma* (2), hardly helps him. There at the time of the sale, a minor was treated as major, a circumstance which did not exactly keep the minor from knowledge of the sale.

Accordingly I see no reason to differ from the finding of the lower Courts, but appellant asks that the order may apply to the share of the 2nd defendant only, that of 1st defendant having been validly sold. There seems to be no objection to this modification, and I order accordingly.

Costs to 2nd defendant.

Appeal partly allowed.

(2) (1914) 98 Mad. 1076 = 29 I.C. 314 = 28 M.L.J. 525.

1924 Madras 860.

DEVADOSS, J.

T. Anjaneyulu—Plaintiff Appellant

v.

P. Chinna Subbiah and another—Defendants-Respondents.

S. A. No. 1469 of 1921, decided on 7th July, 1924, against the Decree of Subordinate Judge, Masulipatam, in A. S. No. 1 of 1921.

Guardian and minor — Gross negligence by guardian—Suit by guardian on behalf of minor for debt against father and four sons—Guardian basing claim on Hindu law liability of sons for father's debt incured for purposes like son's marriage, etc—Suit decreed against father but dismissed against sons—Non-production by guardian of document by two of the sons undertaking to share liability is not under circumstances of case, gross negligence and minor can't reopen decree on attaining majority.

Where in a suit by a guardian on behalf of a minor against a Hindu father and his four sons for the recovery of a debt, the guardian based the claim on the Hindu law liability under which father and sons are liable for debt borrowed for a purpose such as the marriage of one of the sons; and where the suit was decreed only against the father but was dismissed against the sons.

Held, that the non-production by the guardian of a document executed by two of the sons who thereby undertook to share the liability with their father, did not under the circumstances amount to gross negligence by the guardian so as to entitle the minor to re-open the decree on his attaining majority. [P. 860, C. 2.]

G. Lakshmanna—for Appellant.

Ch. Raghava Rao—for Respondents.

Judgment:—The only point argued in this second appeal is that the guardian of the plaintiff was guilty of gross negligence and that he is therefore entitled to reopen the case decided against him. The plaintiff's guardian sued the father and his four sons for a debt due, according to her allegation, by the whole family. The debt was ostensibly borrowed, for the expenses of the marriage of the 4th defendant, one of the sons of the 1st defendant, in the previous suit. She got a decree against the father, the 1st defendant and the suit was dismissed against the sons. The plaintiff now wants to reopen the case and get a decree against the defendants 3 and 4, on the ground that they executed Exhibit A, under which they undertook to share the liability. Exhibit A was not produced in the previous suit. Mr. Lakshmanna strongly relies upon this fact and contends that the omission to produce Exhibit A, in the previous suit, amounts to gross negligence. But it must be remembered that the previous suit was based upon the ordinary Hindu Law liability, under which the father and sons are liable for a debt, borrowed for a purpose, such as the expenses of marriage of one of the sons. This omission to produce Exhibit A in his previous suit cannot be considered to be gross negligence. The learned Subordinate Judge has considered the matter and he is of opinion, that the document was kept back purposely, in order to get a decree against all the defendants, *i.e.*, the father and sons. In the face of that finding, it is impossible to contend that the plaintiff's guardian was guilty of gross negligence. Mr. Lakshmanna very strongly relies upon the case reported in *Gotepati Subban* v. *Gotepati Narasamma* (1). There, the father set up a right by adoption, while he could very well have set up a title under a will. The father evidently, in order to get the whole property, set up the case of adoption, which was false to his knowledge and the finding in that case was that the father was aware of the existence of the will, under which the son would entitled to half the property. The learned Judges held that the father was guilty of gross negligence, inasmuch as he set up a false case to his knowledge and did not set up a case, which was true

(1) (1914) 27 M.L.J. 486 = 26 I.C. 16.

to his knowledge. In *Punnayyah* v. *Viranna* (2), it was held that a decree could be set aside, for the fraud or collusion of the guardian *ad litem*, in not defending the suit, on behalf of the minor. The facts are different here. The guardian claimed a decree against 5 persons, whereas she could have been satisfied with only a decree against defendants 3 and 5. It cannot be said, in the circumstances, that she was guilty of gross negligence, which would entitle the plaintiff to have the case re-opened.

The second appeal is dismissed with costs.

Appeal dismissed.

(2) 1922 Mad. 273=45 Mad. 425=15 L.W. 427=42 M.L.J. 429=(1922) M.W.N. 213.

* 1924 Madras 861.

DEVADOSS, J.

A. Singarayya—2nd Defendant-Appellant

v.

A. Subbayya and others—Plaintiff and defendants 4, 5 and 1-Respondents.

S.A. No. 1339 of 1921, decided on 10th July, 1924, against the Decree of the Additional Subordinate Judge, Ellore, in A.S. No. 5 of 1921.

Contract—Enforceability by a stranger.

Where all parties are before Court and it is in a position to do complete justice, it can order the enforcement of a contract by a person for whose benefit it was made though he is not directly promisee.

Persons who are not actual parties to the agreement or engagement are entitled to sue for the benefit reserved to them under arrangements or engagements like family settlements or partition arrangements. But apart from that, where a Court has before it all persons and is in a position to do complete justice to the case, the suit should not fail on the ground that the defendant did not contract with the plaintiff to pay the amount which he contracted to pay on his behalf. Case-law discussed [P 864, C 1]

K. Ramamurthi—for Appellant.

K. Kameswara Rao—for Respondents.

Judgment:—The main question argued in this second appeal is whether the plaintiff could maintain the suit against the 2nd defendant. The 2nd defendant is the vendee of certain property from defendants 3 to 5. Under the deed, Exhibit A, he undertook to discharge a debt of Rs. 888 due by defendants 3 to 5 to the 1st defendant. The plaintiff brings the suit against the defendants alleging that the 1st defendant is a *benamidar* for him and that he is entitled to the amount mentioned in Exhibit A. The learned District Munsif found that the 1st defendant was a *benamidar* for the plaintiff and gave a decree against defendants 3 to 5 and exonerated the 2nd defendant on the ground that there was no privity of contract between the plaintiff and the 2nd defendant. On appeal the learned Subordinate Judge held that inasmuch as all the parties to the transaction were before the Court, the Court was entitled to pass a decree against the 2nd defendant as well, and he modified the decree of the Court of first instance by passing a decree against the 2nd defendant as well. It is contended before me that the decision of the Subordinate Judge is wrong as the 2nd defendant did not undertake to pay the plaintiff the amount mentioned in the sale-deed; and reliance is placed upon *Isti Panku Menon* v. *Dharman Achan* (1). In that case a Full Bench of this Court held that the principle of the decision in *Tweddle* v. *Atkinson* (2) applied to India and a stranger to the contract could not sue on the contract even though under the contract some benefit was reserved for him. In this case, the vendee and the person to whom the vendee undertook to pay the amount are before the Court. Whether in a case like this the plaintiff should fail because the undertaking was not to him is a question which is not free from difficulty. In *Dwarakanath Ash* v. *Priya Nath Malki* (3) a Bench of the Calcutta High Court held relying upon the well-known case of *Gregory* v. *Williams* (4) that where all the parties were before the Court it was open to the Court to give relief to the plaintiff even though no promise was made to him by the person liable. In the case of *Gregory* v. *Williams* (4), the engagement was with one Parker, and it was he that paid the consideration, but Gregory did not furnish any consideration and he was no party to the contract. Parker acted as his trustee; and Gregory derived an equitable right through the mediation of Parker's

(1) (1917) 41 Mad. 484=32 M.L.T. 513=(1918) M.W.N. 98=34 M.L.J. 193=43 I.C. 625=8 L.W. 118.
(2) (1861) 1 B. & S. 393.
(3) (1915) 22 C.W.N. 279=36 I.C. 792=27 C.L.J. 483.
(4) (1817) 3 Mer. 582=17 R.R. 186.

engagement. Sir William Grant, M.R., held that inasmuch as Parker and Gregory were plaintiffs the plaintiffs could succeed. In *Debnarayana Dutt* v. *Ram Sadhan Mandal* (5) Sir Lawrence Jenkins examined the case of *Tweddle* v. *Atkinson* (2) and stated "The bar then in the way of an action by the person not a direct party to the contract was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience." This case has been examined by a Bench of this Court in *Iswaram Pillai* v. *Sonnivaveru Taragon* (6). Some observations in that judgment are, no doubt, against the view taken by Sir Lawrence Jenkins in the Calcutta case. There are exceptions to the principle enunciated in *Tweddle* v. *Atkinson* (2) as in the case of family settlements, partition arrangements, etc. Persons who are not actual parties to the agreement or engagement are entitled to sue for the benefit reserved to them under such arrangements or engagements. But apart from that where a Court has before it all persons and is in a position to do complete justice to the case, it would be straining the law to hold that the suit should fail on the ground that the defendant did not contract with the plaintiff to pay the amount which he contracted to pay on his behalf. In a recent case decided by this Court which is reported in *Peria Thiruvadi Iyengar* v. *Pokutti Janaki* (7), Venkatasubba Rao, J., observes at page 697: "The 2nd and 3rd defendants have undertaken to pay the plaintiff Rs. 1,500. The undertaking is absolute. They have not said that they will be liable to pay Rs. 500 only in the event of the security being sufficient to pay off both the mortgages. The competition is only as between the plaintiff on the one hand and the 2nd and 3rd defendants on the other. . . There is no third party involved. The contest is merely between the plaintiff on the one hand and the defendants 2 and 3 on the other." And he held that the plaintiff was entitled to succeed. It is unnecessary to refer to a number of cases on the point, such as *Jamnadas* v. *Ram Autar Pande* (8), and *Khwaja Muhammad Khan* v. *Hussaini Begam* (9). So long as the principle of the decision in *Gregory* v. *Williams* (4) is held to be good law there is no reason why the plaintiff in this suit should not succeed. The case of *Gregory* v. *Williams* (4) is cited with approval in *In re Empress Engineering Company* (10). Lord Justice James clearly says that any objection on the score of misjoinder would not have been tolerated in that case. That being so, I think the judgment of the learned Subordinate Judge is right, and the plaintiff is entitled to a decree against the 2nd defendant as well.

The other point raised in the case is as to interest claimed by the plaintiff. By Exhibit A the 2nd defendant did not undertake to pay any interest. It is a sum certain and the plaintiff is entitled to claim interest only from the date of demand. There is no evidence that he made any demand prior to the date of plaint. The Subordinate Judge is not right in awarding interest from the date of breach of contract. The plaintiff is entitled to interest at 6 per cent. per annum from the date of plaint as given by the District Munsif. The decree will be modified to this extent. With this modification the second appeal is dismissed with proportionate costs of the 1st respondent.

Second Appeal dismissed.

(5) (1913) 41 Cal. 137=17 C.W.N. 1143=20 I.C. 630=18 C.L.J. 603

(6) (1913) 38 Mad. 753=23 I.C. 951=26 M.L.J. 127.

(7) 1924 Mad. 103=45 M.L.J. 687=18 M.L.W. 590.

(8) (1911) 34 All. 63=39 I.A. 7=16 C.W.N. 97=11 M.L.T. 6=9 A.L.J. 37=(1912) M.W.N. 32=15 C.L.J. 68=14 Bom. L.R. 1=13 I.C. 304=21 M.L.J. 1158 (P.C.)

(9) (1910) 32 All. 410=7 A.L.J. 871=14 C.W.N. 865=8 M.L.T. 147=12 Bom. L.R. 638=12 C.L.J. 205=7 I.C. 237=20 M.L.J. 614 (P.C.)

(10) 16 Ch.D. 125.

* 1924 Madras 862.

KRISHNAN, J.

Jambulinga Chetty and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Rev. Case No. 683 and Criminal Rev. Pet No. 543 of 1923, decided on 1st February, 1924, against the judgment of Sub-divisional 1st Class Magistrate of Cuddalore in Cr. App. No. 79 of 1923, dated 9th July, 1923.

Penal Code, S. 447—Entering upon vacant piece of land and putting up water-shed.

To enter upon a vacant piece of land with the consent of a person who asserts his title thereto as against a rival claimant, and to put up a water-pandal do not amount to the offence of criminal trespass, though the land may not be in the possession of the person permitting the act but in that of the complainant. [P. 863, C. 2.]

V. N. Kuppu Rao and *P. Visvanatha Aiyar*—for Petitioners.

J. C. Adam (*Public Prosecutor*)—for the Crown.

Order :—In this case the six accused who are the petitioners before me, have been convicted by the Third Class Magistrate of Ginjee of criminal trespass and sentenced to pay a fine of Rs. 10 each. The convictions and the sentences were upheld by the Sub-Divisional Magistrate of Cuddalore.

The land on which the criminal trespass is said to have been committed was a vacant piece of land. It originally belonged to one Muthia Chetti. This is admitted on both sides. The complainant's father purchased it from Muthia Chetti first, but he did not get a registered sale-deed; he however, kept possession of the property and under the Transfer of Property Act, the property being worth only Rs. 25 that is less than Rs. 100, title in it would certainly pass to him. But unfortunately for him Muthia Chetti again sold the land to one Dharma Chetti under a registered sale-deed. It is clear law that the subsequent registered sale-deed will prevail against the earlier unregistered sale deed, even though the latter is accompanied by possession. See *Ammani* v. *Jaganatha Reddi* (1). While the land was in the possession of the complainant, the accused who are the headmen of the village and look after some small temple there, entered upon the land and put up a water pandal for the purpose of giving water to persons who attend the temple festival. They were charged with criminal trespass and mischief for cutting down some trees on this land, but they have been acquitted of the latter charge, and I need not consider it any further. It is on this entering upon the land and putting up a water pandal that the charge of criminal trespass has been based against them. The accused pleaded that they were acting for the temple for whose benefit Dharma Chetti had purchased the property. The lower courts say on certain grounds, which seem to me doubtful, that it is not shown that the purchase money came from the temple. The temple accounts have not been produced and therefore the lower Courts held that the property is not proved to have been purchased for the temple by Dharma Chetti, but was purchased by him for himself. Dharma Chetti himself has given evidence in this case as D. W. 6 and he positively asserts that the purchase was for the temple. In the face of such a statement as this, it seems to me rather strange that the lower Courts should have found that the property was not purchased for the temple. Even taking the view that Dharma Chetti purchased the property for himself and not for the temple it was certainly open to Dharma Chetti to assert his title to the property as against the complainants and if the accused went on the land, as they seem to have done, with Dharma Chetti's sanction it is difficult to see how any criminal trespass arises at all. The first Court says that this defence is an imaginary one. I am not able to see how it is. After all what they did on the land was to put up a water-pandal and, even if they had committed trespass in entering upon the land which I do not find, I do not think there is evidence to establish any criminal trespass, for there is no ground for holding that they went on this land for the purpose of annoying any one or for committing any offence.

In these circumstances I have come to the conclusion that the conviction for criminal trespass cannot stand and must be set aside. The accused will be acquitted of the charge under section 447, I.P.C., and the fines, if paid by them, will be refunded to them.

Conviction set aside.

(1) (1915) M.W.N. 442=30 Ind. Cas. 7=18 M. L.T. 103.

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* 1924 Madras 863.

DEVADOSS, J.

Kasivasi Chidambara Swamigal—Plaintiff-Appellant.

v.

Ramakrishna Reddiar and others—Defendants-Respondents.

S. A. No. 51 of 1922 decided on 7th July, 1924, against the decree of the Sub-Judge of Cuddalore, in A. S. No. 33 of 1921.

Minor—Specific performance of guardian's contract—Guardian and Minor—Specific performance.

Specific performance of a contract by minor's guardian for the sale of immoveable property which at the time was for the benefit of the estate, can be decreed notwithstanding there is an offer of better price subsequent to the contract. (42 Mad. 183, *Foll.* [P. 864, C. 2.]

M. Patanjali Sastri—for Appellant.

N. S. Srinivasa Ayyar—for Respondents.

Judgment:—The main question argued in this second appeal is whether the contract entered into by the guardian of a minor for the sale of immoveable property belonging to the minor could be specifically enforced. The plaintiff contracted to buy a portion of the minor's property for Rs. 1,150 Two months after, the property was sold for Rs. 1,500 to the 3rd defendant. The plaintiff has brought the suit for the purpose of enforcing specific performance of the contract in his favour and the 3rd defendant resists the suit. The District Munsif gave a decree in favour of the plaintiff and the Sub Judge has reversed the judgment and has dismissed the plaintiff's suit.

The question in this case is whether the contract by the guardian on behalf of the minor could be specifically enforced, Mr. Patanjali Sastri who appears for the appellant relies upon the case reported in *Rama Jogayya* v. *Jagannadhan* (1). In that case the opinion of the majority was that no decree should be passed against the minor's estate on a contract entered into on his behalf by the guardian. Under the covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. In this case the minor is a Hindu and the guardian is his mother. The contract to sell a portion of the property was in discharge of a debt incurred by the father. The question whether she could sell a portion of the property of the minor for discharging a debt due by the minor's father has to be decided with reference to *Rama Jogayya* v. *Jagannadhan* (1). It is urged on behalf of the respondent that the question of necessity has not been gone into. The 3rd defendant who contested the suit did not raise the question as to the necessity for the sale Evidently it did not suit his purpose to raise such a question for he himself is a purchaser from the guardian and so he cannot now reasonably complain that the question of necessity was not gone into. As it was not specifically raised in the pleadings, the District Munsif rightly disallowed the question of necessity. The Subordinate Judge based his decision mainly relying upon the decisions referred to in *Ramajogayya* v. *Jagannadhan* (1). Whatever may be the effect of those decisions, I am bound to follow the decision reported in *Ramajogayya* v. *Jagannadhan* (1). According to that decision a decree could be passed in certain circumstances against the minor on a contract entered into by the guardian. The contract in favour of the plaintiff is not impeached on the ground of fraud or collusion or on any other ground which would be a proper defence to an action of this kind. The respondent's vakil urged that this is a case of specific performance of the contract and should not be given when the estate of the minor is likely to suffer, and his contention was that as the 3rd defendant was able to pay a better price the contract in favour of the plaintiff should not be enforced and he relied upon *Chhitar Mal* v. *Jagannath Prasad* (2). In that case the learned Judge has held that it was not proper that specific performance of a contract should be granted in a case where the minor's estate was likely to suffer, but that case is no authority for refusing relief where there is a valid contract and at the time where such contract was made there were no circumstances which could invalidate it for the simple reason that some body else is prepared to offer a better price. In a case in *Lal Gopal Datta Chowdhury* v. *Koodooriah Majozilla Zamindary Syndicate, Ltd* (3) a bench of the Allahabad High Court held that the case in *Chhitar Mal* v. *Jagannath Prasad* (2) was not an authority for holding that, when a valid agreement had been lawfully entered into on behalf of a minor and was to the minor's benefit, it could be repudiated if the guardian subsequently found he could obtain more. To hold that a Court should not grant specific performance of a valid contract if better terms are forthcoming would be putting a premium upon offers of a better price long after the contract is

(1) (1918) 42 M. 185.

(2) (1906) 29 All. 413=4 A.L.J. 24=27 A.W.N. 25.

(3) (1911) 16 C.W.N. 297=13 I. C. 673.

entered into. I don't think that in this case the guardian acted against the interest of the minor at the time when the contract in favour of the plaintiff was entered into. If any evidence was forthcoming that the contract was not a proper contract, or that there were other circumstances which could in any way invalidate or go to show that the minor's guardian was not acting as a free agent, certainly the Court would not be well advised in granting specific performance. But no such case was put forward either on behalf of the minor or on behalf of the 3rd defendant.

In the result the second appeal is allowed and the plaintiff's suit is decreed with costs throughout. The plaintiff will pay the whole of the price less Rs. 100 into Court within 14 days from to-day. If he fails to do so, his suit will stand dismissed with costs throughout.

Second appeal allowed.

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* 1924 Madras 865.

KRISHNAN AND ODGERS, JJ.

The Official Receiver, Tanjore—Appellant

v.

Vedappa Mudaliar—Respondent.

Appeal against Order No. 462 of 1922, decided on 16th April, 1924, against the Order of the District Court of East Tanjore, dated 9th August, 1922, in I. A. No. 260 of 1921.

Provincial Insolvency Act, S. 53—Transfer with intention to defraud future creditors is covered by the section—Mere proof of consideration is not enough—Both valuable consideration and good faith should be proved and the initial onus of proof is on the person supporting the transfer and all the circumstances of the case should be taken into account.

A man can commit what may be termed compendiously "anticipatory fraud" and effect a transfer of his properties with a view to get debt and prevent his creditors getting at his property. (26 E.R. 688; 33 Mad. 205 and 5 Bom. L.R. 255, *Rel. on.*) [P. 865, C. 2.]

Under S. 53 of the Act what has to be proved is that the transfer was in good faith and for valuable consideration if the transfer is within two years of the insolvency, the burden being on the person asserting it, to prove it. Every transaction which an insolvent enters into within two years previous to his insolvency is treated by the Act as *prima facie* invalid and it lays the burden on the insolvent or the alienee to show that the transaction is a valid and *bona fide* one. Both good faith and valuable consideration have to be proved by the alienee or by the person who supports the transfer. [P. 866, C. 1.]

The circumstances under which the deed came to be executed, the covenants made in the deed and the conduct of the parties both at the time and subsequently have all to be taken into consideration; and if it can be held that the transfer at the time was really intended to be carried out and was made *bona fide* for saving the insolvent from incurring debts and ruining himself, it may be that the transfer would not be interfered with. But if, on the other hand, there are circumstances to show that the transferor was actually screening his properties from the reach of his future creditors, there will be good ground for holding that the transfer is a fraudulent one. [P. 866, C. 1.]

S. Subramania Aiyar—for Appellant.

A. V. Viswanatha Sastry—for Respdt.

Judgment.:—This is an appeal by the Official Receiver of Tanjore in an insolvency matter in which the Official Receiver applied to have a release deed or a transfer deed executed by the insolvent in favour of his father within two years of the insolvency to be declared void under section 53 of the Provincial Insolvency Act V of 1920. The learned District Judge disposed of the case, we think, somewhat summarily; he fell into the initial error of thinking that, as at the time the release deed was executed all the previous creditors had been paid off and there were no creditors in existence, the deed could not be said to be in fraud of creditors and the subsequent creditors could not impugn it. We cannot accept this as a correct statement of the law. It has been laid down so early as 1742 in *Steleman* v. *Ashdown* (1) that "It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent: for if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside." A man can commit what may be termed compendiously "anticipatory fraud" and effect a transfer of his properties with a view to get debt and prevent his creditors getting at his property. The view that was laid down in 26 Eng. Rep. 688 has been followed in *Thomas Pillai* v. *Muthuraman Chettiar* (2) and *Hoosain Bhai* v. *Haji Ismail* (3). It follows therefore that one of the chief grounds taken by the District Judge for not setting aside this alienation is not good in law.

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(1) (1742) 26 E.R. 688.

(2) (1910) 33 Mad. 205=19 M.L.J. 747=4 I.C. 301=7 M.L.T. 28=(1910) M.W.N. 141.

(3) (1903) 5 Bom. L.R. 255.

The second point the District Judge mentions is that in the present case there was consideration for the alienation, namely, the payment of debts and the maintenance of the executant and his wife and children. This might be no doubt some consideration for the transaction, but the question that has to be considered in such cases is the *bona fides* of the transaction. If the consideration is inadequate or is such that it shows that it was not real consideration it certainly may be taken as one item for deciding whether the transaction itself was *bona fide* or not. Now, under section 53 of the Act what has to be proved is that the transfer was in good faith and for valuable consideration if the transfer is within two years of the insolvency, the burden being on the person asserting it to prove it. Every transaction which an insolvent enters into within two years previous to his insolvency is treated by the Act as *prima facie* invalid and it lays the burden on the insolvent or the alienee to show that the transaction is a valid and *bona fide* one. Both good faith and valuable consideration have to be proved by the alienee or by the person who supports the transfer. On the side of the respondent some Indian and English cases were cited to us *viz*; *Denny* (*Trustee*) v. *Deney and Warr* (4), *Ebrahim Bhai* v. *Ful Bhai* (5), *Re Tetley*; Ex parte *Jeffery* (6) and *Edward Russel William Bayward* v. *Elizabath Hammond* (7). It will be noticed that in all these cases the learned Judges were able to come to the conclusion on the facts and circumstances of those cases that the transaction or alienation were *bona fide*, made in good faith and for valuable consideration. The circumstances under which the deed came to be executed, the covenants made in the deed and the conduct of the parties both at the time and subsequently have all to be taken into consideration; and if it can be held that the transfer at the time was really intended to be carried out and was made *bona fide* for saving the insolvent from incurring debts and running himself, it may be that the transfer would not be interfered with. But if, on the other hand, there are circumstances to show that the transferor was actually screening his properties from the reach of his future creditors, there will be good ground for holding that the transfer is a fraudulent one. As the learned Judge of the Bombay High Court in 26 Bom. 577 at p. 584 points out in determining the question whether the transfer was really *bona fide* or was intended merely for the purpose of screening the property from probable or possible creditors, the Court must take into consideration all the circumstances which surrounded the transaction and the conduct, contemporaneous and subsequently of the parties. It is after examining the position fully that conclusion should be come to by the Court on the question. In this case we think that we should send this case back for a fuller trial of the matter. No doubt the father of the insolvent had an opportunity of adducing all his evidence, but it is possible that he was misled as the learned District Judge was taking a strong view in his favour. We are willing to give him a further opportunity of adducing fresh evidence to show how far the transaction in question is a *bona fide* one. The Official Receiver will also have leave to adduce whatever evidence he wishes to adduce in rebuttal of the alienee's case.

We therefore set aside the order of the District Judge and remand the case for a fresh disposal in the light of the observations made by us above. Costs will abide and follow the result.

Case remanded.

(4) (1919) 1 K.B. 583=88 L J. K.B. 679=120 L. T. 608=(1918) 19 B & C.R. 139=35 T.L. R. 238.
(5) (1902) 26 Bom. 577=4 Bom. L.R. 180.
(6) (1896) 75 L.T. 165=66 L.J. Q.B. 111=3 Manson 226.
(7) (1737) 26 E. R. 9.

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* **1924 Madras 866.**

REILLY, J.

Mulki Narayana Kammathi and others—Petitioners-(Defendants 2 to 4).

v.

Kolathingal Kuni Moyi and others—Respondents—(Plaintiffs 1 & 2 and Defendants 1 & 5).

Civ. Rev. Pet. No. 32 of 1923, decided on 21st July, 1924, against the decree of Subordinate Judge of Calicut, in S.C.S. No. 138 of 1922.

Contract Act, S. 96—Does not apply where buyer defaults and repudiates the contract, time for delivery being fixed though sale was on credit.

S. 96 does not apply to a case where, though the sale is on credit, time is fixed for taking delivery

but the purchaser makes default and repudiates the contract. [P. 867, C. 1.]

K. P. Ramakrishna Iyer—for the Petitioners.

B. Pocker—for the Respondents.

Judgment:—The plaintiffs allege that they sold 25,000 cocoanuts to defendants at Rs. 41 a thousand, that the defendants agreed to remove the cocoanuts from plaintiffs' warehouse within 4 days, that the defendants did not remove them and therefore plaintiffs after notice to defendants sold the cocoanuts by auction at Rs. 35 a thousand. Plaintiffs sued defendants for the amount of the loss on the re-sale. Defendants denied the sale to them, but the Subordinate Judge made a decree for plaintiffs as sued for. Defendants 2,3 and 4 pray for revision.

2. It is urged before me that there was no completed contract between the parties but only negotiations for the sale of the cocoanuts and that, even if defendants agreed to buy 25,000 cocoanuts at Rs. 41 a thousand from plaintiffs, those cocoanuts were never ascertained and appropriated to the sale from among the cocoanuts in plaintiffs' warehouse. But on examining the record, I find that there is evidence, not only that defendant 4, on behalf of defendants, agreed to buy 25,000 cocoanuts at Rs. 41, but also that he inspected the cocoanuts at plaintiffs' warehouse, where they were stored in one lot and agreed to take that lot. The Subordinate Judge was entitled to find on that evidence, that the sale was complete.

3. The only other point urged for defendants is that plaintiffs had no right to resell the cocoanuts. The argument is that they could do that under section 107 of the Contract Act, only if they had a lien on the cocoanuts and that in this case they had no lien, as it does not appear that any definite time was fixed for payment. For this defendant's vakil relies on section 96 of the Contract Act. Under that section, if the sale was on credit and no time was fixed for delivery, then plaintiffs would have had no lien and defendants would have been entitled to immediate delivery. But in this case, the time for taking delivery passed and defendants repudiated the contract. If the sale was on credit, as appears to have been the case, defendants would have had the right to immediate delivery, against which plaintiffs could not have set up any lien. But as defendants failed to take delivery within the time fixed and repudiated the contract, they cannot take advantage of the provisions of section 96, which give the buyer a right to delivery without payment in certain circumstances. The general provision of section 95 of the Act giving the seller a lien on sold goods remaining in his possession has effect, unless some exception applies. In the present case, the Subordinate Judge was right in finding that plaintiffs were entitled to resell the cocoanuts and recover the loss from defendants.

4. The petition is dismissed with costs of respondents 1 and 2.

Petition dismissed.

1924 Madras 867.

JACKSON, J.

Sahadeva Reddi—Petitioner-Plaintiff.

Lingappa Asari and others—Respondents-Defendants.

Civ. Rev. Petition No. 137 of 1923, decided on 24th March, 1924 against the Order of the District Judge of Chingleput, dated 18th September, 1922, in C.M.A. 3, 1922.

Madras Hereditary Village Officers' Act (III of 1895), Ss. 13 and 21—Scope of.

An alienee of the emoluments of the office as distinguished from its holder can sue in ordinary Civil Courts for emoluments. The holder of the office alone must sue before the Collector. (33 Mad. 208, *Foll.*) [P. 868, C. 1.]

L.A. Govindaraghava Aiyar and Ramachandra Aiyar—for the Petitioner.

Rajagopalan and Rajagopalan—for the Respondents.

Judgment:—In O.S. No. 426 of 1919, on the file of the Court of the District Munsif of Tiruvellore, plaintiff sued for Rs. 210 alleging that he held a lease of blacksmith's inam from the previous holder, which had been continued by the present holders, defendants 1 and 2. The other defendants 3 to 8 denied that these holders had title. The District Munsif and District Judge on appeal have held that the jurisdiction vested in the Revenue Court. The plaintiff seeks to revise the order and judgment of the District Court.

This is an unenfranchised inam and the point directly in issue is whether defendants

1 and 2 have any claim to succeed to the office, and whether plaintiff as lessee can recover the emoluments of the office. Section 21 of Madras Act III of 1895 would seem therefore to apply. But it has been settled that section 21 must be read with section 13. In spite of the generality of the language of section 21, the jurisdiction of the Civil Court is taken away only in those cases in which it is conferred on the Revenue Court by section 13: *Muvula Seetham Naidu* v. *Doddi Rami Naidu* (1). Under section 13, any person may sue before the Collector for a village office or for its emoluments, on the ground that he is entitled to hold such office and enjoy such emoluments. The section is clearly confined to persons claiming their own rights as holders. On behalf of the respondents, it is urged that, if this be so, a holder has only to lease the emoluments and leave it to the lessee to sue on his title, in order to carry the suit away from the jurisdiction of the Revenue Courts. The short answer is that he can do this, if he so pleases. The question of jurisdiction is merely mechanical and involves no equities. If a holder wants to sue, the Legislature has provided the Revenue Court as his forum; if any other person is suing, it has provided the Ordinary Civil Court.

The defence has exhibited a certified copy of the judgment in an unreported case of this Court. I deprecate the practice. Courts should depend upon reported cases for guidance. In this Exhibit, it has been ruled that although the plaintiff is not a holder of the office and is a mere alienee from the office holder the suit is still governed by section 21 of Act III of 1893 on the authority of *Palamalai Padayachi* v. *Shunmuga Pusari* (2) and *Veerabadran Achari* v. *Subbiah Achari* (3). In *Palmalai Padayachi* v. *Shunmuga Pusari* (1) plaintiff sued on the ground that he was the village carpenter and as such entitled to the lands attached to that office. The question for determination was whether the suit was barred by section 3, Regulation VI of 1831 and a full Bench found it to be so barred. In *Veerabadran Achari* v. *Subbiah Achari* (3), plaintiff sued as holders for the office of carpenter, and it was found that the office in this case was not one covered by the special Acts. No reported case has been brought to my notice in which it has been ruled that a mere alienee is barred under section 21, Act III of 1895 and as at present advised, I do not see how it could be so ruled.

I must therefore allow this petition, and reverse the judgment and order of the Lower Appellate Court. The District Munsif of Tiruvellore has jurisdiction and must proceed with the suit.

Petitioner will have costs throughout.

Petition allowed.

(1) (1910) 33 Mad. 208=7 M.L.T. 181=5 I.C. 137=20 M.L.J. 91.
(2) (1894) 17 Mad. 302=4 M.L.J. 100 (F.B.)
(3) (1910) 33 Mad. 488=5 I.C. 477=7 M.L.T. 198.

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* 1924 Madras 868.

KUMARASWAMI SASTRI, J.

O. Thanikachallam Chettiar — Petitioner.

In the matter of The City Municipal Act IV of 1919 and of section 99, cl. 2, and sections 155 and 157, and *In the matter of* the Specific Relief Act, section 45, decided on 29th March, 1924.

(a) *Madras City Municipal Act (IV of 1919)—Ss. 155 (2) and 157 and 99—Councillors are under statutory duty to fix the rates of taxes under S. 99—Resolution for reduction of tax postponed by President for discussion after budget discussion is in order when coupled with a resolution for reduction of expenditure though it might reduce statutory minimum balance since budget expenditure must not be deemed to be finally voted and also because there may be other modes of taxation.*

At a meeting of the Madras City Municipal Corporation a Councillor during the discussion of the Budget at the suggestion of the President did not move a resolution for the reduction of Property Tax by 1 per cent., since the President stated that the question of the reduction of tax might be considered after the items of expenditure had been considered by the Council. After the items of expenditure had been discussed and voted upon, the same member moved a resolution for the reduction of Property Tax by ½ per cent. but the President ruled it out of order on the ground that if the resolution were allowed the income would become so much reduced that the required balance of one lakh of rupees under S. 155 (2) could not be maintained. On this the member proposed, in the alternative, that if the financial condition of the Corporation would not admit of such reduction of Property Tax then to suspend proposals of increase sanctioned during Budget discussions from being given effect to. But the President again ruled it out of order.

Held, that there was a statutory duty on the Councillors to fix the rates or to vary them and therefore, the member's resolution prior to the Budget resolution was in order, and the postponment of the first resolution under the order of the President must be deemed to have been on the ground that the expenditure though voted was not

final and that if the income was to be reduced, a reduction in the expenditure might be voted afresh. [P. 871, C. 1]

Held, further, that even if the voting on expenditure was final the reduction of tax was not by necessary implication negatived because of the statutory minimum balance since there might be other modes of taxation open to the Municipality to make up the minimum balance and therefore, the motion for the resolution was in order. [P. 871, C. 2.]

(b) *Madras City Municipal Act—Regulations.*

Rule 23 for the conduct of business does not make it irregular to move a resolution for the reduction of a tax by a percentage and not by a specific figure. [P. 871, C. 2.]

(c) *Specific Relief Act, S. 45—Grounds.*

Rejection of resolution to reduce tax by 1/4 per cent. does not justify refusal of a writ of mandamus for compelling resolution for the reduction of tax by higher per centage coupled with a resolution for reduction of the items of expenditure, especially where the member moving the resolution has no other adequate remedy and where the member's right as rate-payer and Councillor is denied to him by the President. [P. 873, C. 1.]

The Petitioner in person.

The Advocate-General—for the Respondents.

Judgment :—This is an application by Rao Bahadur O. Thanikachallam Chettiar, one of the Commissioners of the Corporation of Madras and also a rate-payer, for an order directing that the President of of the Corporation of Madras do allow the Municipal Councillors to consider and vote upon the proposition referred to, in the Notice of Motion, which proposition was formerly moved and seconded at a meeting of the Corporation and which the President ruled out of order. The resolution which was moved and seconded runs as follows :

"This Council resolves that a reduction be made of property tax to the extent of ½ per cent. and if the financial position of the Corporation would not admit of such reduction, then the proposals for increase to the staff, increased grants and for revision, of the Works Department sanctioned during the budget discussion be suspended from being given effect to during the coming year."

The facts, which led to the present application, as appear from the affidavits, are shortly as follow: Under the Municipal Act, a budget has to be prepared by the Commissioner, containing a detailed estimate of income and expenditure for the ensuing year, together with a statement, as to whether it is necessary to raise any additional taxation, or raise any fresh loans. This budget framed by the Commissioner has to go to the Standing Committee and that Committee has to consider the budget and prepare a budget for the consideration of the Corporation. Section 155 of the City Municipal Act, which refers to the duties of the Standing Committee as to budget, states that the proposals made by the Commissioners shall be considered and the budget shall be framed for the next year. Two essentials are prescribed in such a budget, namely, (1) a provision for payment as they fall due of all instalments of principal and interest, for which the Corporation may be liable, on account of loans, and (2) allowance for a cash balance at the end of the year of not less than one lakh of rupees. The budget so framed by the Standing Committee has to be printed and circulated to each Municipal Commissioner. Section 156 provides for a meeting to be held some day in February, at which meeting, the budget has to be laid before the entire body of Councilors. Section 157 refers to the procedure to be followed, when such budget is laid before the Commissioners. It runs as follows :—

"The Council may refer the budget estimate to the Standing Committee, for further consideration and re-submission within a specified time, or adopt the budget estimate, or any revised budget estimate submitted to it, either as it stands, or subject to such alteration, as it deems expedient : provided that the budget estimate finally adopted by the Council shall make adequate and suitable provision for each of the matters referred to in clauses (*a*) and (*b*) of S. 155, sub-S. (2)."

Section 158 refers to the Council finally passing the budget estimate and submitting a copy to the Governor-in-Council. In pursuance of these provisions of the Act, a budget was prepared by the Commissioner, was considered by the Standing Committee and was printed and circulated to the Municipal Commissioners and came on for discussion at a meeting of the Commissioners held on the 1st March. At that meeting Mr. Runganadham Chetty, an elected Councillor, wanted to move a reduction of the tax on property appearing in the budget by 1 per cent. ; but according to the affidavit of Mr. Thanikachallam Chetty, the President asked him not to move it then and stated that the question of the reduction of the tax might be considered after the items of expenditure had been considered by the Council. Mr. Thirumalai Pillai in his counter-affidavit admits this fact, but states that the sense of the meeting was that the expenditure should be considered first and that the Council would then be able to know what the closing balance would be and be in a

position to decide the extent to which, if any, property tax could be reduced. Mr. Thirumalai Pillai admits that he requested Mr. Runganadham Chetty to move his proposition, when they came to the item of receipts. On this assurance, the proposition was not pressed and the Corporation went on with the consideration on the items of expenditure. The work not having been finished on that day, the meeting was adjourned to Saturday, the 8th March, when the further items of expenditure were discussed and there were increases made in the items of expenditure. The meeting was adjourned to the 12th March, for further consideration of the budget. On the 12th March, after the items of expenditure were considered, Mr. Runganadham Chetty moved his resolution for the reduction of property tax by ½ per cent. and that was duly seconded. The President, Mr. Thirumalai Pillai, however, refused to put it before the meeting and ruled it out of order. On his being ruled out of order, Mr. Thanikachallam Chetty proposed the proposition, which I have already set out in the opening of my judgment. He moved it and his proposition was seconded by Mr. Narayanasami Chetty. Then one of the Commissioners, Mr. Venugopala Chetty drew the attention of the President that there was a proposal for the reduction of property tax the previous year, and while he was proceeding, he was interrupted by the President, who observed that the proposition had been moved and seconded and that Mr. Venugopala Chetty should wait and see, whether the President was going to allow it or not and that it was possible that he might rule it out of order. He then read the provisions of sections 99 and 157 of the Act. His objection to the consideration of the amendment moved by Mr. Thanikachallam Chetty was that, having voted the items of expenditure and the statutory balance of one lakh of rupees not being maintained, if there was a reduction of property tax, the proposition was out of order. He also thought that they cannot send the budget back to the Standing Committee for further consideration. No definite ruling was given. But at this stage, another councillor intervened and wanted to know whether it would be practicable, if the budget was referred to the Standing Committee, without discussing it there. Then there were further discussions and the mover gave his reasons, against the view that the procedure he followed was not in conformity with the Act. Meantime one of the councillors interrupted and said that a ruling had been given and the President stated that the ruling given stood, but so far as the proceedings go, till that stage there seems to have been no ruling one way or the other, beyond a discussion with several interruptions. Then again one of the commissioners said that in his view the council could refer it back to the Standing Committee, for further reconsideration and the President stated that after having been considered by the Standing Committee, it could not be referred back for further consideration. Mr. Vyasa Rao expressed some surprise and the President said that it could not be done and that was his ruling. Then there was further discussion and eventually the proposition was not placed before the meeting, the President ruling it out of order.

So far as the proceedings, which have been filed before me, of the meeting of the 12th March, are concerned, the reasons given by the President for ruling the motion out of order were that the Commissioners could not refer the budget back for consideration by the Standing Committee and that to allow the resolution would involve a breach of the condition in section 155, as to the statutory requirement of one lakh to be shown as balance in the budget. Out of all the discussions and interruptions, that took place at the meeting of the 12th March, these two facts emerge, as the reasons given by President for his ruling. It seems to me to be clear that if this proposition had been moved on the 1st March, before the items of expenditure were taken into consideration, it would have been in order. So far as the property tax is concerned, the provisions of the Municipal Act are clear. Section 99, which deals with property tax refers to the tax being levied, at a consolidated rate on all buildings and lands within the city, save those exempted and states that it shall comprise a water and drainage tax, lighting tax and tax for general purposes and that subject to the special exemptions there, or alterations referred to in section 102, that tax shall be levied at rates fixed at percentages of the annual value of lands and buildings, such rates being determined by the council, so

that the rates of the property tax are a matter to be determined by the council and it is open to the council within the sliding scale, prescribed by the Act, to state what the tax is. The budget which was framed and which was for discussion took the basis of the tax, at the rates which were in force in that year. On page 10 of the printed budget, the heading "Municipal rates and taxes" comprises clauses. (*a*) to (*h*), the tax on properties being clauses (*b*) to (*g*). They give the percentage. Having regard to section 99 of the Act, it seems to me there is a statutory duty on the councillors to fix what the rates of the taxes are. It is open to them to have the same rates, as in the previous year, or to vary the tax, in their discretion. If before the expenditure was considered, at the meeting of the 1st March, a Councillor proposed that this tax should be reduced, I think he would have been perfectly in order. What happened was that as they had to begin either income or expenditure in the first instance, the President or the majority of the members thought that it would be better to proceed with the expenditure first. But it is perfectly obvious that there was this resolution tabled before them for consideration, which they had to consider, either then, or afterwards and it is obvious that a reduction in the income would necessitate a readjustment in the expenditure, especially where the statutory minimum of one lakh had to be maintained. The only reasonable view to take in this matter is that the items of expenditure, which were dealt with first were provisionally dealt with, on the assumption that a reduction might have to be made in them, if the income was to be reduced. I am unable to see how with a postponement of the discussion of the reduction of the income, it can be said that there was a final decision as to expenditure. So far as I can see, the proper stage at which anybody would have moved the proposition, which was tabled to come on, at the opening of the discussion on the 1st March, would be a time, when according to the sense of the meeting, or ruling of the President on the 1st March, the expenditure *had been* considered, and that was the opportunity first taken by Mr. Ruganadham Chetty to move his proposition. I find it difficult to see how, having deferred the consideration of the reduction of the tax, which was moved on the 1st, till the expenditure was considered, anybody can turn round and say,

"Very well. You have considered the expenditure. Now your motion automatically goes."

without any discussion, or without the council being given an opportunity of considering, whether on the merits that proposition was sound or unsound. To do so would, I think be obviously unjust, as it puts off the discussion of an important matter, till the discussion as to expenditure and then rules out the motion, not on the merits, but because something was done in the meantime, though the original proposition itself was held in abeyance.

It is argued by the learned Advocate-General for Mr. Thirumalai Pillai that every time they were discussing the expenditure, they must be presumed to have had an eye on the requisite statutory balance and an eye also upon the natural effect of the resolution for reduction, had the resolution been carried. I doubt very much whether this was the mental attitude of all the commissioners present. But assuming it was so, it by no means follows, that the granting of the estimates of expenditure necessarily negatived the reduction of the tax, because of the statutory balance. There were other modes of taxation, which could have been resorted to, to make up any deficiency between the tax reduced and the one lakh, which has to be maintained as the balance. This argument, therefore does not impress me.

The other argument put forward was that the proposition itself was irregular, and reference was made to Rule 23 of the Regulations for the conduct of business. Rule 23 runs as follows :—

> "The President shall read each item of the abstract of receipts and of expenditure and shall, without any mover or seconder, put to the meeting the question, 'that this item stand part of the budget'. If any councillor proposes to reduce, or to increase the item and the proposal be seconded, such proposal shall be treated as an amendment and shall become the question before the meeting."

It is argued that this rule necessarily involves that a certain specific figure should be given and that any resolution which is to vary by a percentage a tax, would be irregular. I do not see any such limitation in Rule 23 and very often such a limitation would not be practicable. Taking the present case of house tax, under the Act, the house tax is by percentage. The budget put before the councillors for consideration also gives the percentage and

the estimated income according to the percentage. I do not see why a commissioner should not propose that in arriving at the income a lesser percentage should be adopted. The percentage being fixed, it is only a question of arithmetic, as to what the result of that percentage would be. And if any commissioner wanted information as to the practical effect, as to the working of that percentage on the finance, he had only to ask from the office for information and it would be easy for the office to give, if not a perfectly accurate figure, at least a figure fairly accurate for purposes of discussion. Otherwise, it would mean that before the budget meeting is held, a commissioner, who wants to move a reduction in tax would have to go to office, reduce and fix each figure for each house and then table his resolution as to reduction, by giving the correct total figure. I do not think such a position was contemplated by Rule 23. What we have to see is whether the resolution is one which gives a correct idea of what is proposed and which would enable the commissioners in dealing with it to know what is actually being done. Roughly speaking, the percentage can easily be worked out, by taking the average on the whole; or if necessary, an officer might be deputed who could easily work out the figures from the resolution. I may point out that there was not even a suggestion as to the difficulty raised now by the Advocate-General, during the debate or the meeting. The President never thought of this. I do not think there is much force in the contention that the actual figure not having been given, the resolution is out of order.

It is also contended that the resolution of Mr. Thanikachallam Chetty being in the alternative was in an hypothetical form. To appreciate the resolution one has to see what went on before. The reduction of ½ per cent. by Mr. Runganatham Chetty was proposed and ruled out of order. The reason given was this bogey of a statutory minimum of one lakh, which had to be kept. It was also assumed that they could not refer the budget back to the Standing Committee. Then the proposition was to reduce the tax and if by any reduction, they could not maintain the statutory minimum, then they keep in abeyance certain additions, which they had made to the expenditure. It seems to me it is a perfectly logical and concrete proposition put forward for consideration. If the statutory minimum of one lakh would be reduced by this reduction of tax, and if the commissioners thought the tax had to be reduced, the obvious thing was to keep in abeyance the estimates of an additional expenditure sanctioned, because it seems to me that if they had considered this proposition first and had resolved to reduce the tax, they would certainly not have sanctioned the additional expenditure. To treat the additional expenditure, which was considered, pending a resolution upon the reduction of tax, as final and then ruling out the motion for reduction of the tax is, I think not reasonable or fair.

Another contention put forward was that subsequent to the ruling out of order, another commissioner proposed a reduction of a specific figure of Rs. 41,000 and odd, which represented, according to the statement of the mover, ¼ per cent. which was seconded and put to the meeting and lost. It is stated that this showed the sense of the meeting and that if ¼ per cent. reduction was rejected, Mr. Thanikachallam Chetty's proposal of a reduction of ½ per cent. is likely to have been lost too and there will be no use in submitting this to the discussion of the Municipal Commissioners. But it seems to me, that the proposition, moved by Mr. Madanagopal Naidu, was not the proposition, which Mr. Thanikachallam Chetty wanted to move. What he moved was a reduction of ½ per cent. and keeping in abeyance all the increases in expenditure, which they had sanctioned, should the statutory minimum not be maintained. Mr. Thanikachallam Chetty was entitled, upon his application to have his proposition, which is otherwise regular, in my view, put to the meeting and that was a right, which I think has been withheld from him without justification. I cannot speculate at this stage what would have happened, if at the proceedings he had been allowed to move the proposition and other councillors in favour had used their persuasive eloquence, in support of it. I do not think that I can speculate on it now, after all this was over and his motion was ruled out of order, for the reasons given by the President, because of the proposing of another proposition. I do not think that I can hold that the original proposition, if put in the usual way, would have been lost. What I have to see is whether there

has been in this case a violation of a right, which Mr. Thanikachellam Chetty had, as a rate-payer and as a councillor and whether the denial of that right could be a ground for an order such as has been prayed for. He has no other adequate remedy and therefore in this case, there are all the elements, which are required for granting an order directing that the President of the Corporation do allow the petitioner to exercise his statutory right of moving a proposition, otherwise valid. The Advocate General very properly does not question the right of Mr. Thanikachallam Chetty to the relief claimed, if his arguments on the other points are not accepted by me. I therefore direct that the President do allow Mr. Thanikachallam Chetty at the next meeting in which the budget is being considered to move the proposition, which I have set out above.

Mr. Thanikachallam Chetty does not claim any costs and therefore none are allowed.

Application allowed.

1924 Madras 873 (1).

SPENCER, J.

Venkata Reddi and others—Accused-Petitioners.

Cr. Rev. Case No. 284 of 1924 Cr. Rev. Petition No. 238 of 1924, decided on 11th April, 1924, against the order of the District Magistrate of Dharmavaram, dated the 13th February, 1924, in Dis. C. No. 530 of 1924.

Crim. Pro. Code, S. 528 (5)—Order without reasons is liable to be set aside.

An order for transfer of a criminal case without reasons required by cl. 5 is bad and should be set aside.

E Krishnamurthi Aiyar—for the Petitioners.

Order:—The order of transfer (assuming it was made under section 528, which is the section quoted at the head of the District Magistrate's proceedings) is bad for failure to state the reasons for the order, as required by section 528 (5) of the Code of Criminal Procedure.

The order is set aside and the District Magistrate is directed to pass a fresh order giving reasons for the transfer, if he thinks after hearing the accused or their pleader that the case should be transferred from Dharmavaram to Penukonda.

Order set aside.

* 1924 Madras 873 (2).

VENKATASUBBA RAO, J.

Saraswathi Ammal—Petitioner.

v,

Dhanakoti Ammal and others—Respondents.

Cr. Mis. Petition No. 326 of 1924, decided on 14th July, 1924.

(a) *Guardians and Wards Act, S. 17—Welfare means religious, moral and physical.*

The word welfare must be taken in its widest sense. The moral and the religious welfare must be considered as well as the child's physical well-being and due regard must be had to the ties of affection. [P. 874, C. 1.]

(b) *Crim. Pro. Code, S. 491—In proceedings for* habeas corpus *in respect of child, welfare of the child is the dominant question—The opinion of an intelligent grown-up child will weigh in the estimation of the Court*—Habeas Corpus.

On an application by the *de jure* guardian for *habeas corpus* in respect of a child detained against its will the dominant question is what conduces to the interests and welfare of the infant and the Court must dispose of the application with reference to it. The moral, the religious and the physical welfare and the ties of affection as also the opinion of the child if it is capable of forming an intelligent opinion are to be taken into consideration. The opinion of the child is an important element and the degree of the child's mental development must to a certain extent weigh with the Court. The age of the infant is also an important factor. There is no inflexible rule in England that a boy over 14 and a girl over 16 will have the final voice and that the wishes of the infant have to be given effect to. Even if such a rule exists it is too artificial to be applicable in India. [P. 876, C. 2.]

R. N. Aingar, O. Thanikachalam Chetti and *T. N. C. Srinivasaraghavachariar*—for the Petitioner.

A. Krishnaswami Aiyar—for the 1st Respondent.

M. Subbaraya Aiyar—for Kripasankari Ammal.

Order:—This is an application made under section 491 of the Criminal Procedure Code. It is in the nature of an application for *habeas corpus*. The applicant is the mother of the girl who is said to be illegally detained. There was some dispute as regards the age of this girl, and there was conflicting medical testimony on the point. But Mr. A. Krishnaswami Aiyar who appeared for the girl as well as for her step-sister (from whose custody the minor girl was produced) agreed to proceed with the application on the footing that the age of the girl was a little over 17 and under 18.

The parties belong to a wealthy Gramani family residing at Kodambakkam outside the Municipal limits of Madras. The members of this family have shown themselves extremely litigious and repeated applications have been made before this Court from time to time in regard to disputes that have arisen between them. It is unnecessary to go into these various matters, because the more essential of the facts can be brought within a very small compass. The applicant left the family house or was compelled to leave it about a year or two ago, and the girl has been continuing to live with her step-sister. Arrangements were recently made to give the girl in marriage to her paternal aunt's son who is also a respondent to this motion, and the mother thereupon applied for a writ to Devadoss, J. who was the Vacation Judge and an interim order was made for the production of the minor as well as restraining the marriage. I must mention that the step-sister has shown herself to be a person of very strong will and that the mother, on the other hand, is liable to be easily led away. I have examined the minor herself with a view to ascertain her own wishes in the matter. She is a full-grown girl and is resolute and self-willed. She expressed her wishes very strongly and stated to me that she would not return to her mother and that she was determined to marry the young man to whom her mother objects. The only relevant allegation made against him is that he is not possessed of any property worth mentioning. He is employed as a Proof Reader in the Government Press and gets a pay of about Rs. 25 a month. He looks healthy and strong, and the girl herself, as I have observed, has a decided preference for him.

The short question to be decided is, has a case been made out for the issuing of directions in the nature of *habeas corpus*?

It has been repeatedly held in England that the main consideration which ought to weigh with a Court of Chancery is really the question of the welfare of the child. The jurisdiction arises from the power of the Crown delegated to the Court of Chancery and it is essentially a parental jurisdiction, and it is to be exercised for the benefit of the infant. It is also settled law that the word 'walfare' must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being, and due regard must be had to the ties of affection. With reference to all the circumstances of the case the Court makes an order; they relate to the position of the parent, the position of the child and the happiness of the child. There can be no question that this is the law that is administered by a Court of Chancery in England. The Courts in India act on the same principle, and the Guardians and Wards Act (Act VIII of 1890) recognises that the rules that guide the Court of Chancery are applicable in this country. Section 17 enacts that the Court shall be guided by what appears in the circumstances to be for the welfare of the minor, and where the minor is old enough to form an intelligent preference, it is further enacted that the Court may consider that preference.

A question of law has been raised and as I consider it to be of great importance I proceed to deal with it. The basis of *habeas corpus* is illegal restraint. If the person that is alleged to be illegally detained is an adult, the case presents little difficulty because he appears before the Court and says either that he has been wrongfully detained or that there has been no wrongful detention. But in the case of a minor he cannot be said to be capable of of giving consent, and detention against the wishes of a lawful guardian is *prima facie* illegal. The consent to which the Court must thus refer is the consent of the guardian and not that of the infant. If therefore the *de jure* guardian applies for *habeas corpus* in respect of a child detained against his will what are the considerations which must guide the Court in determinig the rights of the parties? I have said that the question of the interests and welfare of the infant is the dominant question, and the Court must dispose of the application with reference to it. But it is argued by Mr. A. Krishnaswami Aiyar that in the case of a boy over 14 and in the case of a girl over 16 the Court has no option in the matter and that the wishes of the infant must be given effect to. He puts his argument in this way. The application deals with the liberty of a subject. If the infant is of an age to exercise a choice or use a discretion and the infant declares to the Court that he is not in unlawful custody, the Court is bound to make no further order than merely to declare him at liberty; only where the

person is too young to be competent to choose, the Court makes an order giving the custody to the lawful guardian. The next step in his argument is, that the right to such an election depends upon age and age alone and not on mental capacity. In support of his proposition he chiefly relies upon *Queen* v. *Howes* (1), *In re, Andrews* (2) and the observations of Brett, M. R. in *In re, Agar Ellis* (3).

In *Queen* v. *Howes* (1) Cockburn, C. J. thus observes :—"The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion ; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue ; *and short of which such a child has no discretion to consent to leaving him.*"

The *ratio decidendi* would appear to be applicable to cases arising in India, as corresponding to the English Statutes which fix the age, there is the provision of the Indian Penal Code, section 363, which makes it penal to entice a minor under 14 years of age if a male or under 16 years of age if a female.

In *In re, Andrews* (2) Archibald, J. makes the following observations :—"The right to such an election, it has been clearly decided, depends upon age alone, and not on mental capacity [see *Reg.* v. *Clarke* (4)]; and it may be taken as settled that no such choice can be made, at all events by a female infant under the age of sixteen ; *Rex* v. *Howes* (5) followed by the Court of Probate and Divorce, in the case of *Cartlidge* v. *Cartlidge* (6) and *Mallinson* v. *Mallinson* (7)." It will be convenient to set out *in extenso* the observations of Brett, M. R. in *In re Agar-Ellis* (3) which have been strongly relied on.

"It is the universal law of England that if any one person alleges that another is under illegal control by anybody that person, whoever it may be, may apply for a *habeas corpus* and thereupon the person under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages, as to boys the age of fourteen and as to girls the age of sixteen, up to which as a general rule the Court will not inquire upon a *habeas corpus*, as between the father and the child as to the consent of the child to the place wherever it may be. But above the age of 14 in the case of a boy, and above the age of 16 in the case of a girl, the Court will inquire whether the child consents to be where it is ; and if the Court finds that the infant no longer a child, but capable of consenting or not consenting is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away."

With reference to Mr. A. Krishnaswami Aiyar's argument it is necessary to examine whether the passages extracted above express the law of England correctly on the point. In *Queen* v. *Gyngall* (8) which related to an application for *habeas corpus* in respect of a female infant aged 15, the Court of Appeal refused to give to the mother of the minor custody although she had not been guilty of any misconduct. The child in that case, although she was a female infant under sixteen, was examined and the Court inquired into her wishes. Kay, L.J. refers with approval to *Ex parte Hopkins* (9) which related to three girls, the eldest of whom was only thirteen, whom King, Lord Chancellor questioned to ascertain her own wishes. The observations of Brett, M. R. in *In re, Agar Ellis* (3) to which I referred are set out in the judgment of Kay, L.J. who proceeds thus :—

(1) 3 El. &. E. 332 (121 E.R 467).
(2) 8 Q. B. 153=28 L. T. 353=21 W. R. 480.
(3) 24 Ch. D. 317=50 L.T. 161=32 W.R. 1=53 L.J. Ch. 10.
(4) 7 E. & B. 186=26 L. J. Q. B. 169=3 Jur. (N.S) 335=5 W R. 222.
(5) 3 E.&E. 332=30 L.J.M.C. 47=7 Jur. (N.S.) 22.
(6) 2 S. W. & Tr. 567=31 L.J. Mat. 85=8 Jur. (N.S.) 493.
(7) 1 P. 221=14 L.T. 636=14 W.R. 973=35 L.J. Mat. 84.
(8) (1893) 2 Q B.D 232.
(9) 3 P. & Wms. 152.

"This language, of course, had reference to the case of *Reg.* v. *Clarke* (4) in which the application being for *habeas corpus* before the Judicature Act and the child in question being a girl and under sixteen, Lord Campbell, C.J. said that in the case of Common Law such a child being deemed incapable of consenting he would not inquire into the wishes of the child. I have already shown by reference to the case of *Ex parte Hopkins* (9) that there never was any such rule in the Court of Chancery." In the same case Lord Esher, M. R. referring to *Reg.* v. *Clarke* (4) says :—"It appears to me that that ruling was quite correct. That case is no authority for the present where a different jurisdiction comes into play." Both Lord Esher, M.R. and Kay. L.J. refer to the passing of the Judicature Act and clearly lay down that the decisions prior to that Act are not authorities for cases arising after the passing of that Act. If in the light of these remarks one turns again to *In re Andrews* (2) one cannot fail to notice that the decision rests upon the authority of *Reg.* v. *Clarke* (4) which the Court of Appeal refused to follow in *Queen* v. *Gyngall* (8) on the ground that it was no longer applicable after the passing of the Judicature Act. Kay, L.J. refers in this connection to a child being of a reasonable age and says that the Court would hardly then desire to determime the question without seeing and speaking to the child and ascertaining its wishes on the matter. This expression of opinion is hardly consistent with what Cockburn, C.J, said in regard to intellectual precocity of any particular individual.

The subject is considered again in *In re, Harriet O'Hara* (10). Fitz Gibbon, L.J, summarises the principles deducible from the judgments of Lord Esher and Kay, L.J. in *Gyngall's case* (8) and repudiates the suggestion that the girl in question there ought not to have been consulted because she was only 11 years of age. He thus observes :—"I entirely dissent from this contention. From the time of King Chancellor in *Ex parte Hopkins* (9) the Court of Chancery has exercised its discretion in seeing the young children not for the purpose of obtaining their consent but for the purpose and as one of the best modes of determining what is really for their welfare though the Common Law Courts as a general rule would not inquire as between parent and child as to the child's consent below the age of 14 for a boy for 16 of a girl."

I think I have made it fairly clear that the hard and fast rule which Mr. Krishnaswami Aiyar asks me to accept does not obtain at the present day in England. I have been referred by Mr. Krishnaswami Aiyar also to Simpson on *Infants*, 3rd Edn., page 188 and Short and Mellor's *Practice of the Crown Office*, 2nd Edn., page 313. But the learned authors rely upon cases decided before the passing of the Judicature Act and I cannot therefore act upon the passages to which my attention has been drawn.

In each case the Court must decide with reference to the interests and the welfare of the minor. If an infant capable of forming an intelligent opinion expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. It seems to me that the rule that fixes an inflexible limit in regard to age is too artificial and evenif the contention is correct (which in my opinion is not) that such a rule obtains in England, I am emphatically of opinion that there is no warrant for the extension of the doctrine to India where different considerations may apply and different conditions do prevail.

In *Pollard* v. *Rouse* (11) Wallis, J. (as he then was) thus observes at page 293 :—"Lastly it is well established that the Court will not ordinarily force a minor of more than 14 if a boy, and of more than 16, if a girl, to remain in custody to which he or she objects." It is urged by Mr. Krishnaswami Aiyar that Wallis, J. by qualifying his statement by the use of the word "ordinarily" has failed to correctly set forth the effect of the English decisions. It is doubtful whether Wallis, J. brought his mind to bear upon this particular aspect of the question

(10) (1900) 2 I.R. 232.

(11) (1910) 33 M. 288=(1910) M.W.N. 187=6 I.C. 754=8 M.L.T. 47.

because at page 298 there occurs in his judgment the following passage inconsistent with his earlier observation :—"As regards the girls over 16 and boys over 14 it is now conceded in accordance with the principles I have explained that the Court cannot in the present case force them to return to the plaintiff against their will." It seems to me that this case cannot be of much value as an authority upon this particular point.

In *In re, Saithri* (12), a minor, Bagulay, J. points out in a judgment which refers to various authorities that it is not right to apply the very artificial rule to which reference has been made.

I have therefore looked at the question purely from the point of view of the welfare of the minor. I have paid necessarily, as any Court will pay, great attention to the expressed wishes of the infant who will soon reach the age of 18, the age of majority. She is in a position to decide for herself and she expresses a decided preference to remain in the custody from which she has been produced. She is able to form a judgment as to what is in her own interest and for her benefit. She has freely chosen to give her hand in marriage to her paternal aunt's son. It is also not impossible that she has been on terms of friendship and familiarity with this young man and it is not desirable to take her away from the surroundings to which she has been accustomed and to place her in the custody, against her will, of her mother who is a woman not of strong will and easily capable of being influenced by the person who at the time happens to be nearest to her; and it is necessary and important to bear in mind that the mother is not being deprived of the custody of the infant but on the contrary I am asked to take the child away from the custody which she prefers and place her in the custody of the mother to whom she expresses a positive dislike.

The order that I propose to make therefore is that she be freed from all restraint and be at liberty to go where she chooses.

In the circumstances of the case I make no order as to costs.

Application dismissed.

(12) (1891) 16 Bom. 307.

1924 Madras 877.

PHILLIPS, J.

Gollapudi Seshayya—Appellant (Plaintiff).

v.

Nadendla Subbayya and another—Respondents (Defendants).

S.A. Nos. 203 & 204 of 1923, decided on 23rd April, 1924, against the decree of the Sub-Judge of Bapatla in A.S. Nos. 105 & 99 of 1922.

(a) *Contract Act, S. 23—Agreement to finance a litigation is against public policy if it is extortionate and unconscionable or is a gambling in litigation or encourages unrighteous suits.*

To determine the validity of an agreement to finance the litigation what has to be seen is whether the agreement is extortionate and unconscionable or one made for the purpose of gambling in litigation or of injuring or of oppressing others by encouraging unrighteous suits in which case the agreement would be contrary to public policy and hence un-enforceable. [P. 879, C. 2.]

(b) *Civil Pro. Code, O. 23, r. 1—Second suit filed and fought out without paying costs on payment of which the first suit was allowed to be withdrawn, is barred.*

Where a suit was withdrawn with leave to bring a fresh suit on condition of paying costs to the defendant but the costs were not paid until after the trial of the second suit,

Held, the second suit was barred. [P. 878, C. 1.]

A. Krishnaswami Aiyar—for the Appellant.

N. Rama Rao and *K. Kameswara Rao*—for the Respondents.

Judgment:—The respondent in both these appeals is one Subbayya, the adopted son of Ramachandrudu. He was dissatisfied with his father's misconduct and spendthrift ways and, consequently, wanted to file a suit for partition of the family property. As he had not sufficient funds to finance this litigation, he entered into relations with the appellant, Seshayya who is a private vakil. On the 1st of November, 1916, Subbayya executed a sale-deed in favour of Seshayya for Rs. 1,000, under which he sold one-half of his share in the family properties. Admittedly the consideration was fixed at a low figure on the ground that Subbayya's father was wasting the family property and alienating the same and that consequently the properties that would be recovered for Subbayya's share might be considerably less than what he really ought to have. It is found that Seshayya paid a sum of

Rs. 600 towards the consideration for the sale-deed, and a suit was filed by Subbayya and Seshayya jointly in 1918. A decree was obtained under which Subbayya was to get as his half share of the property all the properties which had not been alienated by his father, leaving the validity of the alienations undetermined. Before the decree was passed Subbayya agreed to certain items being decreed in favour of Seshayya and the remainder was to fall to his share. Subsequently Subbayya appears to have thought that he had been defrauded and he filed a suit, O. S. No. 641 of 1919 to set aside the sale-deed in favour of Seshayya. That suit was withdrawn with leave to bring a fresh suit on condition of Subbayya paying the costs of the suit. Subbayya then filed his present suit, O. S. No. 195 of 1921, in which he again seeks to set aside the sale-deed. Seshayya has also filed a suit O. S. No. 505 of 1921 in which he seeks to recover the property decreed to him in the prior litigation alleging that he obtained delivery through Court of the property decreed to him but that subsequently the plaintiff has obstructed his enjoyment. Subbayya's suit has been decreed and at the same time Seshayya has been given a charge upon the properties for Rs. 600 with interest. Seshayya's suit for possession has been dismissed. Hence these two appeals.

The first point for consideration is whether Subbayya's suit is not barred by reason of Order 23, Civil Procedure Code, for it is admitted that he did not pay the costs of his first suit until after the close of the trial in the present suit; and it is contended that he is precluded from filing a fresh suit until he has complied with the condition imposed. In *Fischer* v. *Nagappa Mudali* (1) it was held, that when an order had been made giving permission to bring a fresh suit on condition of paying the costs before a specified date, a subsequent suit was barred if the costs had not been paid by that date. That case differs from the present in that the date was specified for payment of costs, whereas the order in the case under consideration does not specify any date. Without expressing any opinion as to the correctness of the decision in *Abdul Aziz Molla* v. *Ebrahim Molla* (2) that case was distinguished. In that case it was held that subsequent payment of costs was sufficient to warrant the reception and trial of a fresh suit which had been allowed to be brought on condition of those costs being paid. In that case the costs were paid before the suit was tried. This has been followed in a later case reported in *Shital Prosad* v. *Gaya Prosad* (3) where the question is discussed somewhat fully and the reasoning adopted for the conclusion is as follows:—"It is said that, inasmuch as permission to withdraw and bring a fresh suit is made conditional on a certain payment, the original suit cannot be deemed to be withdrawn until those costs have been paid and it must, therefore, be deemed to be a pending suit which becomes disposed of as soon as payment is made." This case was followed in *Kuldip Singh* v. *Kuldip Choudhuri* (4) and also in *Deb Kumar Roy* v. *Debnath Barnes* (5), but I can find no authority in this Court for holding this view which, with all respect, appears to me to be incorrect. These cases all assume that the permission granted by the Court is not only permission to bring a fresh suit but also permission to withdraw the first suit, and that consequently until the condition is fulfilled the first suit is pending. This seems to me to overlook the provisions of Order 23, rule 1 (1) which gives a plaintiff power to withdraw his suit at any time without the permission of that Court. Consequently, I think that we must read the latter part of clause 2 (*b*) as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions. If the first suit is still pending as held in the above cases, it would be open to the plaintiff to obtain permission under Order 23, and instead of complying with the conditions of that permission, to go to the Court and demand that the trial on his first suit should be proceeded with and this could be done however long the interval

(1) (1909) 33 Mad. 258=6 I.C. 288=7 M.L.T. 226.
(2) (1904) 31 Cal. 965
(3) (1914) 19 C.L.J. 529.
(4) (1917) 3 Pat L.J. 63 =44 I.C. 79=4 Pat. L.W. 134.
(5) (1920) 64 I.C. 738.

might be. For these reasons I am unable to accept the view that the first suit is still pending, for it has been withdrawn and that withdrawal, in my opinion, takes effect from the date of the Court's order. If the Calcutta view were to be applied in the present case, it would appear, as observed in those judgments, that the trial of a second suit is barred under section 10, Civil Procedure Code, until the first suit is disposed of by performance of the condition imposed by the order granting leave. In the present case, therefore, the whole of the trial of the suit which took place, before the costs were paid, would be bad under section 10, Civil Procedure Code, for want of jurisdiction and the whole suit would have to be tried again. There is another case in the Calcutta High Court reported in *Sajjad Hossain* v. *Ram Lal Sahu* (6) where it was held that payment might be made after the institution of the suit but that suit would not be deemed to be validly instituted until the date of such payment. In the view that I take, I would follow *Fischer* v. *Nagappa Mudali* (1) and hold that it extends, as was held in *Hari Nath Dass* v. *Syed Hossain Ali* (7) and *Subal Chandra* v. *Mosaraf Ali* (8), to cases where no time is fixed for fulfilling the condition.

In support of the view held by the Calcutta High Court, reference has been made to other cases in which similar conditions were held not to be mandatory, *Ramayyangar* v. *Krishnayyangar* (9) with reference to the provisions of section 539, Civil Procedure Code, *Ammukutty* v. *Manavikraman* (10) with reference to the permission necessary to bring a suit against a Receiver and *Mahomed Azmat Ali Khan* v. *Lalli Begum* (11) with reference to the certificate requisite for bringing a suit under the Pensions Act. I do not attach much importance to these cases, for in all of them the Court *prima facie* has jurisdiction to try such suits; and, beyond imposing a condition precedent none of the provisions referred to take away the jurisdiction of the Courts; whereas under Order 23, rule 2 (3) a Court is definitely precluded from entertaining a second suit when no permission has been granted. Unless, therefore, permission has been given, a Court is specifically forbidden to entertain a second suit.

In this view, Subbayya's suit is barred under Order 23 and must be dismissed. Second Appeal No. 203 must, therefore, be allowed and the suit dismissed with costs throughout to be paid by 1st respondent.

As regards Second Appeal No. 204, the Subordinate Judge has found that the sale-deed in favour of Seshayya is "vitiated by undue influence and fraud and cannot be enforced and consequenty, has dimissed the suit "which is based upon it." I may observe here that the suit is not based upon the sale-deed but upon the decree obtained in pursuance of that sale-deed, namely, the decree in O. S. No. 12 of 1918. In giving his finding the Subordinate Judge does not definitely specify the facts which he finds to be sufficient to prove undue influence and fraud. In the plaint the plaintiff stated that the sale-deed was brought about owing to several misrepresentations specified in paragraph 4, but there is no finding by the Subordinate Judge that these misrepresentations were made, and apparently the statments set out in the plaint are substantially correct The cases relied upon by the Subordinate Judge for holding that the sale-deed is invalid are merely cases in which the transactions were set aside as being hard, unconscionable and opposed to public policy. *Chunni Kuar* v. *Rup Singh* (12), *Loko Indar Singh* v. *Rup Singh* (13) and *Husain Bakhsh* v. *Rahman Husain* (14). It has been held that in this country *champerty* is not necessarily opposed to public policy; and in considering whether champertous agreements should be set aside, it has to be considered whether such an agreement is extortionate and unconscionable, or one made for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits, in which case it would be contrary to public policy and unenforceable. These facts do not seem to have been considered by the Subordinate Judge. He has not found what the facts were which made the bargain unconscionable or otherwise opposed to public policy. He finds that property worth Rs. 2,000 was sold for Rs. 1,000 and that Rs. 600 cash

(6) (1911) 15 I.C. 159.
(7) (1905) 2 C.L.J. 480=10 C.W.N. 8.
(8) (1917) 38 I.C. 476.
(9) (1886) 10 Mad. 185.
(10) (1920) 43 Mad. 793=59 I.C. 568=12 L.W. 331.
(11) (1881) 8 Cal 422=9 I.A. 8 (P.C.)
(12) (1888) 11 All. 57=1888 A.W.N. 296.
(13) (1888) 11 All. 118=1889 A.W.N. 72.
(14) (1888) 11 All. 128=1888 A.W.N. 273.

was actually paid as consideration. The properties which have passed under the sale-deed are, no doubt, worth Rs. 2,000 but it was by no means certain that the plaintiff's suit would be successful, or, at any rate, successful to such a large extent. Half of the family property had been alienated and, if those alienations had been found to be valid, Subbayya's share would have come to Rs. 1,000 or less, the consideration agreed to be paid, to which must be added additional compensation for Seshayya's trouble and knowledge of litigation, Here again I must note that the Subordinate Judge has not discussed the question whether the decree in pursuance of the sale-deed was obtained by fraud. There is no such allegation in the plaint, but the Subordinate Judge seems to hold in paragraph 7 of his judgment that the undue influence exercised in the suit was that of the plaintiff's vakil, who is not a party to this litigation, and not the influence of Seshayya ; and he has also omitted to notice that Subbayya did not pray to have the decree set aside, although an amendment was asked for but refused by the District Munsif. There are other points to be considered also in the appeal which have not been dealt with by the Subordinate Judge, one of these being whether Seshayya's remedy was by suit or by execution proceedings. It was on this latter ground that the District Munsif dismissed his suit without giving him an opportunity of treating the suit as an execution petition. It would also be necessary to consider what effect the dismissal of Subbayya's suit will have upon Seshayya's suit for in execution proceedings a claim by Seshayya to these properties was allowed (*vide* Ex. VI) ; and it has to be considered whether that was not a final adjudication of the rights of the parties. Appeal No. 99 of 1922 will accordingly be remanded for fresh disposal in the light of the above remarks. Costs in this Court will abide the result.

Court-fee in S. A. No. 204 of 1923 will be refunded.

S. A. No. 203 allowed.
S. A. No. 204 remanded.

1924 adras 880.

KUMARASWAMI SASTRI, J.

Siva Pratap Bhattadu and another—Petitioners.

v.

The Commissioner of Income Tax, Madras—Respondent.

In re Specific Relief Act and Income-Tax Act, decided on 7th March, 1924.

(a) *Income Tax Act* (1922), *S. 27—High Court cannot revise order under S. 27, discretion of the officer as to sufficient cause being final.*

High Court cannot revise order under S. 27 and interfere with the discretion of the Income Tax Officer, since there is no question of construction of the Act on which the officer could be said to have gone wrong, the question of sufficient cause being one of fact left entirely to the discretion of the officer. [P. 881, C. 2.]

(b) *Evidence Act, S. 74—Power of attorney—Evidence.*

Statements in powers of attorney are required to be proved like any other statements. [P. 882, C. 1.]

G. Lakshmanna—for the Petitioners.

The Government Solicitor—for the Respondent.

Judgment:—This is an application under the Specific Relief Act and the Income Tax Act for an order directing the Commissioner of Income-tax to refer to the High Court the following points :—

1. Whether on the facts stated in the accompanying affidavit of the petitioner's *munim* there is 'sufficient cause' within the meaning of section 27 of the Income-tax Act of 1922.

2. Whether it was open to the Commissioner to arrive at a finding of wilful default in the absence of any evidence and whether there is evidence in this case on which such a finding can be recorded.

3. Whether it is open to the Commissioner to take into consideration the previous adjournments which were granted by the Income Tax Officer (Collector of of Godavari) to canvass the adequacy of the reasons for such adjournments and to base a finding of wilful default as regards the final due date 1st February, 1923, on such considerations or whether he should confine the consideration of 'sufficient cause' to the final due date.

4. Why the Commissioner of Income-tax should not be directed to review the assessment of super-tax, under section 35.

Income-tax Act, through the Income-tax Officer, Godavari.

The petitioner was directed under section 23 (2) of the Income-tax Act to produce his accounts in support of his Income-tax return. He got two extensions of time, and the last extension of time gave the petitioner time till the 1st February, 1923, for this purpose. It is alleged, and there is nothing to the contrary on record that the grandson of the petitioner who came to Rajahmundry before the 1st February was taken ill with enteric pneumonia and died on the 28th February, 1923. The medical certificate produced supports this statement, and this fact is not disbelieved by any of the Income-tax Officers. On the 3rd March, 1923, soon after the funerals were over, the petitioner presented an application to the Income-tax Officer to excuse the delay in the production of the accounts and although the order of assessment was not served, his application was refused, and he received a notice of demand, on the 7th March, 1923, stating that he was assessed at Rs. 15,276-1-0, on an estimated income of Rs. 71,500. The assessment of the previous years was only on an annual income of Rs. 2,800, so that there can be little doubt that this enormous assessment effected was due to his not having produced his accounts in time. His application, when he received notice of assessment for cancellation of the *ex parte* assessment and to levy one after looking into his accounts, was refused. On this, an appeal was preferred to the Commissioner of Income-tax, who directed the Income-tax Officer to restore the petition to the file and dispose of it on its merits. The Income-tax Officer on remand declined to re-open the assessment and he was of opinion that the plea of the illness of the petitioner's grandson was merely an excuse. An appeal was preferred against this to the Income-tax Commissioner but he declined to interfere and confirmed the assessment.

It is alleged before me that the Income-tax Commissioner and the Collector of Income-tax were wrong in their construction of the words 'sufficient cause' in section 27 of the Income-tax Act and that they should have been guided by those considerations which should guide Courts in construing the words 'sufficient cause' in the Civil Procedure Code and should have borne in mind the principles set out in *Arunachela Ayyar* v. *Subbaramiah* (1) where the words 'sufficient cause' have been explained. It is also alleged that as the income assessed on was only Rs. 71,000 and odd the basis of supertax should have been taken as not applicable, the trade being a Hindu joint family trade. On these contentions it is stated that a case ought to have been stated to the High Court.

I may say at the outset that I think the officers in this case have been very unsympathetic. The facts have not been found against, namely, that before the 1st February the petitioner's grandson was seriously ill of typhoid fever, and pneumonia and that he died. It is also not found against that he had no proper help during this period and I find it difficult to understand the remark of the Income-tax Officer that the plea of the illness of the petitioner's grandson was merely an excuse. It is extremely unlikely that the death of a grandson will be used by any Hindu as a pretext. If I were sitting as a Court of Appeal or Revision I would have no hesitation in characterising the proceedings as extremely harsh and the assumption baseless and in remanding the case for disposal on the merits. But the question is whether acting under section 45 of the Specific Relief Act I can find that any case has to be stated. What 'sufficient cause' is is a question to be determined by the officer who has to deal with the application for setting aside the *ex parte* assessment and disposing the matter on an inspection of the account books. Where on the facts, about which there was no dispute, that officer thinks that sufficient cause has not been shown, it is difficult to see how the issue of an order directing him to refer the question as to what the meaning of 'sufficient cause' is would help the petitioner. All that the High Court can do would be to state the law as set out in *Arunachela Ayyar* v. *Subbaramiah* (1). And still the question would be left to the Income-tax Officer to decide whether on these facts the petitioner has offered sufficient excuse for not appearing in time. There is really therefore no question of law. There is no construction of any section of the Income-tax Act which the High Court can say has been

(9) 1923 Mad. 63=46 Mad. 60=16 L.W. 583=(1922) M.W.N. 600=31 M.L.T. 257=43 M.L.J. 632.

erroneous. It relates merely to the exercise of a discretion vested in the Income-tax Officer, and the High Court has no powers of appeal or revision over the Income-tax Officer. I really do not see what benefit would be gained by the High Court calling the attention of the Income-tax Officer to the law as to the sufficiency of cause enunciated in *Arunachela Ayyar* v. *Subbaramiah* (1). It will still be open to the Income-tax Officer to say that having regard to all the facts he is still of opinion that the assessee ought to have sent up his accounts and that he should have left the boy to take care of himself, the illness of the boy was not sufficient to excuse his not obeying the directions of the Income-tax Officer as to the submission of accounts. As I said before, it may be extremely harsh, but at the same time it is difficult to see how the High Court can interfere.

The next point is as regards the joint family minimum. Here again there has been no evidence and no accounts produced before the Income-tax Officer which would show that the assessee was a joint family. It is argued that the power-of-attorney which was filed by the agent stated that it was a joint family, but a statement in a power-of-attorney would not prove itself. It will be like any other statement made by a person. Moreover all that the power-of-attorney can show is that *A* was the agent of *B*, but any collateral statement in it would not prove itself nor can it be acted upon without more. It was therefore open to the Commissioner to say that there was nothing before him which would bring the case within the provisions of the Income-tax Act whereby the minimum has to be Rs. 75,000. I do not think therefore any useful purpose would be served by directing a reference.

But I must say that having regard to the facts of the case it would be just and equitable that this matter should, if possible, be reconsidered by the proper authorities, and that the assessee, who was assessed only on an income of Rs. 2,800, in the previous year, which would make him liable only for Rs. 72, ought not, owing to his failure to produce his accounts within time which he has explained, be assessed to income-tax of Rs. 15,000 and odd the next year, especially when he is prepared to offer his account books for inspection and pay all the expenses of inspection. It cannot be said that trade revived so much in the year under question as to raise any fair presumption. So far as Madras is concerned the complaint has been that trade has been very dull and I had numerous applications for extending time for payments. Very probably the state of things in the mofussil has not been better. This is a matter, I think, where there has been an injustice to the petitioner which I am sorry I cannot remedy by proceedings under section 45 of the Specific Relief Act. I must also say that there is very little foundation for the assumption of the Income-tax Officer that the illness and death of the grandson of the petitioner is only an excuse or that he deliberately withheld his accounts with the object of misleading the Income-tax Officers into levying a light assessment.

Petition dismissed.

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* 1924 Madras 882.

VENKATASUBBA RAO, J.

Ramanuja Naidu and others—Petitioners (Plaintiffs).

v.

Muthu K. R. V. Alagappa Chettiar and another—Respondents (Defendants and 4th Plaintiff).

Civ. Rev. Petition No. 134 of 1924, decided on 28th July, 1924, against the Order, dated 7th January, 1924, of the Additional Subordinate Judge of Madura, in O. S. No. 10 of 1923.

Court Fees Act, Sch. II, Art. 17 (iii) — Prayer for temporary mandatory injunction requires Court-fee under Art. 17 (iii) where it is substance a prayer for an account within S. 92, Civ. Pro. Code.

Where the plaintiff among other reliefs under S. 92, Civ. Pro. Code, claimed a temporary mandatory injunction to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 due from him to the trust.

Held that the suit was covered by Art. 17 (iii) as the prayer was in effect for an account falling within S. 92, Civ. Pro. Code. [P. 883, C. 1.]

C. S. Venkatachariar—for Petitioners.

C. V. Anantakrishna Aiyar, *P. S. Narayanaswami Aiyar* and *D. Ramaswami Aiyangar*—for Respondents.

Judgment:—The learned Subordinate Judge has held that a Court-fee of Rs. 2,200 odd is payable on the plaint, and the plaintiff files this Civil Revision Petition attacking the correctness of the order. The suit

has been instituted under section 92 of the Civil Procedure Code is respect of Kudal Alagar and Madhanagopalaswami Devasthanams at Madura. The plaint contains a prayer for various reliefs, such as the removal of the defendant from trusteeship, the appointment of a new trustee, the settling of a scheme, etc. In addition, the plaintiffs ask for the issue of " a temporary mandatory injunction " to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 which the plaintiffs claim is due from the defendant to the Devasthanams. The Subordinate Judge has held that a Court-fee is payable on this sum to which the relief mentioned relates.

The only question to be decided is : Is this a suit that falls under section 92, Civil Procedure Code ? Under article 17 of schedule II to the Court Fees Act, if a suit is brought under section 92, the fee payable upon the plaint is a sum of Rs. 50. A suit to obtain a decree directing accounts and enquiries comes clearly within the express words of section 92. The Subordinate Judge has committed a slight error in saying that there is a prayer for the issue of a mandatory injunction. As I observed the words used are " a temporary mandatory injunction." In any event, the suit is, in my opinion, substantially one under section 92 ; for, all that the plaintiffs in effect ask is, that an account should be taken and that the defendant should be ordered to pay such amount as might be found due from him on such an account being taken. The sum mentioned in the plaint is merely an estimate and plaintiffs' valuation of the relief cannot alter the character of the suit. The Court-fee paid therefore, namely, Rs. 50 is the proper fee and I set aside the order of the lower Court and allow the Civil Revision Petition with costs.

Petition allowed.

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* 1924 Madras 883.

VENKATASUBBA REO, J.

V. Krishna Aiyar—Petitioner

v.

Pachiappa Chetty and others—Respondents.

Civ. R. P. Nos. 253, 580 and 579 of 1923, decided on 19th March, 1924, against the order of Subordinate Judge of Sivaganga, dated 25th January, 1923, in I.A. Nos. 95, 93 and 94 of 1923.

(a) *Civ. Pro. Code. O. 6, r. 17—New allegations of fraud will not be allowed, unless delay is explained and the substantiality and the truth of the plea is proved.*

If a party desires to amend his pleadings, by introducing for the first time allegations of fraud the Court will ask why the allegations were not made originally and may require to be satisfied about the truth and substantiality of the proposed amendment. [P. 885, C. 1.]

(b) *Civ. Pro. Code, O. 1, r. 8—Scope.*

The person suing on behalf of others must have interest common to himself and others. If this is not so no member of the class is constructively a party to it.

(c) *Civ. Pro. Code, O. 1, r. 10—Substitution will be permitted only if there was a* bona fide *mistake.*

In a suit under O. 1, r. 8 if a person wishes to be added as a party under O. 1, r. 10, it must be proved that the suit was originally instituted in the name of a wrong person through a *bona fide* mistake. [P. 884, C. 2.]

G. Krishnaswami Aiyar—for Petitioner.

Judgment :—The plaintiff instituted the suit for a declaration that the sale deed, dated the 16th September, 1919, executed by the Official Assignee of Rangoon in favour of the defendant is null and void. He described himself in the plaint as a creditor of T. A. R. A. R. M. Ramanathan Chetty who was adjudicated an insolvent and whose estate was represented by the Official Assignee above mentioned. The suit was filed on the 15th of January, 1920. Among other pleas, the defendant stated that he did not admit that the plaintiff was a creditor of the insolvent Firm. Issues were framed on the 30th of March, 1920, and the third issue runs thus :—

" Whether the plaintiff was one of the creditors of the insolvent Ramanathan Chetty, and if so, whether he has no cause of action to maintain this suit ?

The trial was about to commence in January, 1923 and on the 24th of January, one Krishnier made an application to the Court for the purpose of being added as a plaintiff to the action. I may state that the plaintiff is a Nattukottai Chetty and was represented throughout by this Krishnier. The reason why he desired to be added as a party is set forth in para. 4 of his affidavit, dated the 24th of January, 1923. " The defendant has taken the objection that the plaintiff is not a creditor of the

insolvent firm and has no *locus standi* to maintain the suit. In order to obviate any technical objection on that ground, it is necessary in the interests of justice that this Hon'ble Court should be pleased to join me as a plaintiff and I am willing to continue the suit from the stage which it has now reached."

Mr. G. Krishnaswami Aiyar, the learned Vakil for the petitioner has contended that the suit having been instituted under Order 1, rule 8, C.P.C., was a representative suit filed in the interests of the creditors of the insolvent, that therefore Krishnier was throughout constructively a party to the proceedings, that the application in effect was to place Krishnier on the record *eo nomine* as a party and that in making the application he was merely taking advantage of the provision contained in clause 2 of rule 8. If this argument is correct, in my opinion there will be very little difficulty in acceding to the request. But the question is, is Krishnier a party to the proceeding at all; is he a party although on the record his name does not appear? The answer to this question will depend upon the construction of Order 1, rule 8. The application of this provision is that in certain cases one person or a few persons should be allowed to represent all persons interested in a suit. The rule is in fact an exception to the general rule that all persons interested should be made parties to a suit. It presupposes the existence of a right in the plaintiff. It assumes that under the substantive law, the plaintiff has a right of suit and the rule enables him to represent the whole body of persons whom he seeks to represent. The rule says "Where there are numerous persons having the same interest in one suit, one person may sue on behalf of all persons so interested." The one person indicated in the rule is the person who has an interest common to himself and the body whom he professes to represent. The community of interests between him and the others of the class as the pre-requisite is necessary to the end proposed. It is not any person that may sue on behalf of a class, but it is that person who has an interest which is the same as that possessed by the whole body of persons. "Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent." (Judgment of Lord Magnaghten in *Bedford Duke* v. *Ellis* (1)). If this condition is found wanting, if the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit, I am of the opinion that the suit is wrongly constituted. The permission to sue is given by the Court on the assumption that the plaintiff is a member of the class and if the assumption is shown to be wrong the suit is not a representative suit and no member of the class is constructively a party to it. On the assumption therefore that the plaintiff in the present suit is not a creditor of the insolvent, Order 1, rule 8 has no application.

The following observations of Knight Bruce, L. J., in *Burt* v. *British Life Assurance Asscciation* (2) are very relevant in this connection. "He has sued on behalf of himself and others, and notwithstanding what has been contended on the part of the defendants, I assume that there still exist persons who have a right to complain of these transactions. But that will not give the plaintiff a title to sue for them. As on one hand a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested though no other may wish to sue, so although there are a hundred who wish to institute a suit and are entitled to sue, still if they sue by a plaintiff only, who has personally precluded himself from suing, that suit cannot proceed. The present case in my opinion stands upon the same footing as if the dissatisfied share-holders (supposing them to be dissatisfied) had sued by a plaintiff who had released the defendants." Lord Justice Turner concurs and the law is stated in the same terms in *Daniel's Chancery Practice*, p. 179.

If the plaintiff is a creditor, the assumed necessity for this application does not exist and it equally fails.

It is next contended that Krishnier may be made a party under Order 1, rule 10. I do not propose to discuss the applicability of this rule to cases falling within Order 1, rule 8. It is sufficient to say that it must be alleged and proved, that the suit was instituted originally in the name of wrong person through a *bona fide* mistake and that element is utterly wanting in the

(1) (1901) A. C. 1=70 L.J. Ch. 102=83 L.T. 686 =17 T.L.R. 139.
(2) (1859) 4 De. G. & J. 69=45 E.R. 62.

present case. No allegation is made that the mistake was *bona fide*. As a matter of fact, no materials—absolutely none—are placed before the Court from which an inference can be drawn in favour of the plaintiff. This application cannot therefore be allowed under Order 1, rule 10. I may in passing mention that in the lower Court only this provision was relied on and that reference to Order 1, rule 8 was made only in the course of the arguments before me. Civil Revision Petition No. 253 of 1923 therefore fails and is dismissed.

Another application was made on the same date, namely, 24th of January, 1923, by the original plaintiff himself for permission to amend the plaint. Paragraph 5 of the plaint runs thus :—

"The plaintiff states that the Official Assignee of Rangoon has, through private negotiations conducted by the Official Receiver of Ramnad, conveyed the undermentioned properties for a grossly inadequate value of Rs. 12,000 and has executed a sale-deed in favour of the defendant though several creditors of the insolvent including the plaintiff, protested against such a sale and offered much higher price." He proposes to amend the plaint by saying that the defendant was a benamidar for the insolvents and that Mr. T. S. Ramaswamy Iyengar who conducted the sale as agent of the Official Assignee of Rangoon made a pretence of selling the property by public auction but really sold the property by private contract to the insolvents, the defendants being merely a benamidar for them. Thus allegations of fraud are proposed to be added. The law is stated thus in Annual Practice, p. 451. "Thus, if either party seeks to amend his pleading, by introducing for the first time allegations of fraud, etc., the Court will ask why this new case was not presented originally and may require to be satisfied as to the truth and substantiality of the proposed amendment." The materials, if any which substantiate the allegations of fraud have not been referred to in the affidavits. In the circumstances and having regard to the great delay in making this application from which want of *bona fides* may be inferred I am not disposed to interfere with the order of the lower Court. C. R. P. No. 580 of 1923 accordingly fails and is dismissed.

Then there is a third application made by the plaintiff on the same date for adding the Official Assignee of Rangoon as a party-defendant. The defendant contends that the plaintiff's object in making this application is to delay the trial. As a matter of fact the learned vakil for the petitioner says that he wants no relief against the Official Assignee but that for enabling the Court to do complete justice between the parties his presence is necessary. He says, if the plaintiff obtains a decree setting aside the sale and if the Court directs the refund of the purchase-money to the defendant, it may then become necessary to have the Official Assignee on the record. The answer is that if the plaintiff obtains the decree, it will be open to him to move the insolvency Court for directions to the Official Assignee to pay the money. I do not think at this late stage this application ought to be granted. C. R. P. No. 579 of 1923, therefore fails and is dismissed.

The petitioner will pay the defendant's costs in all the C.R.Ps. (Three sets of costs.)

Applications dismissed.

1924 Madras 885.

KRISHNAN, J.

Clan Line, Ltd., by its Agents Messrs. James Finley & Co., Ltd., of Bombay—Appellants (Defendants)

v.

R. Srinivasa Pai (died) and others—Respondents (Plaintiff and his Legal Representatives).

S. A. No. 257 of 1923, decided on 11th March, 1924, against the decree of the District Court of South Malabar, at Calicut, in A.S. No. 319 of 1920.

Carrier—'Restraint of Rulers' clause' exempts carrier from liability after he is commandeered during war—Carriage after such commandeering must be paid for under S. 70 of the Contract Act.

Where the contract between the Steamship Company and consignees provided for exemption in case of restraints of Rulers and a ship carrying goods to be delivered to the consignees at Cochin was commandeered at Bombay and where the Steamship Company through their Bombay agents arranged for the carriage of the goods to Cochin from Bombay but only on payment of the freight and other charges incurred in carrying the goods from Bombay to Cochin,

Held that the Steamship Company were free from the obligation to carry the goods from Bombay to Cochin,

Held further that even if the Company had no authority to carry the goods from Bombay to Cochin, in view of the correspondence of the party after commadeering of the ship, S. 70 of the

Contract Act entitled the Company to claim charges for carriage as compensation. (32 Cal. 374, *Dist.*) [P. 885, C. 2 and P. 888, C. 1.]

Govindan Nambiar and *Messrs. King & Partridge*—for the Appellants.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar*—for the Respondents.

Judgment:—In this second appeal, the Clan Line Steamship Company, Limited, is the appellant. The respondents are certain merchants in Cochin, who were consignees of certain goods, which the defendant company had undertaken to carry from Liverpool and London to Cochin, under bills of lading, Exhibits 50, 51 and 52. The language of all these bills is exactly similiar and it will be sufficient to refer to one of them in considering the case. The total freight to Cochin was paid as advance freight in England and the goods were put on board of one of the defendant company's steamers, S.S. "Clan Mackellar." The ship duly arrived in the Bombay Harbour, but when it arrived there, it was commandeered by the Government of India for use as transport and in consequence its voyage with cargo had to be terminated and all its cargo was discharged in that port. The steamship agents gave notice of what happened to all the consignees, including the plaintiffs, by Exhibit 24, and asked them to make arrangements to take delivery in Bombay. Some correspondence passed between the parties, the effect of which will have to be considered presently. Finally, plaintiff's goods were forwarded to Cochin by the defendant company's agents in Bombay on board S. S. Upada, a vessel belonging to the B. I. S. N. Co. and were taken delivery of by the plaintiffs on payment of the freight and other charges, amounting to Rs. 1,720 and odd, for the carriage of the goods, from Bombay to Cochin—plaintiffs aver that these charges were wrongfully collected from them and that they are not liable for them and they seek in this suit to get a refund of that money with a small sum for damages for short delivery.

The Subordinate Judge, who tried the suit, dismissed it; but on appeal, the District Judge has given the plaintiffs a decree for part of the amount claimed, made up of the freight and incidental charges connected with the transhipment of the goods from Bombay to Cochin, and of the damages claimed. The plaintiffs have not appealed as regards the amount disallowed, but the defendant company has appealed and has contended before me that the suit should have been dismissed.

The main question for decision is whether the defendant company was entitled to call upon the plaintiffs to pay the charges for the carriage of goods from Bombay to Cochin. There can be no doubt that, when Clan Mackellar was commandeered in Bombay, its voyage terminated as the result of "restraint of rulers", the words used in paragraph 3 of the bill of lading, Exhibit 50, and the ship-owners were not liable for any loss for damages occasioned thereby. The restraint of rulers being one of the excepted causes under paragraph 5, the Master of the ship was entitled under that paragraph to land the plaintiffs' goods in Bombay, at their expense and risk, and the shipowners' responsibility ceased, as soon as notice was given to the shippers by Exhibit 24. Though the voyage to Cochin had not been completed, the shipowners were not bound to refund any portion of the advance freight paid, or to carry the goods to Cochin at their expense. These propositions are laid down in a recent decision of this High Court, with reference to this very voyage of S. S. Clan Mackellar and the bill of lading there was in the same terms as here. The learned Judges have referred to the English authorities on the points, and have discussed the questions at length and as I respectfully follow that ruling, it is not necessary for me to discuss these questions again. It was urged that these learned Judges were wrong in applying the English law to the case and that as soon as Clan Mackellar entered the Indian territorial waters, where the commandeering took place, the Indian Law applied and that section 65 of the Indian Contract Act, governed the case. I am unable to accept this argument. The parties have expressly covenanted by the very first clause in the bill of lading that their contract was to be judged by "the law of the Flag" and that certainly meant in this case the English law, till the contract came to an end by the goods being landed in Bombay. The further dealings between the parties may be governed by the Indian Law, but it is not necessary to decide it definitely, as it makes no difference in the result.

In the case above cited, the learned Judges dismissed the shipper's claim against the Clan Line Company, for the payment of

the charges, incurred by them in carrying their goods from Bombay to Mangalore, which was the Port of destination in that case. The only difference between that case and this case is that whereas in that case the shippers paid the carrying charges, here the Clan Line Company paid them and collected them from the shippers on delivery of the goods. I do not think this makes any real difference as to the result. It was, however, argued that as the plaintiffs did not ask the defendant company to send goods from Bombay to Cochin, their action in so sending must be treated as one taken by them gratuitously and voluntarily and of their own accord, as a piece of officious interference by them with plaintiffs' goods and therefore they were not entitled to be repaid in law the expenses they were put to. This argument was accepted by the District Judge and he directed the money collected for such charges to be refunded. It seems to me that this is an entirely wrong view to take of the case. Within two days after the goods were landed in Bombay, the plaintiffs wrote Exhibit V to the defendant's agents in Cochin and asked when the goods will be transhipped to Cochin. He wrote again Exhibit VI to the defendant's agents immediately to despatch his goods by country craft, as no steamers were then available. The plaintiffs no doubt offered to take delivery of the goods in Bombay, but it was on condition that the company should pay the difference in the freight and the transhipment and other charges. The defendant company never agreed to pay these, as they were not bound to, under the law. The plaintiffs were apparently under the impression that, if the company sent the goods themselves, they would not have to pay the expenses. They again wrote Exhibit AA where they say "as no steamers are available," they will take delivery in Bombay if its charges would be paid by the company. Defendant's agent wrote in reply Exhibit D, wherein they repudiated their liability to pay any difference in freight and offered to deliver in Bombay, only on guarantee being given freeing them from all claim for charges. In reply to a further letter from the plaintiffs, they sent a telegram insisting on the guarantee. Though the plaintiffs wrote Exhibit CC, on the 10th January, to say that they would take delivery, they did not actually do so. On the 20th, a steamer became available to transhipped these goods to Cochin and the defendant's company's Bombay agents took advantage of the opportunity and transhipped the goods by S. S. Upada. In the meanwhile, they had received instructions from their home office to forward the goods to the port of destination, but at the cost of the consignee, from whom the charges were to be collected before delivery, as shown by Exhibit 36. It is clear from all this correspondence that the defendant's agents never intended to transhipped the goods gratuitously but always intended to hold the consignee responsible for the charges. The plaintiffs asked the defendant's agents to send the goods to Cochin, even by country craft, if no steamer was available. Even when they proposed to take delivery in Bombay, they did so, only because it was thought no steamers were available. See Exhibit AA. It seems to me that the correspondence shows that plaintiffs did want their goods to be sent by the defendant's agents to Cochin, whatever dispute there might be, as to who should bear the charges. The plaintiffs' proposal to take delivery themselves in Bombay was conditional on there being no steamers available. Defendant's agents were therefore justified in sending the goods by S. S. Upada, when that steamer became available and I agree with the Subordinate Judge that the defendant company acted as plaintiffs' agents in doing so. The dispute as to the liability to pay the charges has really nothing to do with the authorization to send the goods by steamer. The dispute has to be decided not on the ground whether the defendant company sent the goods voluntarily, but on the ground as to who was responsible to pay those charges under the law ; plaintiffs' subsequent conduct, after they knew that the goods had been sent on to Cochin, clearly shows that even, if they did not actually authorise such sending, they acquiesced in and accepted the defendant's action and ratified it. Second plaintiff wrote to the defendant's agents Exhibit XI to say that he was entitled to the delivery of the goods and not one Liladhur who was disputing his right and that he would pay the charges on receipt of particulars ; the 1st plaintiff wrote Exhibit VII the next day to the same effect. Subsequently the plaintiffs took delivery of the goods and paid the charges. They say in their plaint that they paid under protest, but that was denied and on the evidence it does not appear that

they made any protest. They did not in any way repudiate defendant's action in bringing the goods to Cochin ; nor did they insist on delivery in Bombay. If the defendants were bound to pay the expenses for carrying the goods to Cochin under the law, the absence of protest at time of payment may not be material; but it is very material in considering whether the parties treated the defendant's action in carrying the goods as a voluntary and gratuitous one.

It seems to me further that even, if the defendant company had no authority to send the goods for the plaintiffs to Cochin and that plaintiffs' subsequent action did not amount to a ratification, defendant company will still be entitled to claim compensation under section 70 of the Contract Act. No doubt, as stated in *Damodara Mudaliar* v. *Secretary of State* (1), quoted by the District Judge and approved of in *Jaso Kumari* v. *Basanta Kumar Roy* (2). "The section should not be so read, as to justify the officious interference of one man with the affairs or property of another." But this is not a case of that sort at all. The defendant company were carriers for the plaintiffs and but for the unforeseen action of the Government of India, they would have carried the goods to Cochin. In such cases, the master has power and ought to act for the cargo owners and make such arrangements, with regard to the cargo as prudence dictates. See Carver on Carriers, 6th Edn., p. 421. It is true he ought to obtain instructions from the cargo owners, if it is practicable to do so ; but in this case, the instructions were, if anything, in favour of sending the goods. Even if he fails to obtain instructions, his action cannot be treated as unlawful ; nor was it so treated, by the plaintiffs themselves. Nor can the defendant company be looked upon as mere officious interferers in sending the goods. It seems to me they acted lawfully and as they clearly did not intend to act gratuitously in the matter and as plaintiffs have enjoyed the benefit, they are bound to pay the charges claimed as compensation.

In any view, the plaintiffs are not entitled to the refund claimed. No separate argument has been adduced before me, regarding the claim for damages for short delivery. That is a claim that should have been made against the British India Steam Navigation Company and not against the defendant company. In the view I take, the second appeal is, therefore, allowed, and the decree of the lower appellate Court is set aside and the decree of the first Court restored, with costs here and in the Court below.

Appeal allowed.

(1) (1895) 18 Mad. 88=4 M.L.J. 205.
(2) (1905) 32 Cal. 374.

1924 Madras 888.

WALLACE, J.

Periaswami Muthiryan and others—Petitioners (Accused).

Crl. Rev. Case No. 292 of 1923, (Crl. R.P. No. 218 of 1923, decided on 1st February, 1924, against the order of the Court of 1st Class Bench, Srirangam, dated 8th March, 1923, in S.T. No. 13 of 1922.

Criminal trial—Stay should be ordered where title and attempt to get possession are pleaded and not where possession on date of trespass is pleaded.

A Criminal Court has power to stay criminal proceedings pending before it, until disposal of civil litigation between the parties respecting the same subject-matter ; but if the defence is that accused was in possession on the date of Criminal trespass no stay need be made ; but where only title and attempt to get possession are pleaded stay should be ordered.

W. S. Subrahmania Aiyar—for Petitioners.

V. L. Ethiraj for *the Public Prosecutor*—for the Crown.

Order :—The Bench Court has no doubt power in law, to stay the trial of the criminal case and I do not understand why it doubts that. If the accused's defence is that they were in possession on the date of the criminal trespass, then the result of the civil case will have no bearing on the criminal trial and no stay of the latter will be called for. But if accused's defence is that they were not in possession but went, in pursuance of their title for possession, to take possession, then the decision of the Civil Court on title will have some bearing on the case and the criminal trial had better be stayed. The Bench will proceed with the case up to the stage of accused putting in their defence and then be guided on the lines indictated above, as to the propriety of staying further trial till the disposal of the civil case.

Order set aside.

* 1924 Madras 889.

KRISHNAN AND ODGERS, JJ.

Srinivasachariar—Appellant

v.

Appavoo Reddy and others—Respdts.

A. A. O. No. 315 of 1923 and Civ. R. P. No. 741 of 1923, decided on 2nd April, 1924, against the order of the Subordinate Judge of Coimbatore, dated 10th March, 1923, in E. A. No. 257 of 1922.

(a) *Civ. Pro. Code, S. 47—A purchaser in execution by inferior Court can object to sale of the purchased property by superior Court in execution of another decree under S. 47 but not under O. 21, r. 58—Civ. Pro. Code, O. 21, r. 58.*

A purchaser in execution of a decree by an inferior Court can bring to the notice of the superior Court the fact of his purchase as a representative of the judgment-debtor for stopping the sale in execution of a decree of a superior Court but he cannot object under O. 21, r. 58. (15 C.W.N, 542, *Diss.*) [P. 890, C. 1.]

(b) *Civ. Pro. Code, S. 63—Scope.*

S. 63 sets at rest conflict of views prior to 1908 and validates proceedings even by inferior Courts during attachment by the superior Court. It enjoins that the superior Court should realise the property in cases where the inferior Court had notice of execution by superior Court. [P. 890, C. 1.]

T. M. Krishnaswami Aiyar—for the Appellant.

Krishnan, J.:—In this case a somewhat novel point arises for decision. There was a decree in the District Munsif's Court against one Bole Reddi and another. The property in question here was attached in execution of that decree. The property had also been already attached by an order of attachment before judgment by the Subordinate Judge of Coimbatore. The Subordinate Judge has passed a decree in his suit and the attachment before judgment took effect as an attachment after decree. The property was sold by the District Munsif in execution of the decree in his Court, and has been purchased by the appellant before us. Subsequently the decree-holder in the Subordinate Judge's Court applied to the Subordinate Judge to have the property sold in execution of his decree. Thereupon the appellant here put in a petition to the Subordinate Judge asking that the property should not be sold in execution of his Court's decree as it was no longer the property of the judgment-debtor, the title to the property having passed to him by his purchase in the execution of the Munsiff's Court decree. The Subordinate Judge rejected this application as being an incompetent application altogether. The appeal is against that order. The Subordinate Judge rightly remarks that the application cannot be treated as an application under Order 21, rule 58, C. P. C., for that rule is only applicable only when the objection taken is that the property attached is not liable to attachment. In this case, at the time the Subordinate Judge attached the property, it was still the property of the judgment-debtor and no objection could have been raised to the attachment when it was put on the property. The Subordinate Judge then proceeds to say in his order that the present application is not one comtemplated by any provision of the Civil Procedure Code and he dismisses it on that ground. We are unable to agree with him. He has quoted the ruling in *Mahadeo Lal* v. *Dinker Prasad* (1) as an authority for his position. In that case one of the decrees in execution was a mortgage decree which did not require any attachment to be put on the property. Here we have a case where two Courts have attached the same property in execution of money decrees in each Court. This is a case which falls under section 63 of the Civil Procedure Code. Ordinarily under clause 1 the Court which should have realized or received such property and determined any claim thereto or any objection to the attachment thereof was the Court of the highest grade, *i.e.*, the Subordinate Judge's Court. But for some reason not clear on the record, it was the Munsif that caused the sale of the property and not the Subordinate Judge. Clause 2 which has been newly introduced in section 63 says, "Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees." It would follow from this clause that the sale by the Munsif in execution of his decree was not invalidate by the fact that the property was under attachment by the Subordinate Judge. The section clearly validates such sales. There was a considerable difference of opinion at one time as to the result of two Courts attaching a property and each selling it itself. It was first held in Madras that the sale of the superior Court even if later in time prevailed and passed the title of the property, the

(1) (1911) 15 C.W.N. 542=9 I.C. 194.

sale by the inferior Court being invalidated, vide *Muttukaruppan* v. *Mutturamalinga* (2). That view was somewhat modified by this High Court in *Kunpayam* v. *Ithukutti* (3) where it was held that the prior sale by the inferior Court would pass title to the property if it had no notice of the proceedings before the superior Court but if the inferior Court had notice of the proceedings of the superior Court and still proceeded to sell, that sale would be vitiated. The Allahabad High Court seems to have taken a different view altogether, namely, that the sale by the first Court prevailed, whatever the grade of the Court that made the sale may be. The introduction of clause 2 in section 63 of the Civil Procedure Code seems to be intended for the purpose of setting this dispute at rest. It clearly lays down that anything done by the Court executing the decree shall not be deemed to be invalidated because of the existence of the attachment on the property by the superior Court, irrespective of any question of notice. That being so, we must hold in this case that the sale by the Munsif passed title to the appellant. Then the question is whether the appellant can adopt any procedure under the Civil Procedure Code to bring to the notice of the Subordinate Judge the fact that the title to the property had already passed to him and stop the sale of it in execution of the Subordinate Judge's decree. The Subordinate Judge says that there is no such provision in the Code; but we think the matter is one which can be brought within the terms of section 47 of the Civil Procedure Code. The purchaser is certainly a representative of the judgment-debtor, even though he is a Court-auction-purchaser. See *Veindramuthu Pillai* v. *Maya Nadan* (4). The appellant was therefore a representative of the judgment-debtor in the suit before the Subordinate Judge and as such representative he was entitled under section 47 to apply to the Subordinate Judge to stop the sale of the property, on the ground that the title to it had passed to him. That is certainly a matter relating to execution. The words of section 47 being quite wide enough to include such a contention, the Subordinate Judge should have entertained this application. The contrary view was no doubt taken in 15 C. W. N. 542; but with all respect we are unable to follow the reasoning in page 544 where the learned Judges say, "We are unable to hold that the present respondent-petitioners can be said to be the representatives of the judgment-debtor for the purpose of that section, namely, section 47. They are, in fact, setting up an antagonistic title based on their purchase." That is not the view that has prevailed in Madras, as the decision of the Full Bench referred to above shows. We are unable therefore, to follow the ruling in 15 C. W. N. 542 on the point. The question then is what is to be done in this case? If there are any allegations of fraud in obtaining the decree in execution of which the appellant purchased the property or any other ground which would vitiate the decree itself, it would no doubt be a ground for enquiry. The order of the Subordinate Judge refusing to entertain the petitioner's application must be set aside and the case remanded to him for a fresh disposal according to law in the light of the observations we have made above. The respondent will pay the costs of this appeal to the appellant. The costs in the lower Court will be disposed of by that Court.

The Civil Revision Petition is dismissed by without costs.

Appeal allowed.
Petition dismissed.

(2) (1884) 7 Mad. 47.
(3) (1899) 22 Mad. 295=9 M.L.J. 1.
(4) (1920) 43 Mad. 107=(1919) M.W.N. 881=36 M.L.J. 32=54 I.C. 209=26 M.L.T. 391 and also 43 Mad. 696=(1920) M.W.N. 299=58 I.C. 501 (F.B.)

1924 Madras 890.

WALLACE AND JACKSON, JJ.

Athamsa Rowther—Appellant (Defendant).

v.

Ganesan and another—Respondents (Plaintiffs 2 and 3.)

A. A. O. No. 340 of 1923, decided on 8th August, 1924, against the order of the Subordinate-Judge of Negapatam, dated 6th July, 1923, in A. S. No. 1 of 1923.

(a) *Civ. Pro. Code, S. 105—Order setting aside ex parte final decree, but not the ex-parte preliminary decree can be challenged in appeal against decree finally passed.*

An order setting aside the *ex parte* final decree in a mortgage suit while not disturbing the *ex parte* preliminary decree in the same suit, is an order affecting the decision of the case and the propriety of the order can be challenged in an appeal against the final decree passed in the suit. [P. 892, C. 2.]

(b) *Mortgage—Application for final decree.*

An application for final decree is a proceeding in a suit and not in execution. Only one such application in permissible and it must be filed within three years of the preliminary decree. [P. 891, C. 2.]

K. Rajah Aiyar and *N. Panchapakesa Aiyar*—for the Appellant.

K. S. Jayarama Aiyar—for the Respondents.

Wallace, J.:—The respondents had obtained in the Court of the District Munsif Tiruvalur, against the appellant a preliminary mortgage decree *ex parte* on 2nd September, 1912, and a final decree *ex parte* on 15th September, 1917. On 20th November, 1920, the appellant applied in I. A. No. 39 of 1921 to the District Munsif to set aside the *ex parte* final decree. This was allowed on 17th December, 1921. The entry on the notes paper referring to this runs:—"*Ex parte* decree set aside as per order on I. A. No. 39 of 1921. For written statement and draft issues adjourned to 6th January, 1922." The order itself is headed, "This is a petition to set aside the *ex parte* final decree passed against the petitioner," and concludes. "It is ordered that the petition be and the same hereby is allowed." When the re-hearing of the application for final decree came on, it was contended before the District Munsif, a different Judge from the one who passed the order on I. A. No. 39 of 1921, that the notes paper showed that his predecessor had set aside not only the final decree but the preliminary decree as well, because he had called for written statement and draft issues and that therefore the whole suit should be taken up again. The District Munsif decided against that contention, found that the application for the final decree was barred by limitation, and he therefore dismissed the application. On appeal the lower appellate Court held that the District Munsif's order on I. A. No. 39 of 1921 had set aside both the preliminary and final decrees. He reversed the District Munsif's order and remanded the whole suit for rehearing. The appellant (defendant) has now appealed against that order.

We think that the lower appellate Court's view on this matter is clearly wrong. The application to the District Munsif was to set aside the final decree only and this was clearly apprehended by the plaintiff also as is obvious from his counter in the I. A. The order itself, as quoted above, clearly gave what the petitioner in that I. A. asked for and no more. We must go by that order and not by what we think from the District Munsif's note that he intended the order to be. Even from the notes paper it would appear that the entry calling for written statement and draft issues was a mistake, as, on the adjourned date of hearing, it was a counter-statement and not a written statement that was put in and accepted by the same District Munsif and no draft issues were ever put in. The case was disposed of on that counter-statement. It would take much stronger evidence to convince us that the District Munsif deliberately ordered a relief which he was not asked to give by either party. We are quite clear that only the final decree was set aside and the order of the lower appellate Court remanding the whole suit for trial cannot therfore be supported and must be set aside.

We are asked, however, not to accept the District Munsif's finding that the application for final decree was out of time. The preliminary decree was on 2nd September, 1912. On 17th March, 1913, an application for final decree was made and dismissed because the notice was not served. On 16th March, 1913, another application was filed, the fate of which is uncertain. On 23rd March, 1917, a third application was filed, the one now in question. It was commonly believed at that time that applications for final decrees were to be treated as applications for execution and were subject to the rules of limitation governing these. Of late, the Courts have laid down that an application for a final decree is a proceeding in a suit and not in execution, and therefore only one application is permissible and it must be put in within three years of the preliminary decree. Adopting this later view of the law, the District Munsif dismissed the application of 23rd March, 1917 as out of time. The plaintiff contends that on the same view of the law the dismissal of his application of 17th March, 1913, on the ground that notice was not served was improper, because no notice was necessary on such an application, and therefore his application of 23rd March, 1917, may fairly be treated as a continuation of the application improperly dismissed on 17th March, 1913. We need not refer further to this question, because we think that the respondent-plaintiff is bound to succeed on another ground and that is that

the appellant-defendant's application to set aside the *ex parte* final decree was itself out of time.

The *ex parte* final decree was passed on 15th September, 1917. In I.A. No. 39 of 1921 the defendant alleged that he became aware of it on 20th October, 1920. He did not file his I. A. until 20th November, 1920, one day over the thirty days allowed by law. We have verified that 19th November, 1920 was a working day in the Court. No explanation for the delay was offered in the petition or affidavit. *Prima facie* therefore his petition was out of time. The point was raised before the lower appellate Court which disposed of it on two grounds. First, that the ground of limitation was not taken by the plaintiff when I. A. No. 39 of 1921 was put in, and secondly, that the plaintiff cannot now take this point in appeal from an order setting aside the final decree since it is not a ground affecting the decision of the case within the meaning of section 105 of the Civil Procedure Code. The first point is not a good one. In his counter the plaintiff clearly contended that the application was time-barred although he then thought that the date of the presentation was 11th January, 1921. It was a mere quibble to say that he had not taken the point because he made a mistake as to the actual date of presentation of the petition.

As to the second point it is quite true that certain High Courts have interpreted the words "affecting the decision of the case" in section 105 as meaning "affecting the decision of the case on the merits"—see for example the Calcutta High Court in *Chintamony Dassi* v. *Raghunath Sahoo* (1), the Allahabad High Court in *Gulab Kunwar* v. *Thakur Das* (2), *Tassaduq Husain* v. *Hayat-un-nissa* (3) and of the Lahore High Court in *Fazal* v. *Hashmathi* (4), *Budhu Ram Houda Ram* v. *Ram Jan* (5) and *Sundar Singh* v. *Nigahiya* (6); but all these cases proceed on the principle that, when the setting aside of the order has re-opened the hearing of the suit on the merits, the propriety of the setting aside of the order cannot be attacked in an appeal in the suit. In our opinions they do not go beyond that or lay down that in no case can the propriety of an order setting aside an *ex parte* decree be challenged in an appeal against a decree finally passed in the suit. For example, a proper case in which it could be set aside is the case set out in *Gopala Chetty* v. *Subbier* (7), where an *ex parte* decree had been set aside on behalf of a party who had never applied for it to be set aside. In *Nand Ram* v. *Bhopal Singh* (8) a bench of the Allahabad High Court followed *Gopalu Chetty* v. *Subbier* (7) although perhaps it has stated too broadly the general proposition. It seems to us that the present case is another in which an order setting aside an *ex parte* decree may be properly attacked. It is clear that, when the result of the setting aside of the order has been the hearing of the suit *de novo* on its merits, no injustice would be done to any one by the decision of the case and the final result is not affected. But in the present case the result would be very different. The defendant has deliberately no doubt for good reasons from his own point of view refrained from opening the whole suit and only wants the final decree to be re-opened because he thinks he has a good point of limitation which will enable him to render the preliminary decree futile. So far from courting a decision on the merits he is trying to burke such a decision altogether. In such circumstances we cannot but hold that an order setting aside *ex parte* the final decree while retaining the *ex parte* preliminary decree is an order "affecting the decision of the case."

We consider therefore that it is open to us to consider the propriety of the District Munsif's order allowing the final decree to be set aside. The application was out of time and we can see no reason for indulgence or for not enforcing strictly the law of limitation. Technicalities may be waived in the case of a party *bona fide* seeking to do justice as well as to get it: but the defendant's dodge is too apparent. He admits the mortgage claim, as he does not challenge the *ex parte* preliminary decree, but seeks to defeat it by a technicality of the law affecting the final decree which only became available

(1) (1895) 22 Cal. 981.
(2) (1902) 24 All. 464 = 1902 A.W.N. 136.
(3) (1903) 25 All. 260 = 1903 A.W.N. 39.
(4) (1916) 133 P.W.R. 1916 = 31 I.C. 914 = 40 P. R. 1916.
(5) 1921) 33 P.W.R. 1921 = 59 I.C. 676.
(6) 1923 Lah. 425 (1).
(7) (1903) 26 Mad 604 = 13 M.L.J. 308.
(8) (1912) 34 All. 592 = 16 I.C. 1 = 10 A.L.J. 130.

to him on the later interpretation of the law. He would seek to enforce the law of procedure against the plaintiff while claiming absolution for himself from the Law of Limitation. He would re-open the suit only to the extent to which it would benefit himself. We are not prepared to relax the Law of Limitation in favour of such a person. We therefore hold that the application to set aside the final decree was out of time. The result is that the final decree of 15th September, 1917, stands. We therefore reverse the order of the lower appellate Court and we direct accordingly. The defendant will pay the plaintiff's costs in the lower Courts; he will get his costs in this appeal.

Order reversed.

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* 1924 Madras 893 (1).

KRISHNAN and ODGERS, JJ.

Sinnaswami Chettiar—Appellant-Petitioner

v.

Aligi Goundan and others—Respondents-Creditors-Respondents.

A. A. O. No. 469 of 1923, decided on 3rd April, 1924, against the order of the District Court of Coimbatore, dated 26th September, 1923, in I. A. No. 268 of 1923, in I. P. No. 80 of 1923.

(a) *Provincial Insolvency Act, S. 23—Scope.*

Before adjudication insolvent has no right to be protected unless he is arrested in execution of a decree.

(b) *Provincial Insolvency Act, S. 31—Scope.*

An insolvent is not entitled to apply for protection before adjudication unless he has been actually arrested in execution of a decree. [P. 893, C, 2.]

M. S. Vaidhyanatha Aiyar—for Appellant.

S. S. Ramachandra Aiyar—for Respondents.

Judgment:—This is an appeal from the order of the District Judge of Coimbatore refusing protection to the appellant who has filed a petition in insolvency in that Court. The petition had been admitted but no order of adjudication had been made at the time the application for protection was made or even now. The learned Judge has refused protection on the ground that the insolvent had made two fraudulent transfers just before he made the application. We do not however propose to go into that question in appeal. Section 31 of the Provincial Insolvency Act deals with applications for protection only after the order of adjudication is made and that stage had not been reached in this case yet. The only other provision which deals expressly with what may be called protection before adjudication is section 23. That section says, "At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of a decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary." The condition under which the Provincial Insolvency Act allows the Court to interfere between an insolvent and his judgment-creditors before adjudication is where a decree-holder has arrested him. An insolvent is not entitled to make an application under the Act for protection before he is adjudicated, unless he has been arrested, because there is really no necessity till then for any protection. If the insolvent wants to apply for protection, he ought to expedite matters in such a way as to get his order of adjudication first and then ask the Court to grant protection under section 31. Neither the state of affairs contemplated by section 31 nor by section 23 has arisen in this case. We, therefore, think that there is no necessity to grant protection at this stage. If the insolvent is arrested hereafter, it will be open to him to apply under section 23 and we have no doubt that the Court will consider his case on the merits and not allow the order now passed by the District Judge to stand in the way of such consideration. Similarly if he gets an order of adjudication, he may apply under section 31. But at this stage we do not think it is necessary to interfere. The appeal is therefore dismissed with costs.

Appeal dismissed.

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* 1924 Madras 893 (2).

KRISHNAN AND ODGERS, JJ.

Bathula Pitchireddi and others—Appellants (Defendants 3 to 5 and 7 to 9)

v.

Yallapeddi Bharatasastri — Respondent (Plaintiff).

A. A. O. No. 378 of 1923, decided on 17th April, 1924, from the order of

Subordinate Judge of Bapatla, dated 14th December, 1922, in A. S. No. 131 of 1922.

Civ. Pro. Code, S. 11—Finding on issue not necessary for disposal of suit but recorded to avoid possible remand is not res-judicata.

When a finding is recorded only to avoid a possible remand and it is not the basis of the judgment the point is not finally determined and is not *res judicata*. [P. 391, C. 2.]

Ch. Raghava Rau and *A. Sundaram Aiyar*—for Appellants.

B. Somayya—for the Respondent.

Judgment:—The question raised in this case is one of *res judicata*. The appellant represents the interests of one Pitchireddi. The respondent represents the interests of one Ramireddi II. Ramireddi and Bapireddi brought a suit, O. S. No. 372 of 1904, and got it declared that certain alienations by the widow in possession to Pitchireddi and to some others respectively were not binding upon the reversioners. In that suit, Pitchireddi and the other defendants raised the question that the property did not belong to the widow's husband, and therefore the reversioners had no right to the properties. They also relied upon the question that the suit was barred by limitation. These were the two main questions raised in that case. The District Munsif came to the conclusion that the suit was barred by limitation and dismissed the suit expressly on the ground of limitation. He also gave a finding on the issue as to title against the plaintiffs' reversioners, holding that the properties did not belong to the estate of the deceased last male holder, as alleged by them. But after coming to that finding, he stated in his judgment that he recorded that finding, for the purpose of preventing a remand, but that he really based his judgment upon the finding on limitation. It is the finding of the District Munsif in that suit on the question of title that is now claimed to make that question *res judicata*, between the present parties. There was an appeal from the judgment of the District Munsif by one of the reversioners, Bapireddi; the other reversioner, Ramireddi, was joined as the 5th respondent. So far as the second set of alienees were concerned, the District Munsif's decree was confirmed, on the finding that the suit was barred by limitation, by the appellate Court. But the appellate Court expressed no opinion on the matter regarding Pitchireddi's claim, as the matter ended in a compromise, by which the decree of the first Court was set aside and the suit was decreed in appeal, as per terms of the compromise, under which Pitchireddi agreed that Bapireddi should take the properties on the death of the widow, on the footing that the alienation to him did not cover more than the life-estate of the widow. There was a second appeal in the matter, by Pitchireddi in the High Court, in which this compromise decree seems to have been set aside; and so far as Bapireddi was concerned, the decree of the first Court was restored, Ramireddi not being a party to the second appeal. This is how the matter stands. Now the lower Court has held that the finding in the previous litigation, as to title, is not *res judicata* in the present litigation, on the ground that the finding of the first Court as to title had been by implication set aside, by the appellate Court and the High Court's decree restoring the first Court's decree was not binding upon Ramireddi, because he was not a party to the second appeal. Assuming for a moment that this view is not correct and the first Court's findings are still subsisting, we must still hold that the question of title has not been made *res judicata*, by those findings. The finding of the first Court, on the question of title, was only a tentative decision, a sort of opinion expressed by that Court, that the title was not in the person, whom the reversioners put forward. The District Munsif says, after finding on the question of title, in favour of the alienee, in paragraph 17 of his judgment that:

"the finding on the first issue was beside the point, and that he ought not to have recorded the finding, but for saving the suit, from being remanded, in case the appellate Court disagreed with him in his finding of the other issue."

He then considered the question of limitation and found that the plaintiff's suit was barred by limitation and dismissed the suit. It is clear, after this statement of the Munsif that he did not intend to base his judgment at all, upon the question of title; his finding therefore can only be treated as an *obiter dictum* and not as *res judicata* at all. For a finding to become *res judicata*, it is necessary that the point should have been heard and finally determined. When a Court merely for the purpose of preventing a remand records a

conclusion on an issue, not necessary for the decision, we cannot hold that it has finally determined the question. This point was decided by the Madras High Court in *Devorakonda Narasamma* v. *D. Kanaya* (1). Their Lordships held :

" the words in S. 13 of the Code of Civil Procedure ' has been heard and finally decided by such Court' do not apply to an opinion, expressed in the judgment on other issues, not material for the purpose of the decree, though properly determined under S. 204 of the Code of Civil Procedure, by the Court of First Instance".

That is, if the decree is not based upon a particular finding, that finding cannot be treated as *res judicata*. We therefore agree with the Subordinate Judge in thinking that there is no *res judicata* in this case, and dismiss the appeal with costs.

Appeal dismissed.

(1) (1882) 4 Mad. 134.

* 1924 Madras 895 (1).

RAMESAM, J.

Turka Hussain Saib and others—Accused

v.

Crown—Opposite party.

Cr. R. C. No. 520 of 1923 (Case Referred No. 58 of 1924), decided on 5th August, 1924, against the order of the Sessions Judge, Kurnool, dated 25th July, 1924, in Dis. No. 183 of 26th July, 1924.

(a) *Legal practitioner—Professional misconduct—Unpreparedness to argue the appeal at the time of the presentation of the appeal papers is not professional misconduct.*

A pleader who has looked into the papers of a case for drafting grounds of appeal, is not guilty of professional misconduct merely because he is not prepared to argue the appeal at the time of the presentation of the appeal papers. [P. 895, C. 2.]

(b) *Crim. Pro. Code, S. 421—Special posting after a reasonable time must be made for hearing under S. 421—Where questions of fact are argued records of the lower Court must be sent for even under S. 421.*

A posting for the purpose of hearing under S. 421 must be a special posting after reasonable time—not less than a week, and the appeal should not be heard at the time of the presentation of the papers even for dismissal under S. 421. If questions of fact are argued in the appeal, the appeal ought not to be disposed of without sending for the original records of the Court below. [P. 895, C. 2.]

Order :—I entirely agree with the remarks of the Sessions Judge in his letter of reference. The decisions mentioned by him, *viz.*, *Ramtohal* v. *Emperor* (1) and *Rangacharlu* v. *Emperor* (2) both lay down that a criminal appeal should not be heard at the time of the presentation of the papers, even for the purpose of dismissal under section 421.

The posting for the purpose of hearing under section 421 must be a special posting after a reasonable time—not less than a week. *Ramtchal* v. *Emperor* (1). This is the practice in the High Court and ought to be the practice in the mofussil wherever it is not.

I may also point out that the view of the learned Sub-Divisional Magistrate, *viz.*, that a pleader who has looked into the papers of a case for the purpose of drafting grounds of appeal is guilty of professional misconduct if he is not prepared to argue the appeal at the time of presentation of the appeal papers is not correct.

It is well known that a memorandum of appeal containing all possible grounds (some of which may be ultimately untenable) can be drafted by a mere perusal of the judgment and without the use of the depositions, whereas, for *arguing* the questions of fact, the depositions have to be carefully studied.

In *Rangacharlu* v. *Emperor* (2) it is pointed out that, if questions of fact are argued in the appeal, the appeal ought not to be disposed of even under section 421, without sending for the original records of the Court below containing the depositions. I agree with this.

The result is, the dismissal of the appeal by the Sub-Divisional Magistrate is set aside and the appeal is remanded to him for re-hearing and disposal according to law.

Appeal remanded.

(1) (1909) 36 Cal. 385 = 13 C.W.N. 684 = 1 I.C. 868 = 9 Cr. L.J. 401.
(2) (1905) 29 Mad. 236 = 4 Cr. L.J. 57.

1924 Madras 895 (2).

SPENCER, J.

Mallampati Narasimham — Petitioner (Accused)

v.

Sub-Inspector of Police, Prattipad—Respondent (Complainant).

Cr. R. C. No. 929 of 1923 (Cr. R. P. No. 746 of 1923), decided on 11th April, 1924, against the order, dated 24th

September, 1923, of the Deputy Magistrate of Guntur, in C. A. No. 56 of 1923.

Penal Code, S. 353—Essentials.

Assault by the lessee of the defaulter (pattadar) who had failed to pay the water-tax, on the officer executing the warrant authorising distraint of the defaulter's property is no offence under S. 353.

Ch. Raghava Rao—for the Petitioner.

The Public Prosecutor—for Respondent.

Order:—The Public Prosecutor is not prepared to defend the action of the Village Munsif in attempting to distrain the moveable property of the lessee of the defaulter for unpaid water-tax. The warrant authorises distraint of the property of the defaulter. The defaulter in this case was the pattadar, a person different from the accused. The conviction for assaulting a public servant in the discharge of his duty cannot stand. It is quashed and the fine collected is directed to be refunded.

Order set aside.

1924 Madras 896.

SPENCER, J.

Kuppu Odayar—Petitioner (Petitioner)

v.

Poomalai Goundan—Counter-petitioner.

Cr. R. C. No. 891 of 1923 (Cr. R. P. No. 712 of 1923), decided on 28th March, 1924, against the order dated 1st November, 1923, of the District Magistrate of South Arcot, in C. M. P. No. 29 of 1923.

Crim. Pro. Code, S. 144—Order should not be revised or investigated into after efflux of time.

When an order under Crim. Pro. Code, S. 144 has expired by efflux of time the High Court will not revise it nor will it adjudicate upon the merits thereof. (42 M.L.J. 352, *Diss.*) [P. 896, C. 1.]

E. L. Thornton and *T. R. Govindasami Mudaliar*—for Petitioner.

The Public Prosecutor and *R. Gopalaswami Aiyangar*—for Counter-petitioner.

Order:—The order passed by the District Magistrate under section 144, Criminal Procedure Code, on 23rd September, 1923, has expired.

It ist herefore unnecessary to adjudicate upon the merits of the order, and it would be superfluous to annul an order which has long ceased to be in force, vide *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* (1).

Nevertheless it has been strongly urged that the District Magistrate should not have issued an order under section 144 and should not have discharged the Sub-Divisional Magistrate's order under section 107, Criminal Procedure Code, without finding that there was a danger of a breach of the peace even if the Goundans continued to be bound over to keep the peace. In *Muthukumaraswami Nadar* v. *Muhammad Rowther* (2) a learned Judge of this Court whose attention does not seem to have been drawn to *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* (1) thought it incumbent on him to interfere in revision with an expired order. The cases quoted by him do not in my opinion support his view.

In *Ramanadhan Chetti* v. *Murugappa Chetti* (3) the fact that the order had ceased to be in force does not appear to have been brought to notice when the High Court heard the Criminal Revision Case and in *Govinda Chetti* v. *Perumal Chetty* (4) there was in fact one day more for the order to remain in force. It seems to me a waste of time to adjudicate upon matters which have no practical effect. I therefore dismiss the Criminal Revision Petition,

It will be sufficient to communicate to the District Magistrate for his future guidance a copy of the judgment of Ayling, J. in *Swaminatha Mudaliar* v, *Gopalakrishna Naidu* (5) as representing the proper course to be adopted by a Magistrate in dealing with cases in which his powers under section 144 are repeatedly invoked.

Rivision petition dismissed.

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(1) (1915) 16 Cr. L.J. 272=28 I.C. 160.
(2) (1922) Mad 76=42 M. L. J. 352=15 M.L.W. 423=(1922) M.W.N. 177=30 M.L.T. 148=23 Cr. L.J. 404.
(3) (1900) 24 Mad. 45.
(4) (1913) 28 Mad. 489=30 I.C. 453=16 Cr. L.J. 629.
(5) (1915) 16 Cr. L.J. 592=30 I.C. 144.

1924 Madras 897.

DEVADOSS, J.

Sreemedhanidhi Swamigal by Agent H. Venkataramanachar—Appellant-Plaintiff.

v.

Valai Ibrahim Sahib and others—Respondents—Defendants.

S. A. Nos. 521 to 536 of 1923, decided on 22nd July, 1924, against the decree of the District Court of North Arcot in A. S. Nos. 286 and 288 to 297 of 1920 and 148 to 152 of 1921.

(a) *Madras Estates Land Act, S. 24—Bars suit for enhanced rent under contract.*

A suit by the landholder against the ryot for enhanced rent based upon a contract between the parties is barred by S. 24. [P. 897, C. 2.]

(b) *Madras Estates Land Act, S. 187—Contracts.*

The fact that S. 187 does not specifically mention contracts for enhancing rent, does not render the contract unenforceable. [P. 898, C. 1.]

B. Sitarama Rao—for the Appellant.

A. C. Sampath Aiyengar—for the Respondents.

Judgment:—The first point raised in this batch of second appeals is that the landholder is entitled to claim enhanced rent by virtue of an agreement entered into with the tenants. Mr. Sitarama Rao on behalf of the appellant contends that there is nothing in the Estates Land Act which precludes the landholder from claiming enhanced rent under a contract with the tenants. His argument is that section 187 of the Act does not cover a case like the present, and sections 31 to 37 contain the rules under which enhancement of rent could be granted when claimed under section 30 and he urges that section 24 of the Act, is not a bar to such a claim. Before considering the cases relied upon by him, it is necessary to consider what the provisions of the Act are as to enhancement of rent. Section 24 is explicit in its terms. It says:

"the rent of a ryot shall not be enhanced except as provided by this Act;"

and then provision is made for enchancing the rent in certain cases, and safeguards are provided against unreasonable or improper enhancement, and the enchancement is always to be made through the revenue authorities. That being so, the question arises whether by reason of an agreement between the landlord and the tenants, the landlord can claim enhanced rent. Looking at the frame of the Act and the object thereof, I think the appellant will have to make out a very strong case before he can ask the Court to say that by an agreement entered into between the landlord and the tenant, the landlord could claim enhanced rent notwithstanding the clear provisions of section 24. Mr. Sitarama Rao relied upon *Battina Appana* v. *Raja Yarlagadda* (1) in which the landlord was allowed to claim a sum in addition to what he had been claiming before. But the facts of the case show that the liability on the part of the tenant was not in any way enhanced by the additional claim. It was by reason of the Government entering into an arrangement with the Zamindar that the amount payable to the Government was made payable to the Zamindar, and that case has no application to the facts of the present case.

The next case relied on by him is that reported in *Sivaganga Zamindary* v. *Chidambaram Chetti* (2). In that case, there was no enhancement of rent in the strict sense of the term. There was a demand for an additional sum on account of the increased extent of the holding. Enhancement of rent means enhancement in the rate of rent and additional rent and not merely the increase in the amount claimed. If by reason of a new survey or for any other reason the extent of the holding is found to be more than that for which the tenant was paying rent the landlord is entitled to claim additional rent in respect of such additional extent found in the tenant's holding, and therefore this case does not help the appellant. Under the Old Act VIII of 1865, the Courts enforced the agreements entered into between the landlord and the tenant; and section 11 made it obligatory on the tenant to abide by the terms entered into with the landlord, but the present Act is against allowing the landlords to enforce the contracts entered into by them, with the tenants unless such contracts came within the purview of the Act. The present Act expressly excludes the right of the landlord to enforce an agreement entered into with the tenants, when the enforcement of such contracts would be to the

(1) (1917) 33 M.L.J. 355=42 I.C. 464=6 L.W. 443.

(2) (1915) 38 Mad. 524=14 M.L.T. 386=25 M.L.J. 641=21 I.C. 556=(1918) M.W.N. 926.

detriment of the tenants. That being the scope and the object of the Act, I do not think it would be right in a case like this, where the landlord entered into an arrangement to allow the appellant to succeed.

The learned vakil for the respondent relies upon the following observations of the learned Chief Justice reported in *Chokkalingam Chettiar* v. *Palani Ambalam* (3):

"This indicates clearly that the intention of the legislature was to refuse to contracts made before, equally with contracts made after the passing of the Act any effect on the relation between the ryot and the landholder."

with which I respectfully agree. In the result, I disallow the appellant's contention on this point.

In second appeal No. 521, the plaintiff claims additional rent on the ground that there was an excess holding in the tenant's possession. Mr. Sitarama Rao's contention is that the lower Courts did not give weight to the burden of proof inasmuch as the burden lay upon the defendant to show that he was not liable to pay this additional sum notwithstanding the Muchilika entered into by him. No doubt a muchilika was taken from the tenant. But both the Courts have considered the evidence and the circumstances of the case; and I do not think that the question of the burden of proof arises at this stage. They had before them all the facts, and the Courts came to the conclusion that there was no reason to hold that there was any excess found in the holding of the tenant. These remarks apply to the second appeal arising out of suit No. 290. In the result, the second appeal fails and is therefore, dismissed with costs. This judgment covers all the other cases and they are also dismissed. I fix the vakil's fee at Rs. 150 for this batch of second appeals.

Appeals dismissed.

(3) 1923 Mad. 685=46 Mad. 712 = 18 L.W. 646=45 M.L.J. 124=32 M.L.T. 377=(1923) M.W.N. 411.

1924 Madras 898 (1).

MADHAVAN NAIR, J.

Kumaragurudasa Swamigal—Petitioner.

v.

Krishnaswami Mudaliar and others—Respondents.

Cr. Rev. Case No. 551 of 1923 (Cr. R. P. No. 439 of 1923), decided on 22nd August, 1924, against the Order of the Chief Presidency Magistrate of Egmore, dated 10th November, 1922, and 19th March, 1922, in C.C. No. 11471 of 1922.

Penal Code, S. 500—Violent expressions in reply to attack when they do not assail the personal character or the respectability of the complainant, are not defamatory.

Where in reply to a book written by the complainant the accused wrote a book in reply, matters dealt with being highly controversial religious matters, and in expressing his opinion the accused used very violent expressions but did not assail the personal character or the respectability of the complainant.

Held there was no defamation.

V. L. Ethiraj and *V. Viswanadha Sastri*—for the Petitioner.

F. S. Vaz—for the Respondents.

Order:—This is an application to revise an order of acquittal passed by the Presidency Magistrate. A book was written by the 1st accused as a reply to a book written by the complainant. Both the books deal with highly controversial religious matters. In expressing his opinion, the 1st accused has no doubt used very violent expressions, but taking them along with the context in which they appear, I agree with the Magistrate that they cannot be considered defamatory. I do not think that the personal character or respectability of the complainant is in any way assailed, by the use of the expressions complained of. I dismiss this application.

Petition dismissed.

1924 Madras 898 (2).

RAMESAM AND JACKSON. JJ.

Mahabab Alli Khan—Petitioner.

v.

President, Taluk Board, Kurnool—Respondent.

Cr. R. C. No. 656 of 1923 (Cr. R. P. No. 521 of 1923), decided on 8th February, 1924, against the judgment of the Stationary Second Class Magistrate of Kurnool, in Mis. C. No. 5 of 1923.

Madras District Municipalities Act (XIV of 1920), S. 221—Money due under a contract cannot be summarily recovered.

The term "by virtue of" has not a wider scope than the term "under" used in the previous Act. The new Act does not make any change in this respect. Consequently money due under a contsact,

such as a lease, cannot be recovered summarily in a Magistrate's Court. [P. 899, C. 1.]

L.S. Veeraraghava Aiyar—for Petitioner.

S. Swaminathan—for Respondent.

J.C. Adam (P.P.)—for Crown.

Order:—Accused as lessee of the Johorapuram meat market under the Taluk Board of Kurnool, has been sentenced to pay that body Rs. 371 together with interest and costs being the amount due on his lease for May and June, 1923. He files this Criminal Revision Petition on the ground that money due under a contract cannot be collected under the provisions of section 221, of Madras Act XIV of 1920.

It has long been recognised law that money due under a contract cannot be summarily recovered by a Municipality in a Magistrate's Court under the old Madras District Municipalities Act IV of 1884, section 269 (vide *Abdul Azeez Sahib* v. *Cuddppah Municipality* (1)). The point for determination is whether the wording of section 221 of Madras Act XIV of 1920, has extended the power of the local body. Section 269 of Act IV of 1884 was "all rents, fees, tolls and other payments due to the Municipal Council under the provisions of this Act." Section 221 of Act XIV of 1920 runs "any fee, toll, costs, compensation, damages, penalties, charges, expenses, or other sums due to a local board under or by virtue of this Act." We do not find that this phrase includes sums due under contracts. It was argued that "by virtue of" has a wider scope than "under," but there is no difference between the two terms.

Sections 168 (2) has no bearing on the question. It merely authorizes the local authority to farm out fees on contract, the amount being recoverable from the contractor under the contract and not under that section. This has already been pointed out in Criminal Revision Cases Nos. 179 of 1923 and 222 of 1923.

The conviction is bad and must be set aside and the amount, if paid, must be refunded.

Conviction set aside.

(1) (1903) 26 Mad. 475.

*1924 Madras 899.

DEVADOSS, J.

Somu Pillai—Petitioner (Complainant).

v.

Krishna Pillai—Respondent (Accused).

Cr. R. C. No. 881 of 1923 (Cr. R. P. No. 707 of 1923), decided on 25th April, 1924, against the decree of Sessions Court of South Arcot, dated 30th October, 1923, in Cr. M. P. No. 19 of 1923, against the order of Sub-Divisional 1st Class Magistrate of Chidambaram, in Cr. A. No. 57 of 1923.

Crim. Pro. Code, S. 520—A Sessions Judge cannot interfere with the order passed by a Sub-Divisional Magistrate on appeal under S. 520.

The trial Court handed over the subject-matter of theft to the complainant on conviction of the accused. On appeal the Sub-Divisional Magistrate while acquitting the accused declined to interfere with the order about the restoration of the subject-matter of theft. The Sessions Judge reversed the order of the trial Court on appeal.

Held, he was not authorised to do so by S. 520. [P. 900, C. 1.]

K. V. Krishnaswami Aiyar for S. Panchapagesa Aiyar—for the Petitioner.

V. L. Ethiraj for K. S. Jayarama Aiyar—for the Respondent.

Order:—This is an application to revise the order of the Sessions Judge of South Arcot in Criminal Miscellaneous Petition No. 19 of 1923. The complainant, Somu Pillai, brought a case of theft of bulls against the accused in the Court of the Second Class Magistrate of Chidambaram Taluq. The Sub-Magistrate convicted the accused and directed the bulls to be handed over to the complainant. The accused appealed to the Sub-Divisional Magistrate of Chidambaram who acquitted the accused and declined to interfere with the order of the Sub-Magistrate regarding the bulls. Against this order of the Deputy Magistrate an appeal was preferred to the Sessions Judge of South Arcot Division, who set aside the order of the Divisional Magistrate and directed the bulls to be handed over to the accused. It is urged before me that the Sessions Judge had no power under section 520 to vary the order of the Sub-Divisional Magistrate. Section 520 is in these terms:—"Any Court of appeal, confirmation, reference or revision may direct any order under sections 517, 518 or 519, passed by a Court subordinate thereto, to be stayed

pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just." The Court of Sessions of South Arcot is not a Court of Appeal so far as the order of the Second Class Magistrate is concerned. Appeals from the decisions of Second Class Magistrate lie to the District Magistrate and to Sub-divisional Magistrate who are empowered to hear appeals from Second Class Magistrate. So the Sessions Court is not a Court of Appeal so far as the Stationary Magistrate is concerned. It cannot be said to be a Court of Appeal in respect of the order by the Sub-divisional Magistrate. The Sub-Divisional Magistrate heard the appeal from the decision of the Second Class Magistrate, and no second appeal lay to the Court of Sessions against the order of the Sub-Divisional Magistrate. The Sessions Court is not a Court of confirmation in cases of this kind. It was feebly urged by Mr. Ethiraj that the Sessions Court may be called a Court of reference. I think, a Court of reference means a Court to which references are made and which on references are entitled to go into the matters and dispose of them. The High Court is a Court of reference in jury cases where the Judge differs from the jury. The Sessions Court is not a Court of revision so far as the judgments of the Second Class Magistrate are concerned and the Sessions Court has no revisional powers over the orders of a Divisional First Class Magistrate in appeal cases. Section 520 has therefore no application to the Sessions Court in cases like this. This point came up for decision in Criminal Case No. 236 of 1904 before a Bench of this Court. In that case the Second Class Magistrate convicted the accused and directed the property to be taken possession of by the Forest Officer. This order was made under section 44 of the Madras Forest Act. On appeal the First Class Magistrate reversed the order of the Second Class Magistrate and acquitted the accused under section 47 of the Madras Forest Act and made the order which the Sessions Judge took upon himself to revise. The learned Judges held that the Sessions Court was not a Court of Appeal, etc., in those circumstances from the First Class Magistrate, and had no jurisdiction to revise the order. I hold that the order of the Sessions Judge is not authorised by section 520 or any other section of the Criminal Procedure Code. I set aside the order of the Sessions Judge and direct that the order of the Sub-Divisional Magistrate of Chidambaram be given effect to.

Order set aside.

1924 Madras 900.

WALLACE and JACKSON, JJ.

S. Govindasamy Odayar — Appellant (Petitioner).

v.

The Union Bank Ltd., Kumbakonam by its Director, Singaram Chettiar—Respondent (Respondent).

A. A. O. No. 403 of 1922, decided on 10th July, 1922, against the order of District Judge, West Tanjore, dated 28th November, 1922, in E. P. No. 665 of 1922 in O. S. No. 28 of 1922.

(a) *Civ. Pro. Code, S. 135—A Judgment-debtor present in Court at the time of execution of the second decree can be arrested in execution of the second decree though he was already arrested in execution of the first decree.*

A judgment-debtor who is arrested in execution of a first decree and is present before the Court at the time of his arrest is not exempt under S. 135 from being arrested in execution of a second decree, as there is no obligation on the judgment-debtor to be present before the Court for the purpose of the execution of the first decree. [P. 901, C. 1.]

(b) *Civ. Pro. Code, S. 47—Appeal.*

An appeal lies against the order of arrest where the judgment-debtor is arrested, on the ground that the arrest is invalid. [P. 900, C. 2.]

K. V. Krishnaswami Aiyar—for the Appellant.

K. Bhashyam Aiyengar and *K. Narasimha Aiyangar*—for the Respondent.

Wallace, J.:—A preliminary point is raised by respondent *viz.*, whether an appeal lies. Appellant contends that the order is one under section 47, C. P. C., as he is challenging the legality of his arrest; respondent contends that as he is only challenging the mode of executing the warrant, the case does not come under section 47. There is no direct authority on the point. As at present advised, we incline to hold that the appeal is valid.

On the merits, we cannot see that the appellant is entitled to the benefit of section 135 of the Code of Civil Procedure. He was arrested at 7 p. m. on the 25th November, 1922; he was then in custody of the Court's officers having been arrested

under another decree. Appellant contends (*a*) that at the time of his arresting he was attending the Court for the purposes of execution of the first decree (*b*) that a judgment-debtor cannot be the subject of two arrests at the same time. As to (*a*) we can find no order which directed appellant to be in attendance on the Court at 7 p.m. on the 25th November, 1922. As to (*b*) we see no reason why when there are two decrees held by different decree-holders out against the judgment-debtor, he should not be arrested under each.

We find that the appellant is under no legal obligation to be present before the Court at the time of his arrest. He is not therefore entitled to the benefit of section 135 and the order appealed against is correct.

The appeal is dismissed with costs. The security given by appellant in the District Court under order of this Court will enure until the decree-holder moves the District Court further in the matter of this execution.

Appeal dismissed.

1924 Madras 901 (1).

WALLACE AND JACKSON, JJ.

Rajarathna Naidu—Appellant (8th Respondent).

v.

Ramachandra Naidu and others—Respondents (Petitioner and Respondents 1 to 3 and 5 to 7).

A. A. O. No. 436 of 1922, decided on 10th July, 1924, against the order of the District Court of Chingleput, in E. P. No. 51 of 1920, in O. S. No. 32 of 1916.

Civ. Pro. Code, O. 21, r. 16—Second proviso—Does not apply to mortgage decrees.

Order 21, r. 16, second proviso has no application to mortgage decrees for sale. (43 M.L.J. 761, *Dist.*) [P. 901, C. 2.]

S. E. Sankara Aiyar—for the Appellant.

T. R. Ramachandra Aiyar and *C. Narasimhachariar*—for the Respondents.

Wallace, J.:—The question for decision is whether the second proviso to Order 21, rule 16 of the Code of Civil Procedure applies to a mortgage decree for sale. It applies in terms only to a decree "for the payment of money". The phrase in the old Code, section 232 was "a decree for money." The alteration indicates that emphasis is to be laid on the word "payment" and that unless the decree directs payment of money, the rule will not apply. This is the view taken in the judgment of the Calcutta High Court in *Laldhari Singh* v. *Manager, Court of Wards* (1). The Calcutta High Court has consistently held the view that this proviso will not apply to mortgage decrees for sale [*vide* the above ruling and also *Lalla Bhagun Pershad* v. *Halloway* (2) and *Jagabandhu* v. *Haladhar* (3)].

Appellant relies on three cases of this High Court. Two of these, *Vaidhianathaswami Aiyar* v. *Somasundaram Pillai* (4) and *Ramayya* v. *Krishnamurthi* (5), are not of much assistance as they do not deal with the language of Order 21, rule 16, or the corresponding section under the old Civil Procedure Code. In *Sadagopa Aiyangar* v. *Sellammal* (6), language somewhat favourable to appellant's contention has been used, but even in that case it is clear that the decree was a "decree for the payment of money," although in the case of the 1st defendant the decree directed the money to be paid out of his family property. None of these cases affects the general principle laid down in the Calcutta cases, and inherent, in our opinion in the rule itself, that the proviso does not apply to decrees which are in essence decrees, not for the payment of money but for the sale of property. We are of opinion that the order appealed against is correct and we dismiss this appeal with costs.

Appeal dismissed.

(1) (1911) 14 C L.J. 639=12 Ind. Cas. 70=16 C. W. N. 132.
(2) (1885) 11 Cal. 393.
(3) (1917) 27 C.L.J. 110=41 I.C. 269.
(4) (1904) 28 Mad. 473=15 M.L.J. 126 (F.B.)
(5) (1916) 40 Mad. 296=19 M.L.T. 124=(1916) 1 M.W.N. 193=32 I.C. 952=3 L.W. 186.
(6) 1922 Mad. 510=43 M.L.J. 761=16 M.L.W. 759=31 M.L.T, 463.

1924 Madras 901 (2).

JACKSON, J.

Mu. Chidambaram Chettiar—Petitioner (Petitioner).

v.

C. K. Kadar Mohideen Rowther and others—Respondents (Respondents).

Civil R.P. No 762 of 1922, decided on 23rd July, 1924, against the order of the

Court of the Sub-Judge, Tinnevelly, dated 1st March 1922 in O.P. General No. 1084 of 1922.

Civ. Pro. Code, O. 33, r. 3—Pauper application presented to Sheristadar is valid under rule 14 of the Madras Civil Rules of Practice.

Rule 14 of the Civil Rules of Practice is not *ultra vires*. Presentation of pauper application to the Sheristadar is valid. The insistence in Rule 3 is on the words 'in person' and not on 'to the Court' as meaning the Judge himself.

P. V. Krishnaswami Aiyar — for the Petitioner.

R. Ganapathi Aiyar—for the 1st and 5th Respondents.

Order:—The petitioner's pauper petition was rejected merely because it was presented in person to the Sheristadar and not to the Court.

There is no reason to hold that Rule 14 of the Civil Rules of Practice is *ultra vires*. "Court" is nowhere defined in the Code of Civil Procedure (1908) and the "Court or such officer as it appoints in this behalf" is the Court for purposes of receiving suits and, by analogy, applications. The insistence in Order 33, rule 3, Civil Procedure Code, is on "in person" not on Court as meaning "Judge himself." If necessary the learned Subordinate Judge may take up the petition again in the light of these remarks; but possibly subsequent circumstances have rendered further action unnecessary.

Petition remanded.

1924 Madras 902.

ODGERS, J.

Kuppammal—Petitioner (Petitioner).

v.

Muniappa Chetti and others—Respondents (Counter-Petitioners).

Civil R.P. No. 876 of 1922, decided on 24th April, 1924, against the order of the District Court of Coimbatore in I. A. No. 341 of 1922.

Guardians and Wards Act, S. 43—Court cannot pass orders against strangers under S. 43 except in certain circumstances.

Under S. 43 (1) it is only the conduct or proceedings of a guardian *appointed or declared by Court* which can be called in question. When the minor was in the custody of a person who was not a guardian appointed by the Court, and thereafter a guardian was appointed, the former cannot be called upon to deliver jewels on the person of the minor during the custody of the former person (36 M.L.J. 189, *Dist.*) [P. 902, C. 2.]

A. Vasudeva Menon—for Petitioner.

V. Narasimha Aiyengar—for the Respondents.

Judgment:—In this case the minor's guardian was the mother, the present petitioner, appointed on 29th November, 1919. Some time before that the minor lived with 2nd respondent, her uncle, presumably against the wishes of the mother. The girl was returned to the mother on 18th December, 1919 and the present application is by the mother for the return of two jewels said to have been on the person of the minor when she went to 2nd respondent. The mother's attitude is a peculiar one. She denies having put in any such application and now says the District Judge has acted without jurisdiction. I think he has. The mother is no doubt a person interested in the minor under section 43 (1) of the Guardians and Wards Act but it is only the conduct or proceedings of any guardian appointed or declared by the Court which can be called in question. The 2nd respondent has ceased at the end of 1919 to be even a *de facto* guardian and was not such at the date of the application by the mother in 1922. The case therefore in *Wallace Sitha Bai* v. *Wallace Radha Bai* (1) has no application.

The learned District Judge has proceeded on the powers conferred by section 43 of the Act. But as pointed out in *Komma Somakka* v. *Kovidala Pedda Ramiah* (2) the Act does not profess to give the District Court any power or authority over persons other than the guardian of the minor except in certain instances which do not apply here. I therefore think in the circumstances of this case the District Judge acted without jurisdiction and he had no right to call upon 2nd respondent to deliver up the jewels under section 43 of the Guardians and Wards Act. I think interference is called for and I allow the Civil Revision Petition and set aside the order of the District Judge with costs.

Petition allowed.

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(1) (1918) 36 M.L.J. 189=51 I.C. 236.
(2) (1911) 10 M. L. T. 483=13 I. C. 251=36 Mad. 39=(1911) 2 M.W.N. 519=22 M.L.J. 193.

1924 Madras 903.

REILLY, J.

Sundara Thevan and another—Petitioners-(Defendants)

v.

Ananthan Kaladi — Respondent-(Plaintiff).

Civ. R. P. No. 935 of 1922, decided on 21st July, 1924, against the decree of the Court of the Subordinate-Judge of Ramnad at Madura, in S. C. S. No. 105 of 1922.

Provincial Small Cause Courts Act, Art. 15—Scope.

Suit by vendee for recovery of purchase-money on the failure of a contract by vendor to convey land is of small cause nature. [P. 903, C. 2.]

W. S. Subramania Aiyar and A.S. Srinivasa Aiyar—for the Petitioners.

K. Bhashyam Aiyangar—for the Respondents.

Judgment:—Plaintiff sued to recover Rs. 85 and interest from defendants, alleging that defendants orally agreed to sell to him certain land for Rs. 85 and on 4th August, 1919, received that sum from him for the land, that they failed to convey the land to him and eventually refused to do so, but orally agreed to return this Rs. 85 to him with interest. Defendants denied the whole transaction, denied that they had received the Rs. 85 and denied that they agreed to repay that amount. The Subordinate Judge of Ramnad tried the suit as a small cause suit. He found, on the only issue framed, that defendants agreed to sell the land to Plaintiff as alleged and that plaintiff advanced the Rs. 85 to defendants, as the purchase-money. He made a decree for plaintiff for Rs. 85 and interest as claimed. Defendants now pray for revision.

2. The first point urged before me for defendants is that the suit was not of a small cause nature and that the Subordinate Judge had no jurisdiction to try it as such. Defendants' vakil argues that in the circumstances alleged plaintiff was entitled only to sue for specific performance of the contract, or for its rescission and a suit for either of those reliefs would not be of a small cause nature. But I see no reason why plaintiff should be confined to those remedies. If there was a contract and defendants refused to perform it, plaintiff was at liberty under section 39 of the Contract Act to put an end to it, and on his doing so, defendants were bound to restore the Rs. 85 to him. Plaintiff if content with that relief, was entitled to sue for it and such a suit is of a small cause nature. *Nangiri Veerasalingam Sithapathy* v. *Sathirazu* (1), which defendants' vakil has quoted does not help him. In that case, a vendor sued his vendee for the purchase-money and the learned Judges held that the suit was for specific performance of the contract and therefore not within the jurisdiction of a Small Cause Court. That is obviously a very different case from the present suit. The other case quoted for defendants, *Pachayyappan* v. *Narayana* (2), in which it was decided that a suit to recover purchase-money, under section 315 of the Civil Procedure Code of 1882, was not cognizable by a Court of Small Causes, as the suit arose neither from contract nor *quasi ex contractu* is not applicable.

3. The next objection urged for defendants is that, in order to support his judgment the Subordinate Judge ought to have found specifically on distinct issues that plaintiff put an end to the contract and that defendants agreed as alleged to repay the Rs. 85. I do not think that the trial can be regarded as defective, because the Subordinate Judge did not frame separate issues as suggested. Defendants denied the alleged contract altogether. Plaintiff by his suit declared his election to put an end to the contract. When the Subordinate Judge had found, on the issues framed, that the contract was true and that plaintiff had advanced Rs. 85 to defendants, as the purchase-money, judgment for the returning of that amount had to follow.

4. The only other point urged before me is that plaintiff is not entitled to interest on the Rs. 85. On that point, I agree with defendants. Interest cannot be awarded in the present case, under the Interest Act, nor under any other principle which can be applied.

5. The Subordinate Judge's decree will be modified by reducing the amount from Rs. 138-6-0 to Rs. 85. In other respects, the petition is dismissed. Parties will pay and receive proportionate costs in both Courts.

Decree modified.

(1) (1909) 5 M.L.T. 296=1 I.C. 552=19 M.L. J. 220.
(2) (1888) 11 Mad. 269.

1924 Madras 904.

KRISHNAN, J.

Nalluli Pandarathil Karnavan Raman Menon—Appellant (1st Defendant)

v.

Collector of Malabar and others—Respondents (Plaintiffs 1 to 4 and Defendants 2, 3, 6, 8, 11, 12, 15, 18, 19 and 20).

S.A. No. 2 of 1921, decided on 15th March, 1924, against the decree dated 22nd July, 1920, of the Court of Subordinate Judge of South Malabar at Calicut, in A.S. No. 1 of 1920.

Practice—Pleadings—New plea of absence of the validity of notice cannot as of right be raised in second appeal.

Validity of the notice, not challenged in the lower Courts cannot be, as of right, challenged in the appellate Court, though it is open to the Court to allow such a point to be raised in second appeal. Ordinarily, however, it should not allow it to be raised since, plaintiff will be prejudiced as he would lose the advantage of withdrawing his suit when he finds that a notice was not a proper notice and of bringing a fresh suit at once, aiter giving a proper notice. [P. 904 C. 2 and P. 905, C. 1.]

K. P. M. Menon—for the Appellant.

The Government Pleader (C. V. Ananthakrishna Aiyar), K.P. Ramkrishna Aiyar and *P. Govinda Menon*—for the Respondents.

Judgment :—In this case, the Secretary of State and three persons who purchased the lands which were the subject-matter of S. A. No. 1025 of 1921, in which judgment has just now been delivered, are the plaintiffs. They sue to recover possession of the lands from the defendants, on the ground that the defendants' lease had been terminated, by a proper notice to quit and they are entitled to possession. The decree was asked to be given, in favour of plaintiffs 2 to 4. The lower Courts have granted the decree asked for and the 1st defendant appeals.

It is contended on his behalf that his tenancy has not been properly terminated, by a proper notice to quit and that therefore he was not bound to surrender possession. The argument is that the notices, as issued by the Government, Exhibits O and P, were not issued by the party entitled to ssue notices, as by the time they were ssued, the Government had parted with all its rights to plaintiffs 2 to 4 and they were the proper parties to issue notices; it is argued that notices should consequently be held to be bad. Before considering this matter, it must be observed that in the plaint an allegation was made that notices (Exhibits O and P), dated 14th December, 1916, and 21st February, 1917, were given by the Government to the defendant and that, as the time fixed under them had expired, the 1st defendant's tenancy had been properly terminated before suit. The 1st defendant raised no objection to this averment in his written statement and no issue was framed as to the sufficiency or validity of notices. In the appeal memorandum, in the lower appellate Court, the point was, however, taken and the affidavit filed by the learned vakil for the appellant in that Court says that the point was argued before the Subordinate Judge; but no notice was taken by the Subordinate Judge of this contention, possibly because the point had not been raised in the Court of first instance.

The first question then which arises for decision is whether it is open to the 1st defendant, now in second appeal, to insist upon the point being raised and considered. He has relied upon two cases, reported in *Abdulla Rawutan, Pakkeri Mohommad Rawutan, Madarsah Rawutan* v. *Subbarayyar* (1) and *Subba* v. *Nagappa* (2), in which questions of notice were allowed to be taken in second appeal, when they were not taken in the lower Courts; but these decisions were subsequently considered by this Court in several cases, which have been brought to my notice and the view taken in the later cases is that though it is open to the Court to allow such a point to be taken in second appeal, it is not bound to do so; and it seems to me that ordinarily it should not allow it to be taken, because ifa point like that is allowed in second appeal, when it was not taken in the first Court, the result will be that the plaintiff will be prejudiced, as he would lose the advantage of withdrawing his suit, when he finds that his notice was not a proper notice and of bringing a fresh suit at once, after giving a proper notice. The authorities cited for the respondents are L. P. A. No. 102 of 1913. *In re Armugam Pillay* (3), *Muthu Reddi* v. *Muthu Venkatapathi Reddi* (4), *Venkatappier* v. *Ramaswami*

(1) (1878-80) 2 Mad. 346.
(2) (1889) 12 Mad. 353.
(3) (1912) 15 I. C. 584.
(4) (1916) 31 M L J 354=(1916) 2 M.W.N. 180=37 I.C. 1=4 L. W. 168.

Aiyar (5), and *Kunhu Kuttan Nair* v. *Govindan Nambuduri* (6). In all these cases, it was held that the point should not be allowed to be raised for the first time in Second Appeal. No doubt, as Mr. Menon points out, in *Venkatappier* v. *Ramaswami Aiyar* (5) and *Kunhu Kuttan Nair* v. *Govindan Nambuduri* (6), some point was made of the fact that the question was not raised even in the lower appellate Court; but I do not think there is any valid distinction between a case where the point is taken in the lower appellate Court, but not in the Court of 1st instance, and a case where the point is taken in neither of the lower Courts. If the point is to be treated as a necessary part of the allegation by the plaintiff (the Landlord), which he should prove to obtain a decree in ejectment, it would not matter, whether it was not taken in the first Court or in both the lower Courts; but that view has not been adopted and I consider that the proper view is that when the point is not taken in the lower Courts, it should not be allowed to be taken in second appeal. In this case, so far as the property, for which patta has been given to the plaintiffs 2 and 4, is concerned, proper notice was given to the 1st defendant by the Government, before the pattas were issued to these plaintiffs. It is clear, therefore, that the principle relied upon by Mr. Menon that, when a landlord parts with a right of possession of his property to a third party, by either mortgaging or by selling away the property, he has no longer any right to give notice to quit, as the proper person to give notice is the transferee, as held in *Wordsley Brewery Company* v. *Halford* (7) will not apply; for the English cases recognise that the person who is the landlord and entitled to possession, on the date of the notice to quit, is the proper person to give the notice and that an assignee within the currency of that notice, can take advantage of the notice sent by his assignor and rely upon it, when he brings a suit for recovering possession. As regards the 3rd plaintiff, it may be that there is some diffieulty, as the notice regarding his land seems to have been issued, after the patta was granted to him. It is, however, very doubtful whether the principle laid down in *Wordsley Brewery Company* v. *Halford* (7) will apply to this case. That was a case, where an owner of a certain property had first given an oral lease to the defendant and subsequently during the continuance of that tenancy granted to the plaintiff a period lease of 14 years. After granting this lease, a notice to quit in writing addressed to the first tenant's husband of the owner of the premises, as her agent, to deliver possession of the property, was served upon the tenant. The question was, whether that was a proper notice to quit and their Lordships no doubt held that it was not a proper notice; but their reasoning was as follows: They held that, as soon as the second lease was granted, it took effect at once; that the grant of the lease "passed the reversion and not merely the allotment" and that therefore the grantor had no longer any right of possession and could not exercise the right of giving notice to quit, to terminate the tenancy. The argument turned upon the question, whether the granting of the lease period amounted to the passing of the reversion or not, and their Lordships say, after discussing about some authorities:

> "It is said that some authorities are inconsistent with the view, that is, the view that it did pass and to some extent they may be; but even if that is so, we have to choose between them all. We must hold that the reversion passed."

In the present case, the Government granted pattas to the plaintiffs.

If there was an arrangement, as suggested by the Government Pleader, between the Government and the plaintiffs that the Government's right to recover possession was to continue and that they should get possession from the tenant and hand it over to the pattadars, the right to possession for that limited purpose will still remain in the Government, though pattas may have been granted. If this is so, I do not see why the Government is not the proper authority to issue the notice to quit.

The point as to notice has not been tried; it was not taken in the first Court and to allow it to be taken now will involve a fresh trial on facts. I do not think I am bound to allow such a point to be taken in second appeal.

The second appeal fails and is dismissed with costs: one set.

Appeal dismissed.

(5) (1919) 10 L.W. 137=52 I. C. 517=(1919) M. W.N. 548.

(6) (1921) 13 L W 397=62 I. C. 290.

(7) (1903) 90 L.T. 89.

1924 Madras 906.

WALLACE, J.

A. L. A. R. Arunachalam Chettiar, through his authorised agent Pichappa Chettiar—(Petitioner) Plaintiff.

v.

Latchumanan Chettiar and others—Respondents (Respondents and 3rd Respondent's L. Rs. Plaintiffs 2 & 3 and deceased defendant and his L.R.)

Civil R.P. No. 117 to 123 and 156 of 1921, decided on 24th July, 1924, against the order of the District Munsif of Satur, in E.P. No. 93 of 1920.

Limitation Act, Art. 182—Step-in-aid—Batta memo, not applying for issue of process along with payment of process fees for issue of warrant is no step-in-aid.

Payment of process fees for the issue of a warrant of arrest in execution of a decree is not a step-in-aid of execution so as to save limitation, where the batta memo does not apply for issue of process. (9 Cal. 644 ; 23 Cal. 374 ; 18 I.C. 455, *Diss.*) [P. 907, C. 1]

K. Balasubramania Aiyar—for the Petitioner.

Judgment:—The short question for decision in all but two (C. R P. Nos. 117 and 156 of 1921) of these Civil Revision Petitions is whether the payment of process fees for issue of a warrant of arrest in execution of a decree is a step-in-aid of execution so as to save limitation.

The execution petitions under consideration were presented on 12th February, 1920, and the previous execution petitions were presented on 9th January, 1917, more than three years before. In the course of the latter petitions batta memos. for warrant of arrest were put in on 21st February, 1917 and 23rd March, 1917. The question is whether the filing of these batta memos is a step-in-aid of execution. The District Munsif held that it was not. The decree-holders have put in these Civil Revision Petitions. The respondents, the judgment-debtors, do not appear.

A step-in-aid of execution has been defined in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) as an application which is not an initial application for execution, but an application to take some step to advance an execution petition already pending. Whether a formal application is in all cases necessary is a matter of some doubt. There is no direct authority whether a mere payment of process fees for an arrest warrant without a formal application for the issue of warrant is a step-in-aid ; but there are cases analogous to this in which different High Courts take different views. This High Court in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*(2) has held that a batta memo. which applies for the issue of a sale proclamation and on which a sale proclamation is issued is a step-in-aid. From the report in that case it appears that the batta memo. itself asked that process may issue and the learned Judges in that case in consequence distinguish it from the Full Bench case in *Malukchand* v. *Bechar Natha* (3) in which there was nothing more than the payment of batta, there being no application either written or oral. *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (2) followed the case in *Ambica Pershad Singh* v. *Surdhari Lal* (4) in which also there was an application for the issue of a sale proclamation. The previous case in Madras, *Bellayya* v. *Jaganatha* (5) is inconclusive, but seems to have held that the payment of stamps for the transmission of records for the purposes of execution to another Court would not amount to a step in-aid unless there was an application. Two Calcuta cases seem to adopt rather a different view. In *Radha Prosad Singh* v. *Sundar Lal* (6) it was held that the deposit of costs for bringing property to sale is a step-in-aid without a formal application, and in *Narendra Nath Padhari* v. *Bhupendra Narain Roy* (7) it was held that the deposit of process fees for service of a sale proclamation is in itself a step-in-aid. Another Calcutta case reported in *Bhupendra Narayan Dutt* v. *Rajendra Nath Dutt* (8) follows these two rulings and holds that a payment of process fees paid at the instance of the Court after a notice had been served and a sale proclamation issued, imported a request to the Court to proceed with the execution and therefore was a step-in-aid. It is a little curious that

1922 Mad. 79=45 Mad. 466=42 M.L.J. 303 15 M.L.W. 348=32 M.L.T. 27=(1922) M.W.N. 118.

(2) (1905) 28 Mad. 399.
(3) (1901) 25 Bom. 639=3 Bom. L.R. 275.
(4) (1884) 10 Cal. 851 (F.B.)
(5) (1883) 7 Mad. 307.
(6) (1883) 9 Cal. 644.
(7) (1895) 23 Cal 374.
(8) (1912) 18 I.C. 455.

the *Radha Prosad Singh* v. *Sundar Lal* (6) and *Narendra Nath Padhari* v. *Bhupendra Narain Roy* (7) cases were not cited before the Full Bench in *Malukchand* v. *Bechar Natha* (3) when other cases from the same volumes were cited. In *Sheo Prasad* v. *Indar Bahadur Singh* (9) it was held that the payment of process fees for attachment without an application is not a step-in-aid. I think the case in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (2) indicates the then view of this Court that a mere payment of batta for process, where the batta memo. itself does not apply for the issue of process, will not be a step-in-aid, and I think that it is more essential in such matters that there should be uniformity of practice in each Presidency than that there should be unanimity in the views of different High Courts.

In the present memo. I find no prayer for the issue of process. I am asked to infer that there must have been one because the Court has under Order 21, rule 37, Civil Procedure Code, discretion not to issue a warrant at once. But there is nothing to show that if it did after deliberation or on application order the issue of a warrant, that application was within three years of the Execution Petition of 1920. I am therefore not prepared to interfere in these cases and dismiss the petition.

In two cases which I excepted at the beginning—C.R.Ps. 117 and 156 of 1921—the case for the petitioner is much weaker. The process memos. there were merely for the issue of a notice to the 2nd plaintiff and not to the judgment-debtors at all. Clearly this was not a step-in-aid of execution and these petitions are also dismissed.

Petitions dismissed.

(2) (1903) 30 All 179=5 A.L.J. 258=(1908) A.W.N. 74.

1924 Madras 907.

SPENCER AND KUMARASWAMI SASTRI, JJ.

Bollapragada Subbarayadu and others—Appellants-Defendants

v.

Valluri Narasimha Rao—Respondent-Plaintiff.

A.A.O. No. 129 of 1921, decided on 13th February, 1924, against the decree of the Additional Subordinate Judge of Ellore, in O.S. No. 15 of 1920.

Landlord and tenant — Ejectment — Though tenant may fail to prove alleged permanent tenancy landlord must prove that tenancy was terminable and was validly terminated.

The landlord before ejecting the tenant must prove that the tenancy was terminable and was validly terminated. The burden is only then shifted to the tenant to prove that he has a permanent right of occupancy. The burden which primarily lies upon the landlord is not affected by the failure of the defendant to prove the alleged permanent tenancy. [P. 908, C. 2.]

A. Krishnaswami Aiyar—for the Appellant.

N. Ramadoss—for the Respondents.

Spencer, J.:—This suit was brought by the purchaser of the proprietary interest in Pedamamidipalli, a whole village in Elamanchilli Zamindari Estate to eject the defendants who are tenants holding plaint items 1 to 16 which were once part of a darimilla inam or failing the relief of ejectment, to declare the plaintiff's right to impose full rates of rents on the lands and to give the plaintiff a decree for recovery of rent at nine bags of grain per acre for three years. The suit lands were granted about 1819 to the defendant's ancestors for rendering karnam service. In 1910, Government purported to enfranchise these lands and the plaintiff filed a suit O.S. 16 of 1911 for setting aside the enfranchisement and for a declaration that the right of resumption rested with him and not with Government. In this suit he was finally successful in the High Court. The present suit is for ejectment of the defendants. The lower Court gave the plaintiff a decree for possession with mesne profits. Defendants 4 to 8, 21 to 34 and 19 appeal.

The facts of this case resemble those of *Idubilly Siyyaddi* v. *Sri Raja Viswaswara Nissanka* (1) with this difference, that there was an admission in that case that prior to the inam grant, the lands were ordinary, jeroyati lands, whereas here the question whether the original grant was a grant of land to be held on a favourable rate of rent or a grant of a part of the melvaram, or landlord's share, depends upon the evidence. Beyond the oral evidence of one witness on each side, which is inconclusive, the evidence is entirely documentary. Each side has attempted to draw an inference in their favour from certain ancient documents called yadasts, ghoshparas and bubands marked as Exhibit C Series,

(1) (1915) 18 M L.T. 142=30 I.C. 416.

Exhibit, C. 3 is the Yadast for fasli 1229 corresponding to the year 1819. This shows an increase of four putties in the total cultivated area of the village. It also shows for the first time the existence of 1½ putties of service inam. For the appellant, Mr. Krishnaswami Iyer argued that a smaller standard of measurement must have been adopted in measuring the lands for this year, and in proof of this theory, he pointed to the excess in the area of village puttas, lakes, channels, etc., which are itemsil R. likely to be liable to sudden increases. On the other hand, the respondent relies on this document to show that the service inams must have been granted out of land that had been previously lying waste. It is difficult to say which is the right assumption to be made. On the other hand Exhibit C 1, the account of cultivation in fasli 1210, shows that the family of Bollapragada Kondaraju who was the defendants' ancestor, possessed two putties of jeroyati land in addition to one-fourth dumbalu inam. The Subordinate Judge is in error in his observation that these accounts do not show that Kondaraju was cultivating any land in Padammidipalli as jeroyati land before the grant.

In this state of the evidence, it is argued for the respondent that recent decisions of the Privy Council and of this Court have unsettled the principles upon which *Idubilly Sivaddi* v. *Sri Rajah Viswaswara Nissanka* (1) and *Gajapathi Maharaju Garu* v. *Sondi Prahalada Bissoyi Raju* (2), were decided and that now the burden is on the tenant to show that he was granted a right of Kudivaram when the inam grant was first made. The most recent decision of the Privy Council is that in Privy Council Appeal No. 46 of 1922 in which they say that "it cannot now be doubted that when a tenant of lands in India sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant." In *Suryanarayana* v. *Patanna* (3) Privy Council laid down that there was no presumption that at the date of the grant of an inam, there were any tenants holding lands with any rights of occupancy by custom or otherwise. It is also true that no permanent right of occupancy arising out of the enactment of section 6 of the Madras Estates Land Act I of 1908 in favour of holders of ryoti land in an estate can be availed of by holders of service inams, as such lands are expressly excluded by section 3 (16) (*c*) from the definition of ryoti land so long as the service tenure subsists. Upon resumption of a service inam if the land is incorporated, among the ryoti lands the person let into possession would acquire an occupancy right by virtue of section 6. But in the present case with the exception of items 7 and 8, for which the plaintiff says that jeroyati pattas were issued by mistake, there is no admission on the part of the landlord that the lands became "ryoti" lands when they were disannexed from the burden of service. It has however been made clear not only in 18 M. L. T. 142, but also in *Muthusami Aiyar* v. *Naina Ammal* (4), that when a plaintiff seeks to eject a defendant from possession on the ground that the latter is his tenant whose tenancy has been terminated, he must prove not only that the defendant is his tenant as alleged, if that is denied, but also his right to eject. In order to prove a right to eject, he must necessarily show that the tenancy is a terminable one and has been validly terminated. This *onus* is unaffected by any defence of permanent rights of occupancy that the defendant may set up but fails to prove. The principle that in a suit for ejectment the plaintiff must first prove his right to eject before the *onus* is shifted to the defendant to prove that he has a permanent right of occupancy has been recently re-affirmed in *Venkatarangayya Appa Rao Bahadur* v. *Marampudi Baji Raju* (5) which was like this a case of a resumption of service inam.

Mr. Rama Doss argued that in the previous suit it was admitted that the land was granted as inam. The suit was between the Zamindar and the Government as to the latter's right to enfranchise and the ryot was only a *pro forma* defendant. As observed in *Gunnaiyan* v.

(2) (1913) 14 M.L.T. 562=21 I.A. 833=(1914) M. W.N. 179.

(3) (1918) 41 Mad. 1012=45 I.C. 209=25 M.L.T. 80=(1918) M.W.N. 859=23 C.W.N. 273=9 L.W. 126=29 C.L.J. 153=36 M.L.J. 585=21 Bom. L.R 547=48 I.C. 689=(1919) M.W.N. 463 (P.C.).

(4) (1918) M.W.N. 219=43 I.C. 977=7 L.W. 194.

(5) 1924 Mad. 93=45 M.L.J. 238=(1923) M.W.N. 755=19 M.L.W. 619.

Kamakchi Aiyar (6), the practice of Government upon enfranchisement is to impose full assessment and not to disturb existing possession. Therefore the use of the word" land" in the written statement of the tenant in this suit is inconclusive. In the present case the plaintiff having come into Court with a prayer to be put in possession of lands in defendants' occupation has failed to prove that the defendants are holding those lands upon a tenancy which is terminable and has been determined.

The lower Court was therefore not justified in giving the plaintiff a decree for the first relief asked by him and the lower Court's decree directing delivery of possession of items 1 to 16 must therefore be modified. In lieu thereof the plaintiff will have a decree for recovery of the full assessment of the land at the rates to be determined under the seventh issue which the lower Court has left undecided. The appeal is therefore allowed and the suit will be remanded for deciding the seventh issue and giving the plaintiff a decree for rent in accordance without decision upon the other issues in the case. Costs in this Court to be borne by the respondent. Costs in the lower Court will abide and be provided in the final decree.

Kumaraswamy Sastri, J.:—I agree.

Appeal allowed.

(6) (1902) 26 Mad. 339.

1924 Madras 909.

SPENCER AND DEVADOSS, JJ.

Ottapurakkal Thazhath Soopi—Appellant-2nd Defendant.

v.

Koobhalantavida Parkum Chakhan Abdulla and others—Respondants-(Plaintiffs 1 and 3 to 10 and Defendants 1 and 3 to 5).

A. A. O. No. 310 of 1921, decided on 21st March, 1924, against the decree of the Subordinate-Judge of Tellicherry, dated 31st March, 1921, in O. S. No. 21 of 1917.

Malabar Law—Powers of Karnavan—During continuance of partnership by karnavan with strangers, junior members are bound by karnavan's agreement, but not after dissolution.

On dissolution of a partnership the Karnavan of a Thavazi accepted a smaller portion of the assets of the partnership than he was entitled to, under the terms of the partnership, from the partners who were strangers to the thavazi. On a suit by the junior members to set aside this arrangement.

Held, that though the junior members were bound by agreements made by the karnavan during the continuance of the business of the partnership still after the dissolution they were not so bound. [P. 909, C. 2 and P. 910, C. 1.]

C. V. Ananthakrishna Aiyar and *T. S. Viswanadha Aiyar*—for the Appellant.

A. Krishnaswami Aiyar, *P.S. Narayanaswami Aiyar* and *P. S. Ramachandra Aiyar*—for the Respondents.

Spencer, J.:—The parties are governed by the Marumakkathayam law. The 2nd defendant appeals. The 2nd defendant and one Alipi Haji, now dead, were carrying on a timber trade. In 1896, the 2nd defendant took his son, the 1st defendant, as a partner, and a partnership agreement was drawn up, which is Exhibit A, dated 9th February, 1896. Under this, each of the partners had a ⅓rd share in the profits of the timber trade. The assets contributed by the 1st defendant were the putravakasa property of the tavazhi, consisting of himself and the plaintiff, the 5th defendant and her children (plaintiffs 5 to 9) and the wife of the 2nd defendant. The tavazhi property was thus invested in the partnership trade, the 1st defendant being the karnavan of the tavazhi. In such a case, each member of the tavazhi does not himself become a partner; but as held in *Ramanathan Chetty* v. *Yegappa Chetty* (1), and *Gangayya* v. *Venkataramiah* (2), the manager of the family is the trading partner and represents the interests of the joint family. That being the case, the members of the tavazhi would have no right to interfere in the management of the affairs of the partnership, so long as it was a going concern. But in 1913, the partners entered into an agreement (Exhibit C.), to dissolve the partnership and to have a partition deed drawn up. They also made a temporary arrangement for the allotment of the elephants, which were used in the working of the timber trade. The dissolution of the partnership, agreed to at that time, was finally embodied in Exhibit 1, dated 22nd November, 1914, under which the 2nd defendant was given a half share, instead of ⅓rd, on account of his extra exertion and his supply of funds.

(1) (1916) 19 M.L.T. 66=(1916) M.W.N. 81=32 I.C. 427=30 M.L.J. 241.
(2) (1917) 41 Mad. 454=34 M.L.J. 271=22 M.L.T. 527=(1917) M.W.N. 805=43 I.C. 9=6 L.W. 708.

Alipi Haji agreed to take one quarter and the 1st defendant also took one quarter. This suit was instituted to declare that that arrangement is not binding on the members of the tavazhi and to recover their rightful share.

It is obvious that the 1st defendant as Karnavan had no right to surrender the interest of the tavazhi without any consideration, as this amounts to an alienation of tavazhi property, and as he was in a fiduciary position, the plaintiffs representing the R. tavazhi are entitled to follow the tavazhi property into the hands of those in whose favour it has been alienated. The objection that this suit will not lie on the ground that the plaintiffs are not members of the partnership and have no voice in the direction of the partnership affairs is answered by showing that at the time when the suit was instituted, there had been a dissolution of partnership. In *Watts* v. *Driscoll* (3), it was held by the Court of Appeal, that the assignor of a share in a partnership is not bound by any agreement made by the partners themselves on a dissolution of partnership by which the amount or value of the share is altered. In the English Partnership Act of 1890, section 31 makes it clear that an assignee cannot interfere in the management of the affairs of the partnership, but upon dissolution he is entitled to take his assignor's share of the assets and to have an account from the date of the dissolution. The same principle was followed in *Chidambaram Chetty* v. *Karuthan Chetti* (4). That was a case of sub-partners and the learned Chief Justice observed that in the absence of any settlement between the partners before dissolution, which of course would be binding on the sub-partner, the sub-partner after the dissolution is entitled to have an account taken to ascertain the share of the partners under whom he claims as without such an account it would be impossible to say what he was entitled to. The objection to the maintainability of the suit thus fails.

On the merits, it is urged for the respondents that the lower Court should have found on the evidence that there was a settlement by arbitrators by which the 1st defendant's and Alipi Haji's shares were reduced after looking into the accounts and the 2nd defendant's share was increased. The Subordinate Judge has held that the alleged mediation was a fiction. We have referred to the evidence of the defence witnesses. They do not say that in consideration of the extra contribution made by some persons definite sums were allotted to those partners who had contributed most, but they say that, before the net assets of the partnership were ascertained, there was an agreement that 2nd defendant should take half of the whole assets and that the other partners should take each a moiety of the remainder, as the arbitrators thought it was proper to do so. Unless the adult members of the tavazhi consented to such an arrangement, they would not be bound by the 1st defendant's action against their interests. The witnesses do not speak of any such consent being given by other members of the tavazhi. D. W. 1 and D. W. 3 say that the 1st plaintiff was present at the mediation. Nanu Menon, the 5th witness, who is supposed to have settled it, says that the 1st plaintiff was present but he was not consulted and did not raise any objection. The 1st plaintiff has stated that he did not know about any mediation by Nanu Menon and he was not cross-examined as to whether he was present on that occasion. D. Ws. 2 and 3 say that they did not see Nanu Menon that day.

It has not been shown that there was any occasion for arbitration on account of any disputes between the partners. The 2nd defendant has not gone into the witness box and given his account of what happened.

On the whole, we see no reason to differ from the Subordinate Judge's conclusion that there was no regular arbitration in the matter. The lower Court's judgment awarding plaintiffs 1 and 3 to 10, on behalf of themselves and defendants 1 and 5, 1/6 of the properties given to the 2nd defendant is therefore correct. The decree provides that the 2nd defendant do deliver up 1/6 of the properties given to him, as shown in schedules A and E, and if it is not available, to pay their value Rs. 27,502. There is no question of the immoveable properties being available or not available.

The memorandum of objections raises the question whether 1/6 of the properties should not have been partitioned and delivered. The decree will be amended by

(3) (1901) 1 Ch. 294=70 L.J. Ch. 157=84 L.T. 97 =49 W.R. 146=17 T.L.R. 101.

(4) (1920) 39 M.L.J. 511=28 M.L.T. 138=58 I.C. 80=12 L.W. 444.

directing that the 2nd defendant do deliver up 1/6 of the immoveable properties and 1/6 of the moveables and providing that if any moveables are not available to be delivered, 1/6 of their value as found by the Commissioner shall be paid by the 2nd defendant, or as ascertained in execution, if the Commissioner has not already valued any particular item. With this modification the appeal is dismissed with costs.

The division of both immoveable and moveable properties may be made in execution.

Upon the memorandum of objections, the respondents will recover Rs. 265, the difference between the amount of Court-fee which the appellants actually paid and the amount they ought to have paid. Vakils' fees to be calculated on the correct amount at which the suit ought to have been valued, namely, Rs. 55,000.

Decree varied.

1924 Madras 911 (1).

WALLACE, J.

Minnekanti Kotayya and others—Petitioners.

v.

Telaprolu Krishnayya and others—Respondents.

Civil R. P. Nos. 965 and 966 of 1923, decided on 18th February, 1924, against the Order of the District Court of Guntur in C. M. A. No. 17 of 1923.

Civ. Pro. Code, S. 115—Order without any prayer and not justified by law should be set aside.

Where without a prayer for sale the Court ordered the sale without purporting to act under S. 151, Civ. Pro. Code.

Held, the order should be revised. [P. 911, C. 2.]

[illegible]h. Raghava Rao—for the Petitioners.

Judgment:—There was no prayer before the District Munsif by the petitioners for the sale of the lease, and he was not therefore justified in making his order on the assumption that there was. If his order is to be taken as one passed under Order 40 as, if one takes the form of the petition it should be, then the District Munsif by the manner of his order deprived the present petitioners of the right of appeal to the District Court. If his order was passed under section 151, Code of Civil Procedure, it does not purport to be so passed and as I have noted, purports to rely on some prayer by the present respondents which was not in existence. In these circumstances, I think the proper order to be passed is, to revise the District Munsif's order and direct him to pass an order in accordance with the relief which he is asked to grant.

Some question of the existence of a covenant to renew in favour of the present petitioners, was raised before me. There is no material here on which I can decide if it exists. If it does, I think the position of the lessee would not be adv[illegible]. The petitioners, if they have such a point in their favour, can now put it forward in the first Court.

Petitioners will get their costs on one petition.

Petition allowed.

1924 Madras 911 (2).

MADHAVAN NAIR, J.

Karapurathirikkam T. C. Rama Kurup—Appellant-Plaintiff.

Pudottal Thmasil [illegible]m Kunhirattan T. C. Ryru Kurup—Respondent-Defendant.

S. A. No. 1407 of 1921, decided on 16th April, 1924, against the decree of the Sub-Judge of Tellicherry, in A. S. No. 72 of 1921.

Land Acquisition Act, S. 55—Sale by Collector through Tahsildar, of lands acquired for, but relinquished, by Railway Company is valid—Non-observance of conditions as to mode of conducting the sale does not necessarily render the sale invalid.

The Collector of a District can effect the sale himself or through the Tahsildar of the Taluk in which the lands acquired for the Railway Company and subsequently relinquished by the Railway Company are situated. The non-observance of some of the rules which were in the nature of instructions as to the conduct of the sale to the Officer conducting the sale, does not render the sale void in the absence of fraud, misrepresentation or mistake in the conduct of the sale. The non-observance in this case was as to the condition as to public auction and the preference to be given to the adjoining land-owner. [P. 912, Cs. 1 and 2.]

K. P. M. Menon—for the Appellant.

S. Ramaswami Aiyar and *V. P. Karunakara Nambiar*—for the Respondent.

Judgment:—The plaintiff is the appellant. His suit is to recover possession of B. Class lands, relinquished by the Railway Company and included in Survey Nos. 65-B-1 and 65-B-3 of Azhiyur Amsom.

These lands were first sold to the defendant by the Tahsildar and possession was given to him. Afterwards, on an objection raised by the present plaintiff, the sale to the defendant was cancelled and the plaintiff was given these properties, with right to recover them from the defendant. The questions for determination are: (1) whether the defendant has obtained a valid assignment of the plaint properties; and (2) what is the legal effect of the subsequent assignment of these properties to the plaintiff. If the defendant has got a valid assignment of the properties, it follows that the subsequent assignment of the same properties to the plaintiff can give him no right to recover possession. Both the Courts below found that there was a valid assignment of the plaint properties to the defendant and have dismissed the plaintiff's suit.

Mr. Menon for the plaintiff-appellant has argued that the Tahsildar, who sold these properties to the defendant, had no authority given to him by the Collector, to sell them to the defendant; (2) that even if he had the authority, the Collector, who was the agent of the Government for effecting the sale of the relinquished Railway lands, under the Board's Standing Order No. 90, Cls. (4) and (5), had no power to delegate his function to the Tahsildar and therefore the sale by the Tahsildar is invalid: and (3) that since, in conducting the sale, the Tahsildar contravened some of the special rules, under the Board's Standing Order, the sale to the defendant of these lands is invalid.

Exhibits I, II and III are the proceedings relating to the sale of these lands. As regards the first point, a perusal of Ex. II makes it quite clear that the Tahsildar had power given to him by the Collector to sell them.

The next point for consideration is whether the Collector could validly delegate this duty of selling the lands to the Tahsildar. In my opinion, this is not a case strictly speaking of delegation at all. It is admitted that the Collector has the power to effect the sale himself. The Collector having decided to sell these lands has entrusted the purely ministerial work of carrying out the sale to the Tahsildar. I think this in law he is entitled to do.

It is next argued that the Tahsildar, when he carried out the sale, did not observe some of the rules relating to the sale. It was stated that he did not sell these lands by public auction, as he is bound to do, under the rules and that at best with regard to one of the Survey numbers, *viz.*, 65 B-3, he did not sell it to the adjoining land-owner, that is to say, that the defendant is not the adjoining land-owner to whom he ought to have sold it. I am not quite sure whether 65 B/3 is not contiguous to the defendant's land, because it was stated at the bar that it does not seem to touch it at one point. However, I do not think that the non-observance of these rules can make the sale to the defendant absolutely void. It is admitted that the sale was not affected by fraud, or misrepresentation, or mutual mistake. Exibit II shows that the Tahsildar acted strictly within the scope of his authority. In my opinion the rules violated are nothing more than instructions to the officer disposing of Railway B class land. They do not in any way, define the scope of the authority of the officer concerned in making the sale. As pointed out, by their Lordship in *Sappani Asari* v. *The Collector of Coimbatore* (1).

"Unless the distinction between so much of the rules as is really in the nature of a power-of-attorney defining the scope of the authority of Dharkhast Officers and the rest which are really in the nature only of instructions to such officers, while exercising the power conferred upon them, is fully recognised and enforced, the entire body of Dharkhast rules will become unworkable in Civil Courts".

In *The Secretary of State for India* v. *Bundeppa of Konakondla* (2), it was held that a grant of land on dharkhast by an authority competent to make such grant, cannot, where no fraud has been practised in obtaining such grant, be set aside, on the ground that it was not made in the manner prescribed by the Board's Standing Order. The offer of the defendant in the case, was accepted by a duly authorised officer and that acceptance was communicated to him and he was also put in possession of the properties. In view of these authorities, I do not think that the sale to the defendant can be said to be vitiated by the non-observance of these rules.

It follows therefore that the defendant has obtained a valid assignment of the plaint properties and that the subsequent assignment of them to the plaintiff is

(1) (1903) 26 Mad. 742=12 M.L.J. 417.
(2) (1909) 32 Mad. 300=5 M.L.T. 31=1 I.C. 76=19 M.L.J. 206.

invalid; in any event, in view of Exhibits C and C-1, the assignment of 65 B-1 to the defendant will stand. I dismiss the second appeal with costs.

Appeal dismissed.

1924 Madras 913.

ODGERS AND WALLACE, JJ.

The Secretary of State for India-in-Council, represented by the Collector of Salem—Appellant (Defendant).

v.

T. V. Raghavachariar—Respondent.

S. A. No. 334 of 1921, decided on 22nd January, 1924, against the decree, dated the 22nd July, 1920, of the Sub-Judge of Salem, in A. S. No. 118 of 1920.

(a) *Civ. Pro. Code, S. 100—Mixed question of fact and law cannot be raised for the first time in appeal.*

Where a party claims to have riparian rights for the first time in appeal.

Held, he should not be allowed to put in the claim as it is a mixed question of law and fact. [P. 916, C. 1.]

(b) *Madras Act III of 1905—Grant of patta does not pass with it rights of Government poramboke.*

Through the patta lands of the plaintiff passed a jungle stream and then emptied itself into Government irrigation source. When the Government granted patta the stream was not separately demarcated and specified as Government poramboke. The plaintiff dammed the stream and used the water for raising wet-crop on his dry lands and Government levied water cess for the same.

Held, the grant of the patta did not carry with it the grant of any Government poramboke already existing in the field and therefore the Government were justified in levying water-cess. (31 I.C. 982 *Dist*). The patta was not a document of title or a deed of grant but merely a record of demand by Government, of a certain amount as land revenue or a certain area. [P. 914, C. 2 and P. 915, C. 2.]

The Government Pleader—for Appellant.

T. R. Vijiaraghavachariar—for Respondent.

Ayling, J.:—This second appeal arises out of a suit for recovery of water-cess alleged to have been illegally levied by Government. It appears that the plaintiff took the water on account of which the cess was levied from a channel which passed through his patta land, but was not separately demarcated as poramboke. The fact has been treated by both the lower Courts as conclusive against Government as to the legality of the levy; reliance being placed on a passage in a judgment in *Kalianna Mudali* v. *Secretary of State* (1) which runs as follows:—

"As to the claim to levy water-cess, these rills run through plaintiff's patta land, and their beds have not been separately demarcated as poramboke; they are part of the patta land and not the property of the Government, and therefore the water course cannot be said to belong to Government." decided day before yesterday in Appeal Suit No. of 1910 (on the file of the High Court)."

The learned Government Pleader in second appeal argues that the decision (which is not reported in the Gazette) needs re-consideration.

I was a party to it, though I confess. necessary to say that after the lapse nearly eight years, my memory is of no assistance. I think however cases in any attempt to apply the fact that strict regard must be had to the "rills" feeding we were there dealing with irrigation channels. a pond, and not artificial. Dictionary as "Rill" is defined in the Concise Oxford Dictionary as a small stream, brook etc., artificial origin, implying a natural. Judgment in Appeal and a reference to the which is quoted, Suit No. 113 dealt with the ownership shows that the rivers and the water ship of the bed. In so far as natural flowing over ground, I do not at present see any reason to doubt the correctness of our decision. Artificial irrigation channels stand on totally different footing. When these are demarcated as poramboke; but separate character as poramboke is not affected their wrongful omission to do so. The learned Government Pleader refers us to the following passage in the Settlement Register of the suit village (Exhibit IV): "It must be distinctly borne in mind that at the Original Settlement, a deduction of 25 per cent. has been made from the gross produce on account of unfavourable seasons and on account of any roads, channels, banks, paths, etc., that may have been measured in with the cultivated area. The fact of the inclusion, therefore, of any Government poramboke in any re-survey field does not confer on the cultivator of that field the right of entering on such poramboke or of in any way interfering with it and any unauthorized encroachment on such poramboke will be severely dealt with."

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(1) (1915) 31 I.C. 982.

It will be apparent from this that the fact that the channel forms part of a survey number held in patta without separate demarcation does not, by itself, show that the said channel is not a poramboke channel.

The ruling in *Kalianna Mudali* v. *Secretary of State* (1) does not therefore conclude the case, and I would call upon the Subordinate Judge to submit findings on the issues on the evidence on record in the light of the above remarks. Findings should be submitted by July 16th; seven days will be allowed for objections.

Odgers, J.:—I agree.

[and the following judgments were delivered.]

Odgers, J.:—This suit was brought by the plaintiff against the Secretary of State in Council to recover the amount of water-cess charged on the plaintiff because the plaintiff took Government water to irrigate his dry lands. The District Munsif found that the water-course could not be said to belong to Government and this was upheld by the Subordinate Judge, both the lower Courts relying on the decision in *Kalianna Mudali* v. *Secretary of State* (1) to which further reference will be made. The appeal was heard originally before Ayling, J., and myself and the case was remitted to the lower appellate Court for fresh findings on all the issues. It was then submitted by the learned Government Pleader that the decision in *Kalianna Mudali* v. *Secretary of State* (1) required reconsideration and we pointed out in our judgment that the case relied on was concerned with rills feeding a pond. We pointed out, however, that small natural streams are frequently not separately demarcated as poramboke but their character as poramboke is not affected by the omission to do so; and we also pointed out that it was apparent from the passage in the settlement register of the suit village, Exhibit IV, that the fact that the channel forms part of a survey number held in patta without separate demarcation does not by itself show that the said channel is not a poramboke channel. We held that the ruling in *Kalianna Mudali* v. *Secretary of State* (1) did not conclude the case and, as stated, called upon the lower appellate Court to return further findings on all the issues. This the lower appellate Court has now done, and the finding still is that the plaintiff did not take water to his survey numbers from any Government source. The learned Subordinate Judge, relying on the fact that it was not an artificial irrigation channel and that therefore in his opinion the decision in *Kalianna Mudali* v. *Secretary of State* (1) supported the plaintiff, was apparently of opinion that if the lands on either side of the channel were the patta lands of the plaintiff, it must be held that the channel and its water were included in the patta. This in fact is a point relied on for the plaintiff before us. It was urged as a preliminary point that this question is purely one of fact and cannot be raised in second appeal. But in my opinion, the grounds of the reasoning of the learned Subordinate Judge must be examined to see if they are supportable in law; and if they are not, it follows that his inference of fact from them can also not be supported. The plaintiff began by denying that there was any *odai* (stream) running through his land at all. This has been found to be absolutely false and I have no hesitation in concurring. As a matter of fact, the stream or channel runs through survey Nos. 13 and 17, the plaintiff's patta lands, to the south and falls into a tank in the railway poramboke, which there is reason to think is a Government irrigation source. The passage in the Settlement Register has been already referred to and it occurs also in the preamble to the patta. It is perfectly clear that a patta is merely a bill for rent and is in no sense a grant or conveyance of the land referred to therein. See *Secretary of State* v. *Kasturi Reddi* (2), and *Muthu Veera Vandayan* v. *Secretary of State* (3). It is also clear that the land, and it was admitted, the water channels were poramboke before the grant of patta. The provisions of the Madras Act III of 1905, section 2 which have been discussed in a variety of cases in this Court lay down that "all rivers, streams, etc., and water-courses . . . . . are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force subject to the natural and easement rights of other landowners and to all customary rights legally subsisting with regard thereto." If the pattadar has not prescribed against Government for the use of the water in

(2) (1902) 26 Mad. 268 = 21 M.L.J. 453.
(3) (1906) 29 Mad. 461 = 1 M.L.T. 278.

this channel or for the ownership of the bed thereon, it is clear that he has no grant of such rights contained in his patta. Such streams as the one under consideration have in my opinion been expressly excepted from the grant. It has been said by the Privy Council in *Prasad Row* v. *Secretary of State* (4), that with regard to the true meaning and construction of the Act, various difficulties arise and those difficulties are evident from the conflict of opinion that has arisen in this High Court with regard to it. For instance, in the judgment of Abdur Rahim, J., in *Chinnappan Chetty* v. *Secretary of State* (5), he points out "that the rights of the Government in water are in connection with its position as a landowner may be deduced from the use of the words 'other landowners' in the saving clause"; so it appears to me that, if the ownership of the banks of the stream is still vested in Government, it cannot be said that the pattadar has any rights of ownership in the water thereon. This is pointed out by Sadasiva Aiyar, J., in *Secretary of State* v. *Janakiramayya* (6) wherein he says: "Ryotwari lands stand on an entirely different footing from Zamindari and Inam lands as Government has not lost proprietary rights over ryotwari land. That ryotwari land continues to be Government land....Thus the Government treats itself as owner of its ryotwari tenants' lands while it treats the Zamindar and Inamdar as owner of the lands in permanently settled estates." In *Kandukuri Mahalakshmamma Garu* v. *Secretary of State* (7) Miller and Munro, JJ., held that under section 2 of Act III of 1905, where the channel or river, which is the flowing body of water, is not shown to belong to a private person, it belongs to Government although private persons, may be proprietors of the bed. The riparian proprietors have easement rights, but they are not on that account owners of the channel, and they cannot use water which belongs to Government free from cess in the absence of an engagement with Government to that effect. They laid down that section 2 declared that subject to the natural rights of other landowners, all standing and flowing waters which are not the property of anybody else are the property of Government. This case came on appeal to the Privy Council in *Prasad Row* v. *Secretary of State* (4) where their Lordships recognize the difference in the law of this Presidency as to the rivers and streams in the English law and say that quite possible that it recognizes some rights on the part of Government in water flowing in rivers and streams. Again, in *Secretary of State* v. *Ambalavana Pandara Sannadhi* (8) Abdur Rahim, J. held that "in order to justify the imposition of cess under this Act, it must be made out that the irrigation is caused by water supplied or obtained from a stream or river belonging to the Government," and he did not understand the provisions of Act III of 1905 as laying down that "even in those streams and rivers in which the riparian rights of zamindar or other owners of adjacent land exist, a separate and independent proprietorial right in the water subsists in the Government entitling it to demand from the owners of the land on the banks any price it chooses for the use of the water." This was concurred in by Srinivasa Aiyangar, J. but on the ground that the plaintiff had been drawing off the same quantity of water from time immemorial but he refused to consider the effect of Act III of 1905. I am therefore of opinion that the patta of the plaintiff does not include this undemarcated poramboke stream.

The second contention is that, if Government intended it not to be included in the patta, they ought to have excepted the channel from the patta. Reference has been made to the Survey Manual and to the Board's Standing Orders; but it seems to me that this cannot in any way have the force of law being merely directions of the authorities to their officers, either survey or revenue, as to the way in which their duties should be carried out.

The third question raised is that no presumption in favour of Government

(4) (1917) 40 Mad. 886=44 I.A. 166=34 M.L.J. 114=22 M.L.T. 76=15 A.L.J. 697=21 C. W.N. 1039=(1917) M.W.N. 536=19 Bom L.R. 751=6 L.W. 340=2 Pat. L.J. 260=41 I.C. 98=26 C.L.J. 290 (P. C.)

(5) (1919) 42 Mad. 239=36 M.L.J. 124=25 M.L.T. 121=(1919) M.W.N. 120=49 I.C. 673=9 L. W. 289 (F.B.).

(6) (1915) 29 M.L.J. 389=2 L.W. 73=18 M.L.T. 277=30 I.C. 609=(1915) M.W.N. 671 (F.B.)

(1910) 34 Mad. 295=(1910 M.W.N. 595=8 M.L.T. 389=8 I.C. 67=20 M.L.J. 828.

(8) (1917) 33 M.L.J. 415=22 M.L.T. 151=42 I.C. 697=(1917) M.W.N. 729.

arises from the provisions of Act III of 1905. This I have already dealt with in considering the first question. But I may add this ; in *Secretary of State* v. *Janakiramayya* (6) it was held by a majority of the Full Bench as against the observations in *Secretary of State* v. *Ambalavana Pandara Sannadhi* (8) that a special presumption is raised in favour of Government by Madras Act III of 1905. (*See* per Oldfield, J., at page 398 and per Bakewell, J., at page 403).

The [illegible] contention of the plaintiff is that [illegible] riparian rights. This is a question of at least mixed law and fact which he has not raised in either of the lower Courts and which in my opinion he is debarred from raising in second appeal. That is sufficient to dispose of this point. But I may add that whatever riparian rights, if any, the plaintiff might have in the water of this stream, it is more than doubtful if he was at liberty to erect two dams or diversions by which a considerable portion at least of the waters of the stream was diverted in order to irrigate his own dry patta lands. That would raise the question as to whether the rights of lower riparian owners, if any, have been infringed, (and whether the flow through this *odai* to the tank or manalpallam has been interfered with. This is, of course, a question of evidence which cannot be allowed to be raised here. Reference may be made to S. A, No. 1639 of 1918 to which I was a party in which it was said that the District Munsif thought that ryotwari landholders were entitled to all the rights of riparian owners under the English law. They may be said to own some such rights, such as the rights of access to the river for using the water, for bathing and for domestic purposes and so on; but so far as irrigation rights are concerned, it has been pointed out in *Lakshmiah* v. *Narayanappa* (9) that the only direct rights which the ryotwari landholders have are either derived (through express or implied contract) from the Government or are acquired against Government by prescription.

To refer to the case in *Kalianna Mudali* v. *Secretary of State* (1), the judgment is extremely short. The land in question seems to have been patta land. The first part of the judgment deals with the plaintiff having acquired an easement as against Government to interrupt the flow. The second part of it deals with the claim to levy water-cess and sets out that the "rills run through the plaintiff's patta lands and their beds have not been separately demarcated as poramboke. They are part of the patta land and not the property of Government, and therefore the water-course cannot be said to belong to Government as decided day before yesterday in A. S. No. 113 of 1910." I have perused the judgment in this appeal, which was a case of zamindari lands where under section 2 of Act III of 1905, the zamindar is clearly "another landowner" within the meaning of the section. It is further difficult to discover from the very short statement in *Kalianna Mudali* v. *Secretary of State* (1) what were the exact facts of the case. It may be that the rills began and ended on the plaintiff's own patta land without flowing into or through any other land which is not the case in appeal before us. I cannot see that this case is any real authority for the position advanced by the appellant. The learned Judges relied on a case they had already decided as to zamindari lands which as pointed out stood on a wholly different footing. For these reasons, I am of opinion that the appeal must be allowed with costs throughout.

Wallace, J. :—Plaintiff sued to recover with costs a sum paid by him as penal water-rate levied by the Tahsildar of Uttankarai Taluk, Salem District, for unauthorisedly taking Government water to his registered dry lands. It appears from the evidence in the case that plaintiff is the pattadar of Survey Nos. 13, 14 and 17 registered dry land through which a jungle stream flows which originally according to the survey plan of 1897 ended in Survey No. 17, but so far as appears from the evidence has since the grant or darkhast of Survey Nos. 13, 14 and 17 been discharging its waters into the Government irrigation source called manalpallam, that plaintiff by mud dams at points A and B in the stream diverted a portion of the water of that stream to his dry fields and raised wet crop, and that for his interference with the water of the stream penal water-rate was imposed on him.

Both the lower Courts have decided that the jungle stream within the limits of Survey Nos. 13, 14 and 17 is the property of plaintiff and that the imposition of any

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(9) (1918) 34 M L J 425 = 46 I C 80 = 23 M L T 337 = (1918) M W N 276.

water-rate for the diversion and use by him of its waters, at any point within these survey numbers is illegal. Both Courts have based their decision on the ground that the patta for these fields granted apparently to plaintiff's vendor carried with it a grant of stream bed and the water on it where it flowed through these survey numbers. In so holding, it is perfectly clear that in the present state of the law, both Courts made a fundamental mistake in law as to the legal effect of a patta, and this mistake, we are, in second appeal, bound to consider and rectify.

I should have thought that it was well-known law that a patta is not a document of title, or a deed of grant [see *Secretary of State* v. *Kasturi Reddi* (2) and *Muthu Veera Vandayan* v. *Secretary of State* (3).] It is a record of demand by Government that such and such an amount is due as land revenue on such and such an area. Plaintiff admitted before us, when pressed, that the stream in question within Survey Nos. 13, 14 and 17 was Government property prior to the grant of patta to his vendor. It follows that neither his vendor nor himself has succeeded to the ownership of that portion of the stream unless the grant of patta or the grant of these survey numbers on darkhast somehow carried with it also the transfer of ownership of that portion of the stream. As noted, the patta implies no such grant, and plaintiff has not chosen to produce or call for the darkhast records. I wholly fail then to find any proof that the ownership of Government admitted prior to the darkhast has been lost by Government.

The mere entry of a particular area in a patta cannot be any evidence that the whole extent of the area, without any observations, was granted on darkhast to a darkhastdar, in the face of the customary proviso in all village A registers, *viz.*, that at the original settlement a deduction of 25 per cent. has been made from the gross produce on account of unfavourable seasons, and on account of any roads, channels, tanks, paths, etc., that may have been measured in with the cultivated area. The fact of the inclusion, therefore of any Government poramboke in any re-survey field does not confer on the cultivator of that field the right of entering on such poramboke or of in any way interfering with it (Ex. IV). The mere grant of a patta for a field does not then automatically carry with it the grant of any Government poramboke already existing within that field.

Plaintiff's claim, which amounts to saying that there cannot be any Government channels in existence within lands granted on patta, unless these channels have been separately demarcated, is directly opposed to this general provision of the settlement. It is for plaintiff to prove that this usual reservation did not form part of the contract between his vendor and Government at the time of the grant of patta. He has not produced his patta or examined his vendor to prove this, or to prove that his vendor was in possession of, or owner of a portion of the stream. It seems to me almost absurd to contend that in granting a darkhast for dry lands—lands *ex hypothesi* not entitled to Government water—Government deliberately intended to confer on the darkhastdar not merely the use of water flowing through a channel in that land to a Government source of irrigation but also the ownership of part of that channel, so that every grant of patta would confer ownership of every channel within the land granted and the right to dam up and stop the flow of water altogether. It is certain that Government in granting pattas never had any such intention or contemplated that such a transfer of ownership would involve the wholesale breach of its covenant with the lower wet landholders was included in the contract. The practical inconveniences of upholding such contention are obvious, as plaintiff himself would be the first to discover, if a pattadar further up the stream, say pattadar of field No. 1, claimed the rights which plaintiff now claims, and diverted all the water to his field so that none at all came as far as plaintiff's lands. Plaintiff's claim based on the patta appears to me therefore wholly untenable and the lower Court's acceptance of it is based on a material misconception of the law. The case cited by plaintiff, *Kalianna Mudali* v. *Secretary of State for India* (1), besides being a case not published in the authorised reports, does not seem to me of any assistance to plaintiff, since from the facts of that case, it appears that the " rills " feeding the pond were wholly in the plaintiff's lands and had presumably never belonged, at any time, to Government.

Plaintiff has attempted before us to support the decree appealed against, on two grounds not taken before, (*a*) that under the B.S.O., Government does not charge water-rate for water taken from jungle streams provided no irrigation lower down is interfered with, (*b*) that plaintiff as owner of both banks of the stream in Survey Nos. 13, 14 and 17 possesses the the natural rights of a riparian owner to usufruct of the water as it flows between his banks. As to (*a*) the foundation for such [illegible] not been laid, and Government [illegible] or called upon to meet such a [illegible] it appears in evidence (defendant's 4th witness) that the jungle stream *does* feed an irrigation source so that the B.S.O. quoted has no application. As to (*b*) again such a claim was never agitated in the lower Courts. Had it been, it would have been open to Government to contend—

(1) that a mere darkhast ryotwari pattadar of dry lands has no riparian rights to water for irrigation purposes (*see* S.A. No. 1639 of 1918) ;

(2) that even if he has, such rights do not permit the diversion by mud dams of water which would otherwise flow into a Government irrigated source. I am of opinion that such mixed questions of fact and law cannot be agitated for the first time here in second appeal.

It is clear then that as between plaintiff and Government the ownership of this channel and the water in it within fields Nos. 13, 14 and 17 belongs to Government and that the charge of water rate ordinary or penal for water taken therefrom to dry lands is in accordance with law (Acts VII of 1865 and III of 1905). This second appeal must therefore be allowed and plaintiff's suit dismissed with costs here and below.

Appeal allowed.

1924 Madras 918.

WALLACE, J.

Pachalla Doraiswami Aiyangar and others—Appellants.

v.

Sri Mahant Prayaga Dosjee Varu—Respondent.

S. A. Nos. 1130 and 1131 of 1921, decided on 27th March, 1924, against the decrees of the Sub-Judge of Chittoor, in A. S. Nos. 26 and 32 of 1920.

Madras Estates Land Act, S. 125—Purchaser in sale for arrears of rent takes subject to encumbrances created before the Act—Acceptance of rent from the defaulter's purchaser, makes the purchaser's title stronger than the title of the purchaser under rent sale where landlord did not put an end to occupancy rights under the rent sale.

Under S. 125 a purchaser in a sale for arrears of rent takes subject to encumbrances created before the passing of the Act where the landlord did not put an end to the occupancy right of the defaulter under cover of his rent sale but on the contrary accepted subsequently rent from the purchaser in a mortgage sale, on behalf of the defaulter.

Held, that the purchaser in the mortgage sale had superior rights over the purchaser in the sale for arrears of rent. [P. 919, Cs. 1 and 2.]

K. S. Champakesha Aiyangar—for the Appellants.

T. Kumaraswamiah—for the Respondent.

Judgment:—The facts necessary for the disposal of this appeal are as follows: One Sellappa Asari was an occupancy tenant in the 1st defendant's estate. On 4th May, 1901, he mortgaged the five items of the plaint property.

The mortgagee sued to recover his money and obtained a decree for sale of the mortgaged property on 4th June, 1912. It became final on 9th January, 1913, and the property was sold in execution of the decree on 15th November, 1915. The plaintiff purchased all the five items on 7th June, 1916 from the auction-purchaser and got delivery through Court on 31st January, 1917. In the meantime on 22nd March, 1913, items 3 and 4 of the plaint property were sold by the landlord, the first defendant for the arrears of rent due on the holding by Sellappa Asari and the first defendant alleges that he bought in these properties for eight annas and got delive[illegible] of them on 25th October, 1915, and that [illegible] sold them again to defendants 2 to 8. The question at issue was whether the plaintiff's purchase on the footing of the mortgage decree prevails against the first defendant's purchase in the rent sale. The lower appellate Court has held that the plaintiff's title did not prevail against the 1st defendant's rent sale title, and therefore dismissed the suit and the plaintiff appeals.

I cannot see why the plaintiff was not given at least a decree for items 1, 2 and 5. The first defendant puts forward not claim to items 1 and 2 nor do any of the other defendants : and as regards item 5,

although the first defendant claims that he brought that also in the rent sale, his sale certificates, Exhibits I and II, show that that was not so.

As regards item 3, a garden with an indigo vat and item 4 nunja, it is not quite easy to say definitely what field numbers they correspond to, but, so far as I can ascertain from the documents filed in this case, item 4 seems to correspond to nunja Nos. 200 and 201, while the garden in item 3 appears to be described under Nos. 240 and 244 with an area of 10 acres and 3 cents and the vat appears under Nos. 240 and 241 with an area of 1 acre and 8 cents.

Under section 125 of the Madras Estates Land Act, under a sale for arrears of rent, the purchaser takes subject to any encumbrance created before the passing of the Act. The encumbrance in this case was created in 1901. *Prima facie* then the rent sale is subject to it; but the contesting defendants contend that the mortgage was extinguished when the decree was passed and that, as first defendant was not a party to the mortgage suit, the decree in it will not bind him. The lower appellate Court has accepted both these contentions, but it has wholly misunderstood one crucial fact in the case, and that is that the first defendant never put an end, under cover of his rent sale, to the occupancy right of the defaulter. The rent sale was on 22nd March, 1913. Under Exhibit D (1), dated 15th February, 1915 the first defendant had issued a patta for fasli 1324 to the defaulter for Nos. 200, 201 and 240 (1 acre and 8 cents), and 240 (10 acres and 3 cents), *i.e.*, for the whole of items 3 and 4; so that, for this fasli, the first defendant issued pattas to the defaulter for all that he ostensibly brought in under his rent sale. The patta for the previous fasli 1323 is not filed, but there is no presumption that it will be anything different from patta for fasli 1324. Prior to Exhibit D, but subsequent to the rent sale, is a notice Exhibit D, dated 23rd June, 1914, by first defendant to the defaulter informing him that arrears are due on the indigo vat and that, unless that were paid up, the holding would be sold. This was the holding already sold for arrears of rent on 22nd March, 1913, and alleged to have been brought in. The sale was apparently a sham.

First defendant alleges a sort of delivery through Court on 25th October, 1915 of the items sold at rent sale on 22nd March, 1913. There is no documentary evidence of this delivery and that it was a sham is clear from the facts that the sale itself appears to have been a sham and that on 2nd May, 1916, first defendant again issued patta for fasli 1326 to the defaulter for Nos. 240 and 241, area 1 acre, 8 cents, the indigo vat, and followed it up by a similar patta Exhibit D-3 on 25th May, 1918, for fasli 1327. On 28th January, 1917, and 30th December, 1917, he accepted rent from plaintiff for the indigo on behalf of the registered pattadar appears Asari, *i.e.*, the defaulter (see Exhibit 4 and D-5). On even date with Exhibit D-3 is Exhibit VI a patta for fasli 1327 to 2nd defendant for items 3 (garden) and 4. This is the first issue of a patta to any one else but the defaulter.

There is absoultely no evidence that the occupancy tenancy of the defaulter had ever been terminated by any real and proper legal proceedings on or before 15th November, 1915, the date of the sale in execution of the mortgage decree. It was in the holding and possession of the defaulter and was his property on the date of that sale. This is the property which has passed to the plaintiff of which he got delivery on 31st January, 1917, and of which first defendant never got delivery. First defendant therefore could not convey it to any one else. He never enforced his rights under the alleged rent sale and never terminated the defaulter's occupancy right, which in consequence of his action, passed to plaintiff, beyond the reach of 1st defendant, long before the date of the patta to 2nd defendant. It is impossible therefore to see how the plaintiff's right on the footing of the Court-sale could possibly be interfered with by the first defendant's right under his rent sale. The ruling in *Vemanna Venkatachalla Naidu* v. *Ethirajammal* (1) relied on by the Subordinate Judge has no application to this case since there no patta was issued after the sale for arrears of rent and the occupancy right of the tenant had obviously been terminated by the rent sale.

I must therefore reverse the decree of the lower appellate Court and restore that of the District Munsif with costs to the

(1) (1921) 39 M.L.J. 597 = 13 L.W. 61 = 60 I.C. 192 = (1921) M.W.N. 189.

plaintiff from defendants 1 and 2 here and in the appellate Court.

Second Appeal No. 1131 of 1921 follows the decision in this case and the lower appellate Court's decree must be reversed and the suit dismissed with costs throughout.

Appeal allowed.

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* 1924 Madras 920.

DEVADOSS, J.

Mu[illegible] to (a Mathar Rowthan—Appellant [illegible] notendant).

v.

Kasa Rowthan and others—Respondents (Plaintiff and Defendants 2 to 5 and Legal representatives of 4th Defendant.)

S. A. No. 1123 of 1921, decided on 10th July, 1924, against the decree of the Additional Sub-Judge of Madura, in A.S. No. 3 of 1920.

Limitation Act, S. 10—Entrusting money to another for payment to a third person who acknowledges and promises in a partition deed to pay to the beneficiary, creates an express trust and is not a mere deposit.

Two Mahomedan brothers executed a partition deed wherein they stated that their deceased brother entrusted to them a certain amount which one of the two executants undertook to pay to plaintiff on his attaining majority with interest at ¾ per cent.

Held, that an express trust was created in favour of plaintiff and the amount was not a deposit: (1 L. W. 577; 1922 Mad. 57, *Dist.*)

Held, further, that the partition deed evidenced and acknowledged the trust already created by the deceased brother. [P. 920, C. 1.]

W. S. Subrahmania Aiyar—for the Appellant.

K. Bhashyam Aiyangar, N. R. Govindachariar and *P. R. Srinivasan*—for the Respondents.

Judgment:—The question argued in this appeal is whether the claim of the plaintiff was barred by limitation. The plaintiff's case is that his father entrusted a certain amount to his paternal uncle, Peria Kadir Rowther and that Peria Kadir Rowther was in possession of it, till his death and therefore Peria Kadir Rowther was entitled on his behalf and being an express trustee he is not entitled to claim the benefit of the law of limitation. Both the lower Courts have found that Peria Kadir Rowther was an express trustee. Mr. Subramania Aiyar, on behalf of the appellant, urges that Exhibit A cannot create a trust, as the father of the plaintiff was dead at the time, when Exhibit A was executed and that for the purpose of creating a trust there must be a transfer of the right of the owner to the trustee. It is quite clear from the recitals in Exhibit A that the trust was not created by means of Exhibit A; but Exhibit A mentions that the trusts had been created by the father of the plaintiff in his favour and that Peria Kadir Rowther and his brother were trustees. The recital is:

"Whereas even 12 years before our father's death, our brother, the said Naina Muhammad Rowther, died entrusting to the persons mentioned below his earnings, namely, Rs. 745-4-0 his wife and his son Kasa Rowthan a male child then a minor of about 2 years of age."

In the face of this language, I do not think it is reasonable to contend that Exhibit A itself creates a trust. Exhibit A is only evidence of the fact that a trust had been created and Peria Kadir Rowthan undertook to be responsible for the amount entrusted to him and to his brother. Mr. Subramania Aiyar wanted to contend that here, there was only a mere deposit and that would not by itself create a trust. He relies upon *Rajammal* v. *Lakshmammal* (1) and also upon *Krishna Pattar* v. *Lahskmi* (2). But the facts in this case are quite clear that the trust was created by the father of the plaintiff, in favour of the plaintiff, during his life-time and Exhibit A is only evidence of the fact. In the face of these facts, I do not thing that the contention that there was no trust in this case can prevail. There is no oth[illegible] question involved in the case.

The second appeal fails and is dismissed with costs of the 1st respondent. The other respondents will bear their own costs.

Appeal dismissed.

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(1) (1914) 1 L.W. 577 = (1914) M.W.N. 606 = 22 I.C. 936 = 16 M.L.T. 199.

(2) 1922 Mad. 57 = 45 Mad. 415 = 16 M.L.W. 886 = 42 M.L.J. 119 = (1922) M.W.N. 117 = 30 M.L.T. 233.

THE END.

Acc. No ...17711.2...
Dated ...14.11.1924